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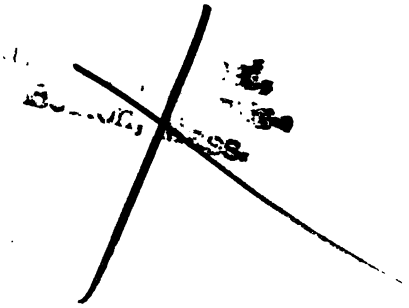

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MASSACHUSETTS REPORTS

164

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JUNE 1895 — NOVEMBER 1895

GEORGE F. TUCKER

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. WALBRIDGE A. FIELD, CHIEF JUSTICE.
HON. CHARLES ALLEN.
HON. OLIVER WENDELL HOLMES.
HON. MARCUS P. KNOWLTON.
HON. JAMES M. MORTON.
HON. JOHN LATHROP.
HON. JAMES M. BARKER.

ATTORNEY GENERAL.

HON. HOSEA M. KNOWLTON.

TABLE

OF THE CASES REPORTED.

TABLE OF CASES

CITED BY THE COURT.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CHARLES S. LINCOLN, executor, *vs.* COMMONWEALTH.

Suffolk. December 10, 11, 1894. — June 12, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, & KNOWLTON, JJ.

Metropolitan Sewerage Act — Res Judicata — Public and Private Ways — Prescription — Creation of Additional Servitude — Interruption to Business by Construction of Sewer in Highway — Damages — Evidence.

A relocation of a public way, establishing its termini, is conclusive, and evidence in a subsequent proceeding that a road included in such termini had not originally been a part of the public way, and the testimony of one of the petitioners for the relocation that, when the petition was signed, there was no controversy as to the termini of the public way, is not admissible to impeach the adjudication.

A highway by prescription may be relocated as well as a way laid out by a town.

The record of the relocation of a highway is admissible in evidence without the production of a plan to which the record refers.

The construction by the Commonwealth of a metropolitan system of sewers under a highway in a town does not create an additional servitude for which damages can be claimed by the owner of the fee.

Damages cannot be recovered for the temporary interruption of business caused by the construction of a sewer, which the Commonwealth has a right, without a new taking, to construct under a highway.

On the issue whether a road over the land of A. was a public or private way, a question to the assessor of taxes for the town in which the land lay, whether in assessing it he had ever deducted a roadway or assessed the land in two parts, is irrelevant, apart from other objections.

PETITION to the Superior Court, for a jury to assess the damages of the petitioner's testator, Orray A. Taft, for the taking by the Board of Metropolitan Sewerage Commissioners in behalf of the Commonwealth, under St. 1889, c. 439, as amended by St. 1890, c. 270, of a strip of land at Point Shirley, in Winthrop, one thousand feet long and thirty-three feet wide, for the purpose, expressed in the instrument of taking, which was recorded on May 9, 1890, of carrying and conducting under the land so taken, and of constructing, operating, and forever maintaining therein, an underground main sewer with connecting sewers, drains, manholes, and underground appurtenances, and of repairing and renewing the same.

Trial in the Superior Court, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

The petitioner's testator had owned since 1853, and had controlled since 1848, a tract of land containing about twelve acres, bounded on all sides but one by the sea, the extreme end of which was the northerly shore of Shirley Gut. On the opposite side of the Gut was Deer Island.

At the time of the taking there was an unfenced way, extending from a point on what was conceded by both parties to be Shirley Street, through land of one Hale, formerly of the Revere Copper Company, and thence in a straight line through the land of the petitioner's testator to his hotel, the corner of which was within about two hundred and twenty-five feet of the high-water mark at Shirley Gut. The petitioner contended that this was a private way, forming part of the land owned by his testator, and denied the contention of the respondent that it was part of a public highway in Winthrop called Shirley Street, or that it extended from the testator's hotel on Point Shirley down to high-water mark. The way had been built and maintained by the petitioner's testator at his own expense, and there was no evidence that it had been built beyond the hotel.

A plan of the premises showing the location of the way in question is given in the case of *Taft* v. *Commonwealth*, reported 158 Mass. 526, to which reference may be had.

The records of the town of Winthrop were produced, and showed the acceptance in 1868 of a "street laid out from City Farm to Point Shirley, according to a plan drawn by John Lowe."

The respondent then offered in evidence the record of the county commissioners for Middlesex County bearing the date of December 14, 1875, which adjudicated the locating anew of Shirley Street, "being a continuation of Winthrop Street towards Point Shirley, commencing at the junction of Winthrop and Beach Streets, and being forty feet wide."

The record then recited that "from this point to Point Shirley the road is but thirty-three feet in width, and is intended to be the same location as was laid out by John Lowe, civil engineer, in 1868, the centre being sixteen and one half feet westerly of corner of lot above referred to, and curving around eastwardly, the slope of what is known as Green Hill, belonging to Tewksbury and others, sixteen and one half feet parallel, from railing and sea wall about S. 35° 40′ W. 475 ft.; then S. 1° W. 250 ft.; thence S. 34° E. 410 ft.; thence S. 42° E. 390 ft., to the line of the property claimed by the Revere Copper Company; thence S. 9° E. 225 ft.; thence S. 36° W. 940 ft.; thence S. 30° E. 1,290 ft.; thence S. 1° E. 525 ft., being 16½ ft. east of the grounds of Revere Copper Company's works, to land of Taft; thence, same course, 1,025 ft., to beach at Point Shirley. A road was located by Mr. Lowe, commencing 250 ft. back from the last angle named (course S. 30° E.), and, deflecting westward, runs by land of said Copper Company S. 40° W. 572 ft.; thence S. 87° W. 228 ft.; thence S. 36° W. 475 ft., to the beach, passing west of the Revere Copper Company's works. This was located 33 ft. wide. The above descriptions of these several streets in Winthrop are intended to conform to plans of the same, as made and surveyed by George Wadsworth, civil engineer, and, as now defined, are hereby relocated."

The petitioner objected to the admission of the record of the county commissioners, on the ground that the plans of Lowe and Wadsworth, therein referred to, were not produced, but the judge admitted the evidence, and the petitioner excepted.

The respondent then introduced in evidence the certificate of the clerk of the county commissioners, that no plans by Wadsworth of any streets in Winthrop could be found in the office of the commissioners. The respondent also offered in evidence the record of the county commissioners for Middlesex County, bearing date September 24, 1884, with the plan therein referred

to, whereby, on petition of certain "tax-payers in the town of Winthrop," Shirley Street in Winthrop was relocated. The record recited that "the following is a true description of said Shirley Street, as hereby relocated and established. Commencing at the easterly side of Revere Street, the northerly line of Shirley Street runs in a southeasterly direction. Also a branch commencing at a point in the easterly line of Shirley Street 132.29 feet north of point marked K on plan, and running in a curved line on a radius of twenty feet, a distance of 47.72 feet; thence in a straight line tangent to said curve in a southerly direction 542 13/100 feet to the division line between lands of S. W. Hale *et al.* and O. A. Taft; thence making a slight angle to the left, and running about one thousand feet to high-water mark, said line coming on corner of piazza to Taft's hotel, as shown on plan. The opposite side of said branch of Shirley Street is 33 ft. east of, and parallel with, the above described line, and is connected with the easterly line of Shirley Street by a curved line of 47.5 feet radius. For further particulars, see plan made by Whitman and Breck, surveyors, which plan is made a part of this description, and which description is intended to conform to said plan."

The petitioner objected to the admission of this evidence, on the ground that the petition upon which the action of the commissioners was based was signed by tax-payers of the town of Winthrop and not by citizens thereof; but the judge admitted the evidence, and the petitioner excepted.

The clerk of the town of Winthrop testified that the town records contained no record of a relocation of Shirley Street in 1875, nor any record of construction thereof or appropriation therefor, and it was agreed that, so far as he knew, no copy of the county commissioners' record of 1884 was transmitted to the town clerk until 1890, shortly prior to the taking of the land of the petitioner's testator.

One Floyd, called as a witness by the respondent, testified that he had lived in Winthrop for fifty years, and had been superintendent of streets from 1880 to 1890; that Shirley Street was a highway in that town which had been travelled by the public for thirty-five or forty years, and that the way through Taft's land had been there as long as the hotel; that in 1884,

under the authority of the selectmen, he had set bounds on each side of that way at all the angles down to high-water mark at the Gut, one of them being on Hale's line; that no repairs had been made on that part of the way going through Taft's estate subsequent to 1884, but that once or twice he had done a little work with the road machine on the branch for a short distance from Shirley Street.

On cross-examination he testified that Shirley Street, as he knew it, ran down through the Hale land to the water, and that no part of the branch had ever been known as Shirley Street, but was known as Taft's avenue or Taft's road; that prior to the action of the county commissioners he had never heard any claim that it was a part of Shirley Street; that he had used the scraper or road machine on the branch without authority or instructions so to do, and not for the purpose of construction, but only for repair. On re-direct examination he testified that the condition of the road in 1875 was about the same as at the time of the trial, consisting of a narrow travelled driveway made of clay, which Taft had caused to be placed there. On re-cross-examination he testified that, in 1875, there was a road which Taft had built extending from Shirley Street down to the piazza of his hotel, but no further.

The petitioner's testator having died since the former trial of this case, the testimony then given by him was introduced in evidence, and was in substance that he, Taft, became acquainted with the property owned by him in 1830, and controlled it after 1848; that in 1827 a small building was erected there to entertain people who were accustomed to land on the beach; that the people on Deer Island were in the habit of crossing over Shirley Gut and going on Point Shirley, and up through the town to Boston; that before 1850, and after the erection of the public institution on Deer Island the prisoners released therefrom were transported in the same way, until, on account of the annoyance they caused, that method of transportation was stopped; that the city of Boston always had a right of way through his place; that he supposed that the city had always taken it and everybody else; that the point was originally covered by salt works, but that in 1850 he tore them down and built a driveway over the place formerly covered by the works

and down to his front door; that people were wont to walk on the driveway, or go anywhere they pleased on the beach or upland, and that he never made any objection to any one going there except heavily loaded teams, and that, on account of some differences between visitors and his customers, he had cut away a wharf formerly erected by him; that he had never made any contract with the city of Boston with respect to its right to cross through his land; that, many years before, the Mystic water-pipes, with his permission, were laid through the way for the city of Boston, for which no damages had been paid to him, and the Revere water-pipes were laid there for his own use; that telegraph poles were placed on his land, but not in front of his house, the wires being attached to buildings; that he never knew or heard that the driveway down to his house was designated by the name of Shirley Street; that members of the government of the city of Boston were still likely to pass over the way to Deer Island at any time, and that parties were likely to go there at any time by permits.

The clerk of the town of Winthrop testified that he had resided there for forty-six years; that he had never heard of the southerly terminus of Shirley Street being elsewhere than on the harbor side of Point Shirley at the old stone wharf, or heard of any claim that the street went down past Taft's hotel, and terminated at Shirley Gut, and that he never knew the roadway past Taft's house to be called Shirley Street; that the public, he supposed, had gone over Taft's way ever since the hotel was there; that he assisted Lowe, the civil engineer who laid out Shirley Street in 1868; that in making the measurements for Shirley Street Lowe did not go upon Taft's land; that the street went down to the copper works on the harbor side of Point Shirley; and that the plan by Lowe, supposed to be lost, had been found among some old papers. On cross-examination he testified that before Shirley Street was laid out by Lowe there was an existing travelled road; that Taft always had his private way from Shirley Street down to his hotel, over which he did not think the public had ever travelled except to the hotel and to Deer Island.

One George, who had resided in Winthrop for fifty-three years, testified for the petitioner that the southerly terminus of Shirley

Street was not on Taft's land, but on land of the Revere Copper Company; that when Taft's driveway was reached, Shirley Street branched off to the right and ran down to the shore; and that, to his knowledge, the road to Taft's hotel was never known as Shirley Street. On cross-examination he testified that for thirty or forty years there had been a road there which could be travelled, although a little rough; that every one who went down there went over it, whether going to Deer Island, or to get kelp, or for other purposes.

One Floyd also testified, for the petitioner, that at the time that he and others signed the petition to the county commissioners for the relocation of Shirley Street there was no controversy as to what its southern terminus was; that there was a question in regard to the exact location of the whole street, but that the question did not relate to its southern terminus, nor to the road over Taft's land.

All the witnesses agreed that the way over Taft's land was not known as Shirley Street, and that they never knew of any controversy about it, and the plan of Lowe, which was introduced, showed no way over Taft's land.

The assessor of the town of Winthrop, called as a witness by the petitioner, was asked whether, in assessing Taft's land, he ever deducted a roadway through it, or assessed it in two parts. To this question the respondent objected, and the judge excluded it, subject to the exception of the petitioner.

The judge ruled that the way in controversy was a public way, and the petitioner excepted.

The petitioner offered to prove that the construction of the sewer along the line of the way over Taft's land rendered the way impassable, and caused serious interruptions to his business in the conduct of his hotel, and contended that even if this was a public way he was entitled to recover damages for such interruption of his business; but the judge ruled that no damages could be recovered on that ground, and the petitioner excepted.

The petitioner also contended that even if the strip in controversy was a public way, he was entitled to recover for damages for the right taken by the Commonwealth, on the ground that such taking created a servitude additional to that created by the laying out of the county commissioners; but the judge ruled

that no damages could be recovered on that ground, and the petitioner excepted.

It appeared that the laying out by the county commissioners through Taft's land extended only to high-water mark, while the taking by the Commonwealth extended to low-water mark, and a verdict was returned for the petitioner for this additional taking, subject to the exceptions alleged by him.

S. J. Elder & E. A. Whitman, for the petitioner.

W. D. Turner, for the Commonwealth.

HOLMES, J. In *Taft* v. *Commonwealth*, 158 Mass. 526, there was conflicting evidence as to whether Shirley Street extended across the petitioner Taft's land before 1875, and the record of a relocation in that year establishing a part of it on Taft's land was held conclusive against him. At the second trial, all the witnesses agreed that the way over Taft's land was not known as Shirley Street, and that they never knew of any controversy about it. The records of the town of Winthrop were produced and showed the acceptance in 1868 of a "street laid out from City Farm to Point Shirley, according to a plan drawn by John Lowe." The plan was put in, and did not show any way over Taft's land, and finally one of the petitioners for the relocation of 1875 testified that at the time he signed the petition there was no controversy as to where the southern terminus of Shirley Street was. On the other hand, the location by the town in 1868 did not cover the whole of Shirley Street. Shirley Street was an ancient highway. There was no question that there was a visible way over the place in dispute and there was some evidence from Taft himself and from other witnesses that there was a way there by prescription. The petitioner contended that on this evidence it must be assumed that the county commissioners had no jurisdiction, but the judge ruled that the way was a public way.

The petitioner makes some slight attempt to fortify his argument by the reference to John Lowe's plan in the relocation, and by suggesting that the petition for relocating was not intended to open this question. These suggestions may be dismissed with a few words. The relocation, although referring to Lowe's plan, overrides it, or supplies by express words what the plan does not show. The petition is broad enough to open any question which

could be raised on relocation, and what the petitioner intended does not matter.

Coming to the main point, we are of opinion that the ruling of the court was right. As was pointed out by the counsel for the Commonwealth, the conclusiveness of a relocation made in good faith, and not manifestly absurd, is laid down in stronger terms in *Hadley* v. *County Commissioners*, 11 Cush. 394, than it was in our former decision, 158 Mass. 526. See *Tufts* v. *Somerville*, 122 Mass. 273, 275; *Dean* v. *Lowell*, 135 Mass. 55. It is true on this evidence, as it was at the first trial, that the road in question was a mere spur of Shirley Street proper, even if not a part of it, and that the decision that it was part of Shirley Street was not absurd, even on the evidence produced as to the state of things before 1875. For, stated in a somewhat different way, the evidence showed that Shirley Street was an ancient highway in existence before the location of 1868, and some, if not all, of the evidence was that this continuous portion of the way was also an ancient highway. It was part of the same way in everything but name. *Commonwealth* v. *McDonald*, 160 Mass. 528. If it had not the same name, it had no public name so far as appears. Under these circumstances it is impossible to say that the county commissioners were not warranted in finding that the place in question was a part of Shirley Street, and their adjudication is not to be made dependent for its effect upon whether a jury agrees with them on the evidence which can be found many years after they decided what it was their duty to decide. It was not argued that highways by prescription may not be relocated, as well as ways laid out by a town. The language of the statute is, "whether the same was laid out by the authority of the town or otherwise." Pub. Sts. c. 49, § 13. "It is immaterial how it was originally established. If by prescription, the effect of a new location would be the same." *Stockwell* v. *Fitchburg*, 110 Mass. 305, 309, 310. *Richards* v. *County Commissioners*, 120 Mass. 401, 402.

The record was complete and clear without the plans, and the failure to produce them did not make it inadmissible.

The other exceptions do not require much discussion. An exception was taken to a ruling that the right of the Commonwealth to lay this sewer was not an additional servitude. It is

not disputed that, when a highway is laid out, the right to lay common drains is among the elements for which compensation is given. *Pierce* v. *Drew*, 136 Mass. 75, 81, 88, and cases cited. But it is said that the Metropolitan Sewer is an uncommon drain, and cannot be supposed by any fiction to have been contemplated and paid for in the laying out of a suburban road. The answer is, that our law recognizes no such distinctions, although they seem to prevail in some other States. *Van Brunt* v. *Flatbush*, 128 N. Y. 50. Dillon, Mun. Corp. (4th ed.) § 688. When land is taken for a highway, all uses of the land directly or incidentally conducive to the enjoyment of the public easement which the necessity and convenience of the public may require, either then or in the future, are paid for, wherever the highway may be. *Boston* v. *Richardson*, 13 Allen, 146, 159, 160. It sometimes is said that the whole beneficial use of the land is taken. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75, 77. As practically the landowners get the full value of their land in such cases, if there is any injustice it is not they who suffer it. *Brainard* v. *Clapp*, 10 Cush. 6. *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174, 177. *Newton* v. *Perry*, 163 Mass. 319. It being settled that one of the uses covered by the taking for a highway is an underground sewer, it extends to any sewer which is natural to the configuration of the ground. See *Titus* v. *Boston*, 161 Mass. 209, 212. The fact that the public in this case is represented directly by the Commonwealth, instead of by the town, is of no importance. The beneficial interest is the same either way. Also, it is held that the public right extends to authorizing companies to make use of the streets. *Pierce* v. *Drew*, 136 Mass. 75, 81. *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75. And if the Commonwealth has withdrawn from the town a part of the right formerly vested in it, that is no more a wrong to the petitioner than a conveyance in fee by a private person having a similar right in gross would be on the ground that it changed the chances of an extinction of the owner's blood.

Temporary interruptions of business caused by the construction of the sewer along the highway where the Commonwealth had a right to construct it without a new taking for the petitioner cannot be recovered for. This was all that the ruling of the court

meant. *Brooks* v. *Boston*, 19 Pick. 174, 178. *Treadwell* v. *Boston*, 123 Mass. 23, 25.

The question to the assessor, whether in assessing Taft's land he ever deducted a roadway, or assessed it in two parts, was irrelevant to any issue which was open, apart from other objections. See *Kenerson* v. *Henry*, 101 Mass. 152, 155.

Exceptions overruled.

COMMONWEALTH *vs.* AUGUSTUS S. QUINN & others.

Suffolk. April 2, 1895. — June 18, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Dance Hall as Public Amusement — Statute.

A dance hall, to which the public is admitted upon payment of a small fee is a public amusement, within the meaning of Pub. Sts. c. 102, §§ 115, 116.

COMPLAINT, to the Police Court of the City of Chelsea, alleging that the defendants, Augustus S. Quinn, Hugh J. Morrison, and Patrick H. O'Callaghan, did carry on in Chelsea "a certain public amusement, to wit, a dancing assembly," not having a license, "admission to said public amusement being obtained by ticket obtained by the payment of money, and that the said public amusement was not a public entertainment by a religious society, or carried on for a charitable purpose." At the trial in the Superior Court, before *Sheldon*, J., the jury returned a verdict of guilty; and the defendants alleged exceptions. The facts appear in the opinion.

The case was submitted on briefs to all the judges.

R. W. Nason & T. W. Proctor, (*J. J. Corbett* with them,) for the defendant.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

HOLMES, J. The only question argued in this case is whether a dance hall to which the public is admitted upon payment of a

small fee is a "public amusement," within the meaning of Pub. Sts. c. 102, §§ 115, 116, a question left open by *Commonwealth* v. *Gee*, 6 Cush. 174. The words quoted might be used so as to include dance halls, or they might be limited to entertainments where the entertainers offer the amusement and the public is passive.

The Rev. Sts. c. 58, §§ 1, 2, required a license for "theatrical exhibitions, public shows, and exhibitions of any description." Then St. 1849, c. 231, § 1, inserted the words "public amusements" between shows and exhibitions. This section was copied in Gen. Sts. c. 88, § 74, and in Pub. Sts. c. 102, § 115. The second section of the act of 1849, punished offering to view, maintaining, or promoting, etc., any such exhibition, show, or amusement without license, by a fine not exceeding five hundred dollars, and then the third section went on to impose a like fine on getting up or aiding in promoting any masked ball, or other public assembly at which the company wear masks, or other disguises, and to which admission is obtained upon payment of money, etc. This is now Pub. Sts. c. 102, § 118. The argument for the defendant seems at first sight to gain a good deal of force from the other words which accompany public amusements, and it may be said that, by expressly dealing with the case of masked assemblies, the statute excluded like gatherings not masked from its prohibitions. It may be added, as is suggested by the defendant's counsel, that later acts have dealt with music hall exhibitions at which lager beer is sold; St. 1858, c. 152; Gen. Sts. c. 88, § 76; Pub. Sts. c. 102, § 117; and have punished with the same fine, not exceeding five hundred dollars, maintaining without license a skating rink "to be used for the amusement of roller skating" for reward; St. 1885, c. 196; and have punished, with a fine not exceeding one hundred dollars, maintaining without license a grove to be used for picnics "or other lawful gatherings and amusements" for reward. St. 1885, c. 309. On the other hand, it is to be observed that § 3 of the act of 1849 absolutely prohibits the masked balls, etc. with which it deals, whether licensed or not, which is a sufficient reason for its insertion, and that, so far as later acts can affect the interpretation of an earlier one, the two statutes of 1885 both speak of the entertainments then dealt with as amuse-

ments. But the consideration which most weighs with us is that it would be hard to imagine a public amusement offered by the entertainers which would not be included in the words "public shows, and exhibitions of any description," used in the Revised Statutes and contained in the act of 1849 and the Public Statutes with a slight verbal change. In order to give any meaning to the two words inserted by the act of 1849, it is necessary to take them in a popular sense, and not to confine them to public amusements of the nature of shows or exhibitions.

Exceptions overruled.

JAMES COMERFORD *vs.* WEST END STREET RAILWAY COMPANY.

Middlesex. November 27, 1894. — June 19, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, LATHROP, & BARKER, JJ.

Slander by Corporation — Defective Count — Discharge of Servant by Employer — Defamatory Words — Variance.

If a count of a declaration in an action of tort for an alleged slander of an employee of the defendant corporation is to be construed as a count for discharging the plaintiff from its employ under such circumstances as to impute to him a charge of dishonesty, it must fail, as an action of tort does not lie against an employer for discharging a servant; nor can it be maintained as a count for slander, if no words are set forth.

Even if, in an action of tort for an alleged slander of an employee of the defendant corporation, the words uttered by the defendant's superintendent can be considered defamatory, the action cannot be maintained if there is a variance between the allegations and the proofs.

Whether a corporation is liable for slanderous words uttered by an agent or servant in the course of the business in which he is employed, *quære*.

TORT, for slander. Trial in the Superior Court, before *Mason*, C. J., who directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. W. Pickering, for the plaintiff.

W. B. Sprout, for the defendant.

LATHROP, J. In *Fogg* v. *Boston & Lowell Railroad*, 148 Mass. 513, it was held that "a corporation is liable in damages

for the publication of a libel, as it is for its other torts"; and it was said, "To establish its liability, the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the course of the business in which he was employed." See also *Howland* v. *Blake Manuf. Co.* 156 Mass. 543.

Of course, if slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified by it, the corporation is liable; but if they are uttered by an agent or servant in the course of the business in which he is employed, it is at least questionable whether the corporation is liable. We are aware of no case in which this has been held. For the purposes of this case, we assume, without deciding, that the rule is the same in slander as in libel.

We proceed to consider the counts relied upon at the trial. These are the third, fourth, and fifth. The third count sets forth the circumstances under which the alleged slander was uttered, among which are that the plaintiff was a starter in the defendant's employ, part of whose duty it was to hand transfer checks to persons leaving the defendant's cars at Allston, which entitled them to ride in other cars of the defendant to certain points in and beyond Allston, and alleges that the defendant, "falsely and wickedly pretending that the plaintiff had illegally appropriated, embezzled, stolen, and converted to his own use a quantity of said checks, and that the same was the ground of his said discharge, publicly, falsely, and maliciously accused the plaintiff of the crime of larceny, by words spoken of the plaintiff in relation to his said discharge, substantially as follows: 'He is discharged from the employ of this company for the misuse of checks.'"

The fourth count alleges that, under the circumstances set forth in the third count, "and at the time of discharging him, as therein set forth, the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of embezzlement, by words spoken of the plaintiff in relation to his said discharge, substantially as follows: 'He is discharged from the employ of this company for the misuse of checks.'"

The fifth count alleges that, under the circumstances set forth in the third count, the defendant wantonly and recklessly dis-

missed and discharged the plaintiff from its employ, and falsely and publicly charged him with being dishonest therein.

The answer is a general denial, and we assume, in favor of the plaintiff, that the defence that what was said was a privileged communication was not open on the pleadings. *Goodwin* v. *Daniels*, 7 Allen, 61. The case does not fall within the rule laid down in *McLaughlin* v. *Cowley*, 127 Mass. 316, and *Howland* v. *Blake Manuf. Co.* 156 Mass. 543, 567.

The fifth count may be considered first. If it is to be construed as a count for discharging the plaintiff from its employ under such circumstances as to impute to him a charge of dishonesty, the count must fail. An action of tort does not lie against an employer for discharging a servant. Nor can it be maintained as a count for slander, for no words are set forth.

The plaintiff was not entitled to go to the jury on the third and fourth counts. The words alleged are: "He is discharged from the employ of this company for the misuse of checks." At the first interview between the superintendent and the plaintiff, no one else was present, and for what was then said the plaintiff cannot maintain an action of slander, even if the words were defamatory, which we do not mean to imply. The superintendent was then asked to wait until the plaintiff could bring one Roberts there. The superintendent waited and Roberts was brought. After some conversation in which nothing was said against the plaintiff, he asked the superintendent what his authority in the matter was, and the superintendent said, "I have authority to discharge you both for misuse of checks." The plaintiff answered, "Thank you, I have no further use for you."

If these words uttered by the superintendent can be considered defamatory, which we do not intend to imply, they are not in substance those alleged. It is not the same thing, in substance, to say, "I have authority to discharge you both for misuse of checks," as to say, "He is discharged from the employ of this company for the misuse of checks." There was, therefore, a variance between the allegations and the proofs.

Exceptions overruled.

HERBERT L. HILDRETH *vs.* D. S. McDONALD COMPANY.

Suffolk. March 7, 1895. — June 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trademark — Imitation of Goods — Injunction.

A manufacturer who, for the purpose of presenting his goods to the public, has adopted a particular combination of features in part old and in part new, is entitled to an injunction against a palpable imitation thereof.

BILL IN EQUITY, filed November 20, 1894, praying that the defendant corporation be restrained from putting up, selling, or offering for sale any candy or other similar article wrapped and labelled in the manner, or in imitation of the manner employed by the plaintiff. Trial before *Morton*, J., who entered a decree that the defendant be restrained "from printing or causing to be printed in red upon yellow wrappers, adapted to be used in putting up molasses candy, substantially in the size, shape, and manner in which said plaintiff, Herbert L. Hildreth, puts up and offers for sale the molasses candy made by him, the name 'McDonald,' or any other name, word, mark, or device whereby any candy sold or offered for sale by the defendant shall be caused to resemble in its dress and appearance said candy of the plaintiff, and also from putting up, offering for sale, or selling any molasses candy, or candy similar thereto, put up in yellow wrappers, with the red printing thereon substantially like" the method employed by the plaintiff, as shown by an exhibit annexed to the bill. The judge, at the defendant's request, reported the case for the determination of the full court. The facts appear in the opinion.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

J. E. Maynadier, (*S. R. Mitchell* with him,) for the defendant.

A. P. Browne, (*J. K. Berry* with him,) for the plaintiff.

ALLEN, J. There is no question of trademark in this case. The only question is, whether the plaintiff is entitled to an injunction on the ground that the defendant company was passing

off its molasses candy as and for molasses candy made by the plaintiff, and thus injuring the plaintiff by unfair competition. On the report it would seem that others before the plaintiff had made molasses candy of the same size and shape, and wrapped the pieces in the same kind and size of paper, with twisted ends. To this combination, which was not original with the plaintiff, he added the printing of the word "Velvet" in red script letters upon the middle and ends of the wrappers. The defendant company used the same combination of size and shape of the candy, and the same kind and size of paper and manner of wrapping, all of which it had a right to do. But to this it added the printing in Roman letters, instead of script, of another word, viz. "McDonald," in red ink upon the middle of the wrappers, but not upon the ends. It is found that the public is thereby in fact deceived into believing that the defendant's goods are the plaintiff's goods, and that the resemblance was not accidental. It is not expressly stated, but we must assume that the public who are deceived are persons of ordinary caution and prudence. The injunction which was granted was expressly limited to the printing in red letters upon wrappers of the same kind as those used by the plaintiff, to be used for pieces of molasses candy of the same size and shape.

There are decisions to the effect that color alone cannot become a valid trademark, and that a red label on a yellow wrapper, or a white label on a red box, cannot be registered. *Re Landreth*, in Browne, Trademarks, § 89 *d*. *Payson's Indelible Ink*, in Browne, §§ 271, 272. *Philadelphia Novelty Manuf. Co.* v. *Rouss*, 40 Fed. Rep. 585. *Philadelphia Novelty Manuf. Co.* v. *Blakesley Novelty Co.* 40 Fed. Rep. 588. *Fleischmann* v. *Starkey*, 25 Fed. Rep. 127. *Faber* v. *Faber*, 49 Barb. 357. *In re Hanson's Trademark*, 37 Ch. D. 112. But where for the purpose of presenting his goods to the public a manufacturer has adopted a particular combination of features, in part old and in part new, he may be entitled to protection against a palpable imitation. The case of the plaintiff is not very strong on the facts, yet he seems to be entitled to the carefully limited injunction which was granted. The case of *Lever* v. *Goodwin*, 36 Ch. D. 1, is in point upon the principle involved, though the facts there were stronger for the plaintiff than the facts here. See also *Fischer* v. *Blank*, 138 N. Y. 244; *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.* 64

Fed. Rep. 841; and the rule stated at the end of *Dover Stamping Co.* v. *Fellows*, 163 Mass. 191; *Reddaway* v. *Banham*, [1895] 1 Q. B. 286, 294, *per* Lopes, L. J.

In the opinion of a majority of the court, the entry must be,

Decree affirmed.

DANIEL H. COREY & others *vs.* INHABITANTS OF WRENTHAM.

Norfolk. March 8, 1895. — June 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Establishing and Accepting Town Ways — Action — Damages — Entry and Possession under Statute.

Even if the action of those present at a town meeting upon the question of establishing certain streets as town ways is to be deemed the acceptance and allowance of those streets as such ways, no action lies to recover damages awarded by the road commissioners in laying out the ways, if there have been no entry and possession for the purpose of construction under Pub. Sts. c. 49, § 69; and the fact that the town, after establishing as town ways those streets already constructed and in public use, permitted the public to continue to use them for a year and a half without doing anything to indicate that the streets were not public ways, does not constitute an entry and possession for the purpose of construction within the meaning of the statute.

CONTRACT, to recover damages awarded by road commissioners in laying out town ways. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, which appear in the opinion.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

T. E. Grover, for the plaintiffs.

S. H. Tyng, for the defendant.

BARKER, J. The action is for damages awarded by road commissioners in laying out town ways. The award is the same which the town unsuccessfully sought to have revised by a jury in *Wrentham* v. *Corey*, 159 Mass. 93, in which case the court declined to say whether the ways were legally laid out. The town now contends that they were not legally established, and that, if

they were, this action must fail for the reason that no entry and possession have been taken for the purpose of constructing the ways.

It is agreed that the plaintiffs, owners of a tract of land in Wrentham, about the year 1886, laid out and constructed at their own expense three streets, which are the same laid out as town ways by the road commissioners on March 8, 1892, and reported to the town for acceptance in a report which included an award of the sum now sued for as compensation to the plaintiffs for land taken and damages sustained because of the taking of their land; that when the streets were first constructed they were opened to the public by the plaintiffs, and some houses were built upon them, and that the streets have been used by the public from that time to this without restriction. The report of the road commissioners was acted upon in town meeting on March 21, 1892, and since that time neither the town nor its officers have entered upon or taken possession of the streets for the purpose of constructing or altering them, or of making repairs; but the streets have been used by the public as before, and there is nothing to indicate that they are not public ways. No question is made as to the authority of the road commissioners, or the validity of their proceedings, nor as to the power of the town to establish the streets as town ways at the meeting of March 21, 1892; but it is contended that the votes passed at that meeting were not in law an acceptance and allowance of the report of the road commissioners, within the meaning of the provisions of Pub. Sts. c. 49, § 71. The record of the meeting shows that, the report of the road commissioners having been read to the meeting, a motion was made and discussed that the report be accepted; that the meeting voted that the question be divided, and that thereupon "the town voted to accept the lay-out of the commissioners"; that "then the question on allowance for land damages came up. Mr. Sherman moves that the award of the commissioners, $740, be granted, which was voted in the negative."

At the same meeting, under an article in the warrant, "To see how much money the town will appropriate for highways and bridges the ensuing year, and determine how the same shall be expended," the town first voted to appropriate the sum of three thousand dollars, and later the article was again taken up and

"an additional sum of six hundred dollars ($600) was granted, to be expended on Broad, Cottage, and Spring Streets," the streets dealt with in the report on which the town had voted. On November 16, 1892, the town filed its petition for a jury to revise the assessment of damages made by the road commissioners. The rescript sustaining the demurrer of the present plaintiffs to that petition, for the reason that a town is not entitled to have an award of damages by road commissioners revised by a jury, was sent down on May 17, 1893, and at a town meeting held on October 31, 1893, the town voted to discontinue the streets as town ways. This action was commenced on July 17, 1893.

The streets were legally established as town ways, if they were "accepted and allowed" as town ways at the meeting. In the agreed statement, all questions as to the competency of the agreed facts as evidence are saved, but neither party has contended that any fact stated is not competent. We will, however, first consider only the record of the action of the meeting of March 21, 1892, under the article which warned it to hear and act upon the report of the road commissioners. The first motion was that the report be accepted, and the first vote was that the question be divided, and next "the town voted to accept the lay-out of the commissioners," and it next negatived a motion "that the award of the commissioners, $740, be granted." What was the "lay-out of the commissioners" which the meeting accepted? The defendant contends, upon the authority of *Russell* v. *New Bedford*, 5 Gray, 31, and *Cambridge* v. *County Commissioners*, 117 Mass. 79, that "the assessment of damages in these cases is . . . part of the laying out." If so, when the "lay-out of the commissioners" was accepted, the assessment of damages, which was part of it, was accepted by the same vote. The remaining action under the article, by which a motion "that the award of the commissioners, $740, be granted," was negatived, is not inconsistent with the acceptance of that portion of the report which assessed damages. The natural meaning of the motion was the present appropriation of seven hundred and forty dollars to the payment of the damages awarded; and even upon the theory that the meeting knew that the award, if accepted, could be revised only upon the application of the landowners, it was not necessary then to appropriate the money; the award

might be revised upon such an application, and the town might, for that or other reasons, deem it unwise then to grant the money.

The defendant contends that the votes, taken together, were a rejection of the award; and so that the whole action under the article was not a confirmatory vote of the town upon the report. But the failure to pass in the affirmative a motion that an award of money "be granted" is not a rejection of the award, but a mere omission then to appropriate money for its payment. We all think that, upon a fair construction of the whole action of the meeting upon the article which brought before it the question of establishing the streets as town ways, they were accepted and allowed as such ways. This conclusion would be strengthened by considering the other votes of the town at the same meeting; for under another article the town "granted" the sum of six hundred dollars to be expended on these same streets, and the appropriation was illegal if they had not been established as town ways. In the same direction were the acts of the town in bringing its petition to revise the award, and in discontinuing the streets after the failure of that petition.

The remaining question is whether the fact that neither the town nor its officers have entered upon or taken possession of the ways for the purpose of constructing or altering them, or of making repairs, although the ways have been used by the public since March 21, 1892, prevents the plaintiffs from recovering. This depends upon the meaning of the provisions of Pub. Sts. c. 49, § 69, providing that "damages so awarded shall not be paid until the land is entered upon and possession taken for the purpose of constructing such way, . . . and if possession is not taken . . . the party, instead of the damages awarded to him, shall be entitled to indemnity, to be assessed by the selectmen or road commissioners in the same manner that indemnity is awarded by county commissioners in like cases."

The plaintiffs contend that this statute does not apply to the case here presented; and that, if it applies, the fact that the town, after establishing as town ways these streets already constructed and in public use, permitted the public to continue to use them until October 31, 1893, without doing anything to indicate that the streets were not public ways, constitutes an entry and possession within the meaning of the statute.

After the establishment of the streets as town ways, and in the absence of any action by the town forbidding the public to use them as such ways, we have no doubt that the use by the public was a use of the streets as town ways under the public easement so taken and acquired, notwithstanding the fact that there was no entry and possession for the purpose of construction or repair. Nor do we doubt that, if this use of the streets as town ways damages the plaintiffs, they are entitled to recover a reasonable compensation therefor. But the real question is whether this action for damages awarded on the basis of a permanent taking is their proper remedy.

Upon this question the history of the legislation is instructive. Up to the year 1842, when a public way was once established and the damages ascertained in the prescribed modes, both the right of the public to a permanent easement and the right of the landowner to his damages became vested, and the landowner could recover the damages awarded to him, although his land was never entered upon nor used by the public, and although the way had been discontinued so that the public could never use it. See *Harrington* v. *County Commissioners*, 22 Pick. 263, 267; *Hallock* v. *Franklin*, 2 Met. 558. In consequence of these decisions it was enacted that no person claiming damage by the laying out or altering of a highway should have a right to demand the same until the land had been entered upon and possession taken for the purpose of constructing the highway or alteration, and that if he was put to trouble or expense by the proceedings the county commissioners should allow him full indemnity therefor. St. 1842, c. 86, § 1. *Harding* v. *Medway*, 10 Met. 465, 470. In the case last cited this statute was held to apply to all public travelled ways, whether town ways or county ways, when laid out by county commissioners; and in *Bishop* v. *Medway*, 12 Met. 125, it was held not to apply to town and private ways, when the laying out and the assessment of damages were not made by county commissioners but by selectmen. This decision was in the year 1846, and by St. 1847, c. 259, § 4, the provisions of St. 1842, c. 46, were extended, and applied to town ways and private ways thereafter to be laid out by selectmen; and it was provided that, when a person claiming damages had been put to any expense for injuries sustained

by the proceedings, the selectmen should allow him full indemnity therefor, and that he might have a jury to revise their estimate. The substance of these provisions was incorporated into Gen. Sts. c. 43, §§ 14, 15, 63; and it seems that they were extended to cities by force of Gen. Sts. c. 43, § 81. See *Pickford* v. *Lynn*, 98 Mass. 491, 498. In the year 1862 further protection was given to owners of land in such cases by an enactment that the laying out or alteration of the way should be void as against them unless within a reasonable time, not exceeding two years, possession should be taken for the purpose of constructing the way, or the damages awarded them should be paid or tendered. St. 1862, c. 203. The application of this act to ways located before its passage was limited by St. 1863, c. 108. The St. 1869, c. 303, repealed these acts, and provided that any laying out or alteration should be void as against the owner of land taken, unless possession should be taken for the purpose of constructing the way within two years from the time when the right to take possession for that purpose first accrued by law, and that an entry for the purpose of constructing any part of the way should be deemed a taking possession of all the lands included in the laying out. The provisions of Gen. Sts. c. 43, §§ 14, 15, 63, and 81, upon this subject, and of St. 1869, c. 303, were continued in Pub. Sts. c. 49, §§ 14, 15, 69, 91, and 88, respectively, and are now in force. The system is that, when a public way is established, the claim of the landowner to a reasonable compensation is recognized, and his damages as for a permanent taking are awarded by the tribunal which lays out the way, with a right on his part to have the estimate revised by a jury. This compensation does not, however, become payable until there is an actual entry and possession, for the purpose of construction, upon some land included in the laying out. But if such entry and possession are delayed more than two years, he may have the laying out declared void; and if possession is not taken, he is entitled to an indemnity the amount of which he may have revised by a jury. This system allows the landowner a reasonable compensation in every supposable case, even if his damages as first assessed never become recoverable because no land is entered upon for the purpose of constructing the way, even if the way is finally discontinued without such entry and possession,

and after a period of use by the public. To protect the rights of the landowner, it is not necessary to give other than their literal natural construction to the words of the statutes in which this system is found, and in the opinion of a majority of the court it was intended by the Legislature to embrace cases like the present. The phraseology of the statutes has been quite uniform. The words used in St. 1842, c. 86, § 1, are "until the land over which the highway or alteration is located shall have been entered upon and possession taken for the purpose of constructing said highway or alteration." This language is significant, because in *Harrington* v. *County Commissioners*, in view of which decision the statute was enacted, nothing like the phrase "possession taken for the purpose of constructing" was used, the land not having been entered upon at all, either for constructing the way or in using it as a public highway. The Legislature might well say that entry and possession for the specific purpose of construction should be the prerequisite to the right of the landowner to recover damages assessed upon the theory of a permanent taking, and that without such an entry and possession, if his damages were not tendered to him, he should be entitled only to indemnity for such injury and expense as he might actually sustain by the proceedings. Every Legislature since that of 1842 which has dealt with the subject has used substantially the same formula, and a majority of the justices think that the Pub. Sts. c. 49, § 69, are meant to cover all cases of town and private ways, including those already in public use when laid out, and that the damages are not to be paid, except at the option of the municipality, until entry is made and possession is taken for the purpose therein stated. The case of *Parker* v. *Norfolk*, 150 Mass. 489, 491, where, an agent of the county having set bounds at the angles of a county way, it was held that the placing of the bounds could not be said, as matter of law, to be a taking possession of the land within the meaning of St. 1869, c. 303, § 1, supports the view now expressed. Such bounds could not have been set without an entry upon the land taken, and the taking was in the widening of an existing way, already in use by the public.

All the justices are of opinion that the ways were legally established, and a majority think that the right of the plaintiffs

to recover the damages awarded has never accrued, because there have been no entry and possession taken for the purpose of constructing the ways.

Judgment for the defendant affirmed.

DAVID C. NICKERSON *vs.* ISAIAH SPINDELL & another.

Barnstable. April 2, 1895. — June 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Action — Co-owners of Steamer — Plea in Abatement — Evidence — Telegraphic Message — Instructions.

In an action against two of several owners of a steamer, one of whom was the managing agent, for expenses incurred and services rendered in the superintendence of the building of the steamer, the contention that an action at law will not lie as the plaintiff was a part owner of the steamer cannot be maintained if the jury are warranted in finding, either that the plaintiff never actually became a part owner, or that, if his ownership was complete, a new arrangement was made which left him as if it had never existed.

Two of the owners of a steamer who are sued for expenses incurred and services rendered relative thereto are liable as if they were the sole owners, if they fail to plead in abatement the nonjoinder of the other owners.

In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, the signing by A. and B. with others of an agreement to take the amounts in the ownership set against their respective names, "the same to be under the management of A. & Co.," and of an agreement to pay "A., managing owner, the sums set opposite our names for the purpose of paying outstanding bills against said boat to date, the surplus amount to be used as working capital for the said boat," and the testimony that B. visited the steamer and suggested a certain name for her, warrant a finding that both A. and B. were part owners in her.

In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, it is competent for the plaintiff to show, as bearing upon the defence, that the plaintiff rendered his services and paid his money gratuitously, that he was then engaged in other business at which he was earning a certain amount per day, and also that when he rendered the services he expected to be paid for them; and he may also testify to the price per day that his services were fairly worth.

When the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it, and, on a proper foundation being laid, secondary evidence of the contents of the telegram is admissible.

In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, an instruction to the jury, "that if the plaintiff rendered the services and incurred the expenses in question at the request of A., acting in his own behalf and representing the defendant B., and if the plaintiff rendered said services expecting to be paid for them, he would be entitled to recover the value of his services and the expenses incurred by him," not given as the whole law of the case, but to be considered in connection with the other instructions, which required the jury to determine the relation of the plaintiff to the transaction and to the defendant at the time of bringing the suit, is correct.

KNOWLTON, J. There was evidence to show that the plaintiff performed the services and incurred the expenses set out in his declaration, in superintending the building of a steamer for the defendants and others who were the owners of her, and that he did this at the request of the defendant Spindell, who was the managing agent of the owners.

It is contended that there can be no recovery, inasmuch as the plaintiff was one of the signers of the agreement under which the steamer was built. But this was merely an agreement on the part of each of the subscribers to it to take a share in the enterprise, and to pay the managing agents a stated sum whenever they should ask for it. It was entered into as a preliminary to the purchase or the construction of a steamboat, and when the plaintiff signed it with the others it was contemplated that he should be the commander of the boat when she was put to use, and should own a share in her. But at some time the plan was changed, and the plaintiff did not become the captain of the boat, nor does it appear whether he ever became the owner of any share in her. He never paid, and apparently was never asked to pay anything under Paper A, and he was not among the signers of Paper B, who are described as the "stockholders in steamer Kearsarge." * There was also evidence that the defendant Spindell said that he did not consider the plaintiff

* Paper A was an agreement of the signers, among whom were the plaintiff and the defendants Spindell and Messer, to take the amounts set opposite their "names in a steamboat to be purchased or built, the same to be under the management of A. & Co." Paper B was an agreement signed by the defendants and others, described "as stockholders in steamer Kearsarge, ... to pay to Isaiah Spindell, managing owner, the sums set opposite our names for the purpose of paying outstanding bills against said boat to date, the surplus amount to be used as working capital for the said boat."

an owner in the steamer. Assuming that he was originally expected to become a part owner, the jury might have been warranted in finding, either that he never actually became one, or that, if his ownership was complete, a new arrangement was made which left him as if it had never existed. Upon a finding that he rendered services and expended money in the construction of the boat at the request of the managing agent, the law would imply a contract to pay for them in the absence of anything to rebut the ordinary presumption. Even if he had done this as one of the owners, he would have been entitled to contribution from the others, although, so long as their relations remained unchanged, he could not have maintained an action against them at common law. *Duff* v. *Maguire*, 99 Mass. 300. *Terry* v. *Brightman*, 132 Mass. 318, 319. If he was one of the proprietors of the business at the time of rendering his services, and if it was afterwards understood and agreed between him and the other owners that his ownership should cease and that his rights should be determined in the same way as if he had never signed the first agreement, he could have recovered, notwithstanding his former interest. *Sikes* v. *Work*, 6 Gray, 433.

The defendants might have pleaded in abatement the non-joinder of the other owners, but in the absence of such a plea they are liable as if they were the sole owners. The signing of Paper B as well as Paper A by both of the defendants, and the testimony that the defendant Messer visited the steamer and suggested the name Kearsarge for her, warranted a finding that they were both part owners in her.

One of the defences relied upon was that the plaintiff rendered his services and paid his money gratuitously. As bearing upon that defence, it was competent for the plaintiff to show that he was then engaged in other business, at which he was earning from three to ten dollars per day. As affecting the probabilities, this fact would furnish a legitimate argument against the defendants' contention. *Parker* v. *Coburn*, 10 Allen, 82. *Upton* v. *Winchester*, 106 Mass. 330. *Norris* v. *Spofford*, 127 Mass. 85. Upon the same proposition, he might testify that when he rendered the services he expected to be paid for them. Not that his expectation would furnish a ground for recovery if there were not facts to create a liability otherwise, but if he was act-

ing voluntarily and making a gift of his money and services without then disclosing it, he could not afterwards change his mind and recover pay for what he did gratuitously, even if the other circumstances were such that, looking to them alone, the law would imply a contract to pay. It was therefore competent for him to negative this part of the defendants' contention by his testimony that he was not acting gratuitously. It was also competent for him to testify to the price per day that his services were fairly worth. *Kendall* v. *May*, 10 Allen, 59.

When the sender of a telegraphic message takes the initiative, the message as delivered may, as between him and the person to whom it is sent, be treated as the original, in the absence of evidence to show mistake in the transmission of it. Whether we should go further, and hold that the telegraph company is so far the agent of the sender as to bind him by their errors in sending it, it is unnecessary in this case to decide. There is much authority in support of this last proposition, although the contrary has been held in England. There was no error in the admission of the testimony.* See *Durkee* v. *Vermont Central Railroad*, 29 Vt. 127; *Saveland* v. *Green*, 40 Wis. 431; *New York & Washington Printing Telegraph Co.* v. *Dryburg*, 35 Penn. St. 298; *Wilson* v. *Minneapolis & Northwestern Railroad*, 31 Minn. 481; *Anheuser-Busch Brewing Association* v. *Hutmacher*, 127 Ill. 652, 658; *Western Union Telegraph Co.* v. *Shotter*, 71 Ga. 760; *Howley* v. *Whipple*, 48 N. H. 487; *State* v. *Hopkins*, 50 Vt. 316; *Smith* v. *Easton*, 54 Md. 138; *Henkel* v. *Pape*, L. R. 6 Ex. 7.

* The plaintiff's wife, called as a witness for the plaintiff, testified that her husband had received numerous telegrams from Spindell to him, which had been destroyed. The plaintiff then offered secondary evidence of the contents of these telegrams. The defendants objected, on the ground that the originals of the telegraphic messages were the messages as delivered to the telegraph company. The judge ruled that, where the sender of a telegram takes the initiative, as between him and the person to whom it is sent the original is the message as delivered to that person, and that, on a proper foundation being laid, secondary evidence of the contents of the telegrams was admissible; and, having found that the absence of the telegrams as delivered to the plaintiff was accounted for, allowed the witness to testify as to their contents. Against the objection of the defendants and their exceptions thereto, she testified that the telegrams contained requests from Spindell to her husband to meet him at a certain place. There was evidence tending to show that the telegrams were sent by Spindell.

The instruction, "that if the plaintiff rendered the services and incurred the expenses in question at the request of Isaiah Spindell, acting in his own behalf and representing the defendant Augustus S. Messer, and if the plaintiff rendered said services expecting to be paid for them, he would be entitled to recover the value of his services and the expenses incurred by him," was not given as the whole law of the case, but is to be considered in connection with the other instructions, which required the jury to determine the relation of the plaintiff to the transaction and to the defendants at the time of bringing the suit. So considered, it contains no error.

Exceptions overruled.

H. P. Harriman & F. J. Daggett, for the defendants.

C. F. Chamberlayne, for the plaintiff.

STEPHEN A. BROWNELL & others *vs.* OLD COLONY RAILROAD COMPANY & another.

Bristol. May 23, 1895. — June 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Statute requiring Railroad Corporation to operate Ferry — Condition Subsequent — Discontinuance of Ferry not an Abandonment — Enforcement of Penalty, which is to go to the Commonwealth.

Where a railroad corporation whose charter is subject to alteration by the Legislature has, under legislative sanction, acquired an existing ferry franchise as an extension and part of its railroad line, the Legislature may require such railroad corporation and its successors to operate the ferry, though taken by itself alone the ferry is unprofitable; and may authorize this court specifically to enforce the duty of so operating it.

The St. 1894, c. 392, entitled "An Act requiring the Old Colony Railroad Company to operate a ferry across the Acushnet River between the city of New Bedford and the town of Fairhaven," imposed upon the Old Colony Railroad Company an absolute duty of providing and operating a suitable ferry between New Bedford and Fairhaven, whether profitable or not; and a decree may be made ordering it so to do, without in the first instance specifying what kind of a ferry would be suitable.

The St. 1854, c. 124, did not authorize the proprietors of the New Bedford and Fairhaven Ferry to transfer their charter by a deed on condition subsequent; and a deed under said statute is not to be deemed a deed on condition, although

it contains a provision that it is made upon the condition that the grantee and its successors shall at all times discharge the duties and become and remain subject to the liabilities set forth in the charter.

A discontinuance for twenty years of a ferry which is a part of a railroad line, without any formal objection, or steps taken by any officer of the Commonwealth or by others to enforce the operation of the ferry, does not show such acquiescence on the part of the Commonwealth in the abandonment of the ferry as to prevent the Legislature from passing a statute requiring the railroad company to operate it.

The penalty of one hundred dollars a day for each day's delay in operating a ferry, provided in St. 1894, c. 392, entitled "An Act requiring the Old Colony Railroad Company to operate a ferry across the Acushnet River between the city of New Bedford and the town of Fairhaven," cannot be enforced in a suit in equity brought by ten or more citizens of New Bedford or Fairhaven, as therein authorized.

BILL IN EQUITY, filed August 18, 1894, by ten citizens of New Bedford and three citizens of Fairhaven, for the enforcement of St. 1894, c. 392, and the forfeitures prescribed therein, entitled "An Act requiring the Old Colony Railroad Company to operate a ferry across the Acushnet River between the city of New Bedford and the town of Fairhaven." The defendant, in its answer, did not allege any intent or effort to obey the statute, but denied its validity, and set up the order of the Railroad Commissioners of October 29, 1894, prescribing February 1, 1895, instead of August 1, 1894, as the day after which the defendant should forfeit to the Commonwealth one hundred dollars a day for each day's delay in operating the ferry. The Attorney General, who was made a party, filed an answer, in which he claimed for the Commonwealth any and all penalties to which it might be entitled against the defendant under the statute.* Hearing before *Lathrop*, J., who reserved the case on the pleadings and evidence for the consideration of the full court. The material facts appear in the opinion.

T. M. Stetson & L. LeB. Holmes, for the plaintiffs.

J. H. Benton, Jr., for the railroad company.

ALLEN, J. By St. 1854, c. 124, the proprietors of the New Bedford and Fairhaven Ferry were authorized to transfer their charter to the Fairhaven Branch Railroad Company, by deed, which should vest in the latter company all the rights and

* The statute and the proceedings before the Railroad Commissioners may be found in the report of the case of *Brownell* v. *Railroad Commissioners*, 163 Mass. 276.

powers conferred by said charter, with a provision that the latter company should be held to perform all the duties prescribed thereby, and that from and after the execution and delivery of the deed the name of the ferry company should be changed, and that the said corporation should afterwards exist and be known by the name of the Fairhaven Branch Railroad Company, and should not be required to hold separate meetings as a ferry company, but that all acts needful and proper to be done should be done at regular or special meetings of the railroad corporation, or by the directors thereof. The deed which was executed under the above statute was expressed to be upon the condition that the railroad company and their successors should at all times discharge the duties and become and remain subject to the liabilities prescribed and set forth in the charter of the ferry company, and also in St. 1854, c. 124. Various intermediate transfers were made, until in 1883, by virtue of St. 1882, c. 80, the Old Colony Railroad Company succeeded to all the franchises and property which had belonged to the Fairhaven Branch Railroad Company. The evidence in the case leaves no doubt, and it is conceded, that after the deed to the Fairhaven Branch Railroad Company the railroad of that company and the ferry became one line, and were operated as such for a number of years. It was the same in effect as if the railroad company by its original charter had been authorized to establish and operate the ferry as a part of its line. The ferry became practically an extension of the railroad, just as if the railroad had been extended over a bridge. The railroad line having been thus extended and operated until 1873, the ferry was in that year discontinued as unprofitable; and by St. 1894, c. 392, the Old Colony Railroad Company was expressly required to provide and operate a suitable ferry, in accordance with the provisions of the original ferry charter and of St. 1854, c. 124.

The first question which we have to determine is, whether this statute is within the legislative power; that is to say, whether a railroad company which owns a ferry as a part of its line, and which is operating the rest of its line, can discontinue the ferry and refuse to obey a legislative requirement to operate it. A railroad company has by no means an absolute power to determine what parts of its line it will operate. Its franchises are

granted for the public good, and in exercising them it is largely subject to the control and direction of the Legislature. Either by virtue of the police power, or of the reserved power to alter charters, many acts may be required which involve expense, and which a railroad corporation, or other corporation to which like rules would apply, would not if left to itself undertake. Numerous illustrations of this are found in the decisions of this court, as well as in those elsewhere. *Roxbury* v. *Boston & Providence Railroad*, 6 Cush. 424. *Commonwealth* v. *Hancock Free Bridge*, 2 Gray, 58, 64. *Fitchburg Railroad* v. *Grand Junction Railroad*, 4 Allen, 198. *Commonwealth* v. *Eastern Railroad*, 103 Mass. 254. *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446. *Worcester* v. *Norwich & Worcester Railroad*, 109 Mass. 103. *In re Northampton*, 158 Mass. 299, 301. *Union Pacific Railroad* v. *Hall*, 91 U. S. 343. *Railroad Commissioners* v. *Portland & Oxford Central Railroad*, 63 Maine, 269, 277. *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538. *People* v. *Albany & Vermont Railroad*, 24 N. Y. 261. *People* v. *Boston & Albany Railroad*, 70 N. Y. 569. *Montclair* v. *New York & Greenwood Lake Railway*, 18 Stew. 436. *People* v. *Louisville & Nashville Railroad*, 120 Ill. 48. *State* v. *Iowa Central Railway*, 83 Iowa, 720. The present case is merely an instance of compelling a railway company to operate its entire line. The Legislature has seen fit to pass an imperative statute to this effect. In view of this statute, it is not open to the railroad company to determine that the ferry should be discontinued while all the rest of its various lines are operated. The defendant appears to rely on *Commonwealth* v. *Fitchburg Railroad*, 12 Gray, 180, as sanctioning a contrary doctrine. But in that case there was no statute requiring that the railroad company should run the unprofitable trains. There is nothing in the decision which declares or implies that the Legislature might not have imposed this as an absolute duty. The same thing may be said of *People* v. *Rome, Watertown, & Ogdensburg Railroad*, 103 N. Y. 95, and *People* v. *New York, Lake Erie, & Western Railroad*, 104 N. Y. 58.

The defendant contends that St. 1894, c. 392, did not impose a new obligation on the defendant, but only required the defendant to perform such obligation as the ferry company would have been

under to maintain and operate the ferry if it had not transferred its charter in 1854; and an elaborate argument is made to show that the original ferry company was not bound to maintain the ferry for all time. But whatever may have been the obligation of the original ferry company, the Fairhaven Branch Railroad Company, when it made the ferry a part of its line, no longer had the power to discontinue the ferry provided the Legislature expressly required that it should be operated. And we are unable to give to the statute of 1894 the construction suggested by the defendant. This statute makes it the imperative duty of the defendant to operate the ferry, whether it is profitable or not.

The defendant contends that the statute requires it to provide and operate a " suitable " ferry, and that there is no proof before the court upon which it can be definitively decided what kind of a ferry is suitable. We think, however, that an order to provide a suitable ferry is sufficient in the first instance, and that, if complaint is made that a ferry-boat which may be provided is not suitable, a further application may be made to the court.

The defendant further contends that the requirement to operate a ferry forces it into a new business, and that, if the Legislature can require it to operate a ferry for a mile, it could also require it to maintain a line of steamboats to Nantucket. The only answer which needs to be given to this argument is, that the ferry by legislative authority was adopted by the railroad company as a part of the line of the railroad, and that its subsequent maintenance is no more outside of the business of the railroad company than the maintenance of any other part of the railroad line.

The defendant further contends that the only liability of the defendant for failure to operate the ferry is a liability to forfeit the ferry charter. This argument cannot prevail since the blending of the ferry franchise with that of the railroad company.

The defendant also contends that it has never acquired the franchise to maintain the ferry. The ground of this argument is that the deed of the ferry franchise to the Fairhaven Branch Railroad Company was upon condition, and that the deed became void by the failure to perform the duties required by the condition; and, moreover, that in the recent transfers no express

mention has been made of the ferry franchise. But the deed of the proprietors of the ferry to the Fairhaven Branch Railroad Company cannot be considered as technically a deed upon condition subsequent. No clause of re-entry for breach of condition was inserted, and the purpose of the proviso was rather to show that the grantee was to assume and perform the duties prescribed and set forth in the charter. *Rawson* v. *Uxbridge School District*, 7 Allen, 125. *Sohier* v. *Trinity Church*, 109 Mass. 1, 19. *Episcopal City Mission* v. *Appleton*, 117 Mass. 326. No conveyance upon condition subsequent was contemplated by St. 1854, c. 124, or by the vote of the stockholders of the Fairhaven Branch Railroad Company to make the purchase. The effect of the transaction was to transfer the duties from one corporation to another, after which the original corporation had no further interest in the matter, but the railroad company was bound by law to perform all and singular the duties of the ferry company. The ferry company was not authorized to make a conditional transfer. By § 3 of the statute, its only existence after the transfer was as the Fairhaven Branch Railroad Company. Moreover, an estate on condition subsequent is not defeated except by re-entry for breach of condition. No such re-entry has been made in this case, nor is it easy to see how it could be, since the ferry company as a separate corporation has ceased to exist. In reference to the suggestion that no special mention of the ferry franchise has been made in the recent conveyances, it may be said that none need be, since the provisions of St. 1854, c. 124, and the delivery of the deed thereunder. Since that time, the ferry corporation has existed and been known by the name of the Fairhaven Branch Railroad Company, and has been included in all transfers of that company.

The defendant further contends that it cannot be required to maintain the ferry during the term of the lease of its railroads and property to the New York, New Haven, and Hartford Railroad Company. This lease, which was executed in 1893, was not pleaded in defence, and we have no reason to suppose that the omission was through inadvertence. Its admission in evidence was objected to as incompetent and not open, and no motion was made to amend the answer by pleading it. We therefore have no occasion to consider whether the existence of the lease

would exonerate the defendant as lessor from its obligations to the Commonwealth; respecting which, however, see *Braslin* v. *Somerville Horse Railroad*, 145 Mass. 64; *Davis* v. *Providence & Worcester Railroad*, 121 Mass. 134.

The defendant also suggests that any obligation to the Commonwealth to operate the ferry was waived by the acquiescence of the Commonwealth in its abandonment for a period of twenty years after 1873, and also by legislation subsequent to the abandonment in 1873, by which the railroads were permitted to lease and consolidate upon the basis of such abandonment. But no such waiver on the part of the Commonwealth is to be presumed, without the use of language in some statute clearly expressing or implying it. The omission by officers of the Commonwealth or by others to take steps earlier for enforcing the duty signifies nothing. No statute has been pointed out showing an intention on the part of the Legislature to waive the performance of it.

The defendant contends that the Legislature could not provide for the specific enforcement of the obligation to maintain the ferry by a suit in court, such as is provided for in St. 1894, c. 392. The numerous cases already cited in which resort has been had to the courts for the enforcement of similar obligations and duties show to the contrary, and that the forfeiture of the charter is not the only remedy.

Finally, it is contended that the penalty of one hundred dollars a day for each day's delay in operating such ferry cannot be enforced in this suit. Upon this point the statute is not clear, but we have come to the conclusion that the better construction of the statute is as the defendant contends. The principal reasons supporting this view are as follows.

The forfeiture of the sum prescribed is to the Commonwealth, but the statute contains no provision making the Commonwealth or any one of its officers a party to the suit which ten or more citizens may bring to enforce the provisions of the act. The maintenance of the ferry is for the peculiar benefit of New Bedford and Fairhaven, but the citizens of those places have no special interest in the enforcement of the penalty. The Legislature can hardly have intended that the penalty should be paid to the ten or more citizens who are authorized to file a petition in

equity to enforce the provisions of the statute, yet nobody else is required to be a party plaintiff. The plaintiffs have made the Attorney General a party to represent the Commonwealth. But he is not a financial officer of the State, and we are at a loss to see how he can properly be made a party, or be entitled to appear in his own name to represent the pecuniary interest of the Commonwealth under this statute. The ordinary way of enforcing a penalty which is to go to the Commonwealth is by a proceeding in the name of the Commonwealth, unless some other mode is enacted by statute or established by custom. We have a difficulty in inferring that the Legislature intended that a heavy pecuniary penalty enuring to the Commonwealth should be enforceable by a suit or petition in equity in this court, which suit is instituted, managed, controlled, and subject to be discontinued solely by private citizens who have no interest in such penalty. The provision of the statute that this court should have jurisdiction in equity upon the petition of ten or more citizens of New Bedford or Fairhaven to enforce the provisions of this act is satisfied by holding that it means the provisions requiring the Old Colony Railroad Company to provide and operate a suitable ferry. These citizens may maintain a petition in equity to enforce so much of the statute as concerns the citizens of New Bedford and Fairhaven. The Commonwealth may enforce the penalty which enures to its benefit. This view derives some confirmation from the Pub. Sts. c. 217, § 2, providing that "all fines and forfeitures . . . expressly appropriated to the use of the Commonwealth . . . may, unless otherwise expressly provided by law, be prosecuted for and recovered by indictment in the Superior Court, . . . or the same may be recovered in an action of tort."

The result is, that the plaintiffs are not entitled to a decree for enforcing the forfeiture of one hundred dollars a day to the Commonwealth, but, in the opinion of a majority of the court, they are entitled to a decree requiring the defendant to provide and operate a suitable ferry.

Ordered accordingly.

SILVANUS SMITH & another *vs.* BENJAMIN F. BUTLER.

Suffolk. January 15, 1895. — June 20, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Action — Equity — Co-owners — Disbursements by Ship's Husband.

A ship's husband made disbursements above earnings for whatever was necessary for the business during a series of voyages. He was a part owner of the vessel at the time, but had sold his share. He sued one part owner at law for his proportion, there being other part owners not settled with. *Held*, that the action could not be maintained, but that the only remedy was in equity, notwithstanding St. 1887, c. 383.

HOLMES, J. This is an action brought by ship's husbands against a part owner to recover from him his share of disbursements made by the plaintiffs over and above the ship's earnings. One of the plaintiffs, Smith, was also a part owner during the time of the disbursements, although he had sold his share before this action was brought. The disbursements were made in foreign commerce during a series of voyages, and covered whatever was necessary for the transaction of the business. Nothing more specific appears as to their nature. We understand from the report that there are other part owners not settled with.

Under such circumstances the only proper remedy is a bill for an account, joining all the part owners who are interested in the decision as to the sums to be paid by them severally. Undoubtedly part owners of a vessel are not partners in the vessel, and it may be, as has been held in England, that an advance by a ship's husband distinctly appearing to have been made for the outfit of the vessel alone ought to be treated as a loan to the several owners individually. *Helme* v. *Smith*, 7 Bing. 709. Very possibly there are other cases where a ship's husband can sue the part owners individually, or be sued by them. But even in England it has been held that repairs for a particular adventure may, if not must, be brought into the account as a quasi or true partnership charge. *Green* v. *Briggs*, 6 Hare, 395, 405, 406. *Alexander* v. *Simms*, 5 DeG., M. & G. 57, 65. *Japp* v. *Campbell*, 57 L. J. Q. B. 79, 81. And we believe

that there is a general agreement that, subject to some possible exceptions, the sums to be paid between several part owners in respect of a particular adventure must be settled in equity. We are of opinion that this case falls within that principle. *Starbuck* v. *Shaw*, 10 Gray, 492. *Maguire* v. *Pingree*, 30 Maine, 508. *Hardy* v. *Sprowl*, 33 Maine, 508. *Dodge* v. *Hooper*, 35 Maine, 536. *Bovill* v. *Hammond*, 6 B. & C. 149. *Vanner* v. *Frost*, 39 L. J. Ch. 626. Maclachlan, Shipping, (4th ed.) 106.

This objection to the maintenance of the present action was not pleaded formally as such, but the fact that there were other owners interested in the account was alleged, and the inability of a court of law to deal with the case is a manifest consequence of that fact. This inability remains unchanged by legislation. See *Worthington* v. *Waring*, 157 Mass. 421.*

Judgment set aside.

C. T. Russell, (*A. H. Russell* with him,) for the defendant.

E. P. Carver, for the plaintiffs.

WILLIAM MINOT, executor, petitioner.

Suffolk. March 6, 1895. — June 20, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Omission to provide by Will for Children — Mortgage — Personal Debt of Testator.

There is no omission to provide by will for children if there should be any living at the testator's decease, within the meaning of Pub. Sts. c. 127, § 21, if, after a bequest to his wife, whom he knew to be pregnant at the time of making the will, he gave the whole of the rest of his property to a trustee to pay the whole income to the wife during life, and the reversion to those who at the time of her death would be his heirs at law by blood.

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* This case decides that the intention of St. 1887, c. 383, entitled "An Act relating to the practice in civil actions in the Supreme Judicial and Superior Courts," is that each proceeding under it must be treated either as an action at law or as a suit in equity, with the incidents which, by established practice, or by other statutes, attach to the particular action or suit, and that the pleadings and procedure must conform to this view.

Where a mortgage upon the real estate of the wife is made by the husband and the wife in her right, to secure their joint and several promissory note, the note will be regarded after his death, upon the petition of his executor to obtain the instructions of the court, as his own personal debt, if that conclusion seems justified by the facts, though meagre, with the inferences that may be drawn from them.

PETITION, by the executor of the will of George R. Minot, to obtain the instructions of the court as to the construction of the will.

The petition alleged that the testator by will bequeathed "all my articles of household and personal use or ornament" to his wife, and also ten thousand dollars in money or in such securities as his executor might select, and gave the residue to the petitioner, in trust to pay the income to the wife during life, and the reversion "to those persons who, if my death occurred at the time of her death, would then be my heirs at law by blood"; that the testator left surviving him his widow, Agnes Minot, and one son, Francis Minot, born on November 8, 1891, after a period of gestation covering more than nine months, which date of birth was subsequent to the making and publication of the will, which took place on March 23, 1891; that prior to and at the time of making the will, the testator knew that his wife was pregnant; that the petitioner, as executor, had practically settled the estate; and was ready and willing to qualify as trustee, but that his duties in the premises and the rights of said Agnes and Francis, under the statutes of this Commonwealth, were doubtful under the terms of the will in connection with the circumstances attending the making thereof and the subsequent birth of said Francis Minot.

The petition further alleged that there was a mortgage upon the real estate of the wife in Milton, which was the home of the testator and wife, made by the testator and by her in her right, to secure the joint and several promissory note of themselves for $20,000, due in five years from date, with interest semiannually at four and one half per cent, given to one Mason, dated September 15, 1891, and duly recorded; that the proceeds of the note went into and formed part of the general funds of the testator, from which, between April, 1891, and October, 1892, he expended over $35,000 in the construction of a house and stable upon said real estate, and in purchases of furniture for the same; that the contracts for the construction and purchases were made in the sole name and as the sole liability of the testator, and all

debts incurred thereunder were exclusively his personal debts; that it was doubtful whether or not, as between the widow of the testator and his estate, the estate was bound for and should pay the whole of the mortgage debt, or one half part or any part thereof, and whether the executor should reserve assets, and if any to what extent, to meet such debt when due.

The case was heard by *Holmes*, J., and reserved for the consideration of the full court.

F. Rackemann, for the petitioner, read the papers in the case.

F. Brewster, for the brother and sisters of the testator, and guardian *ad litem* for the minor children of the brother, and for all persons not ascertained or not in being.

M. Morton, guardian *ad litem*, for Francis Minot.

S. Butler, for Agnes Minot.

ALLEN, J. 1. By Pub. Sts. c. 127, § 21, it is provided that "when a testator omits to provide in his will for any of his children, or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless they have been provided for by the testator in his lifetime, or unless it appears that the omission was intentional, and not occasioned by accident or mistake." This statute applies to children born in the testator's lifetime, but after the making of the will. *Bancroft* v. *Ives*, 3 Gray, 367.

At the time the will was made, the testator's son was not born, and we are not informed whether he then or ever had any other child. After a bequest to his wife, he gave the whole of the rest of his property to a trustee, who was to pay the whole income to the testator's wife during her life, and the reversion was to go to those persons who would then be his heirs at law by blood; that is, to his children, if any should then be living. He knew that his wife was pregnant, and the above provision was no doubt intended to include the child, and there was therefore no omission to provide in his will for his children, if there should be any living at his death. The case is to be distinguished from *Bowen* v. *Hoxie*, 137 Mass. 527, where after the testator's death a child was born, which it would seem that the testator did not have in mind at the time of making his will. In the cases now before us, the provision of the will apparently had reference to such children as might be born after the mak-

ing of the will. *Buckley* v. *Gerard*, 123 Mass. 8. *Peters* v. *Siders*, 126 Mass. 135.

2. When a husband and wife join in a mortgage of her land to secure a debt of the husband, her estate is considered only as a security for the debt, for which the husband and his estate are primarily liable; and the wife or her heir, after the death of the husband, will be entitled to have it exonerated out of the estate of the husband. *Savage* v. *Winchester*, 15 Gray, 453, 455. *Deane* v. *Caldwell*, 127 Mass. 242, 246.

It is therefore to be determined as a question of fact whether the note for $20,000, signed by the husband and his wife, and secured by mortgage of her land, is to be deemed the debt of the husband, or of the wife.

There is nothing to negative the ordinary inference, when a house is built by one person on land of another, that the house and stable when erected on her land became hers. *Webster* v. *Potter*, 105 Mass. 414. If therefore the debt was his, it would imply that he intended to bear the expense of erecting the buildings for the family establishment, leaving the whole real estate to stand in her name.

It seems clear that the furniture was bought with the husband's funds, and there is nothing to negative the inference that it was his property. It appears to be included in the bequest to her of "all my articles of household and personal use or ornament." The cost of the furniture alone is not stated. It is said that "he expended over $35,000 in the construction of a house and stable upon said real estate, and in purchases of furniture for the same." Upon this statement, we should hardly suppose that the cost of the furniture would be as much as $15,000, though it might be so. If less than that amount, then certainly a portion of the husband's expenditure must have been upon the buildings, even if she is held bound to pay the note for $20,000. It appears by inference from the terms of the will that the husband was possessed of some means. Apparently he had some real estate, and also securities to more than the value of $10,000. The fact of such an establishment, costing over $35,000 besides the land, warrants an inference of some means or income with which to maintain it. But we are not informed, otherwise than by inference from the terms of the will, what

property or income he had, or whether she had any means whatever with which to pay the interest, amounting to $900 a year, on the note, or the note itself when due, in September, 1896. It is stated that the contracts for the construction of the buildings and the purchases of furniture were made in the sole name and as the sole liability of the husband, and that all debts incurred thereunder were exclusively his personal debts. The date of the will was March 23, 1891, and the date of the note and mortgage September 15, 1891. At the time of giving the latter, the husband knew that under the will she would receive but $10,000 in ready money, which would be available for paying the interest or principal of the note, provided she should continue in the home which they were then establishing; but the income which she would receive under the will is not stated. He also knew that in case of his death she would have their child to support, if it should live, as he had made no provision for its immediate support, otherwise than by his provisions for her.

On the whole, the somewhat meagre facts which are stated, with the inferences which may be drawn from them, seem rather to point to the conclusion that the testator intended to assume the payment of the mortgage note as his own personal debt.

So ordered.

JOHN GRAHAM *vs.* CHARLES L. BADGER & another.

Norfolk. March 26, 1895. — June 20, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Defective Appliance — Instructions.

In an action for personal injuries caused by the fall of an iron block from a derrick upon an employee, which fall was due to the breaking of a rope at a point where it had been spliced, the weight attached to the rope not being sufficient to break or to endanger the apparatus, if in proper condition, the defendant has no ground of exception to a refusal to rule that the mere breaking of the rope was not *prima facie* evidence of negligence on the part of the defendant, and to an instruction to the jury that if they found that the rope was defective while in the defendant's care, that fact was evidence which, unexplained, would warrant them in finding that the defendant was negligent. *Res ipsa loquitur.*

If an employee had a right to expect due care from his employer as to his permanent appliances, and there was evidence that he was employed to do what he was doing, and that his position was seen by his employer, and it may be that the doing of his work required him at moments to be in the position he was in when injured, it cannot be said as matter of law, in an action for his injuries, that he was negligent in being where he was.

TORT, for personal injuries occasioned to the plaintiff by the fall of an iron block from a derrick upon him while in the defendants' employ. The declaration contained four counts, the first at common law, and the other three under St. 1887, c. 270, § 1, cls. 1, 2. At the trial in the Superior Court, before *Hammond*, J., there was evidence tending to show that the plaintiff, who had been employed by the defendants for about six years, had for the two years previous to the accident been engaged in the quarries of the defendants, assisting about derricks, and doing any work connected with them that was required of him; that at the time of the accident he was working with one Furbush in moving a finished stone by means of a boom derrick, and was standing beside the stone to guide it, and almost under the iron block hereinafter mentioned; that the stone, which weighed from two hundred to four hundred pounds, was suspended by a rope attached to a hook at the bottom of the iron block of the derrick, and his back was to the mast of the derrick; and that this iron block, which weighed about half a ton, was suspended about six or eight feet in the air by means of a rope or fall, which ran from the iron block up to the top of the mast of the derrick to a small block with a sheave in the middle of it, through which it ran, and then ran down the mast to a block at the foot, and then connected with the drum of the engine.

While the plaintiff and Furbush were moving the stone, Furbush having his face to the mast and being some distance away from under the block, the fall parted between the end of the boom and the top of the mast, causing the block to fall upon the plaintiff, and to injure him.

There was evidence for the defence that this fall rope, which was the best manila, had been purchased in January previous to the accident, which happened in May, and that several weeks before the accident it broke while the derrick was in use lifting a stone which weighed from ten to twelve tons. One Willey,

the foreman of the defendants' stone yard, then discarded part of this fall rope, and spliced another piece on to what was left, and replaced the rope on the derrick. Several witnesses testified that ropes spliced as this one was were as strong as new ropes. It also appeared from the evidence, that, at the time of the accident in which the plaintiff was injured, the rope parted in this splice.

The plaintiff contended that the rope or fall had become worn from previous use, and that its parting was due to the negligence of the defendants in not properly inspecting it, and in allowing it to be in a defective and unsafe condition.

The defendant contended that all ropes are liable to kink, and that this being a new rope, and at the time having but a light load upon it, was more likely to kink, and that the accident must have happened through the kinking of the rope and its subsequent cutting in the sheave at the head of the mast, and that the position of the block, about six or eight feet above the ground, with reference to that portion of the rope which parted, showed conclusively that it must have parted by being cut by the sheave.

The plaintiff testified, that on the day of the accident he was told by Willey to get some stone; that Furbush asked him to help with this particular stone; that at the time he was hurt he was getting on a stone to bring from the stone shed over to the polishing shop to be polished, which stone was two feet square and eight inches thick; that it was about a foot out from under the swing of the derrick; that he was standing between it and the boom of the derrick; that as the stone was a finished one, he was holding it to keep it from striking another stone there; that one man could have turned this stone around alone; that Furbush did not have hold of the stone, but had hold of a tag rope which was fastened to the end of the boom; that the plaintiff had placed a rope around the stone and fastened it to a hook in the iron block which weighed about half a ton; that Furbush sang out to hoist, and the fall rope broke, and the iron block fell and struck him; that there was no tag rope on the iron block or on the stone; that the tag rope on the boom was to pull the boom around after the stone had been lifted high enough; that if the defendants were hoisting heavy stone they would warn

him to look out for a chain breaking or something; and that at the time of the accident he did not know of any defects in the rope.

There was evidence for the defendants tending to show that it was the duty of the plaintiff to take stones to the polishing shop, and to and from other places; that it was not a part of his duty either to hoist or to move the stone; that Furbush was at the yard to put stone on to the wagon for the teamsters; that the stones which were put on to a one-horse team weighed from two hundred to two thousand pounds or more, and that the inside purchase or rope was so regulated that the stone would hoist straight; that it would mar the stones to knock against one another; that the teamsters generally helped to load and unload stone, and were permitted so to do; that the plaintiff's duty was to drive, and he did not have to help load and unload; that the rope, which was made of five strands, and was rove through the block, was an inch and a quarter in diameter, and that the block was about an inch and three quarters in diameter, made of sheet steel, and allowing ample room for the rope or fall to pass through it, even when spliced; that the rope ran from the stone through the snatch block about forty feet to the drum of the engine; that there was a tag rope on the end of the boom; that there was no cut in the rope when the stone was taken out of the wagon, five minutes before the accident happened; that the rope was put in by Willey, or under his directions; that a few weeks before the accident the rope parted when hoisting a very large stone, and Willey got a new piece of rope and spliced it together after taking out about half of the fall rope, which was used up; that the strands were wound in and around one another, so as to make a rope when spliced which would hold as well as a new rope; that this splice was well done; that in putting in new falls they were troubled with kinks and had to take them out; that this rope, being practically a new rope, would be likely to kink if there was any slack in it; that no rope if kinked would stand it when brought against the block at the masthead; that there was no way to guard against these kinks; that the defendants' theory was that the rope had kinked and the kink had caught in the masthead; that the defendants made no objection to the plaintiff and Furbush hoisting the stone; that the plaintiff was

standing almost, but not directly, under the block; that everything was safe and good at the time, including the fall rope; that "the break looked as though two strands had been cut, or, in other words, as though they had been drawn over a sharp edge or something"; that the thread was pulled out; that these ends "were just pulled out into a kind of brush end, the same as any rope would part, scraggy ends; that they were not a smooth cut, but practically what one would call kind of a chaw cut, kind of chawed off"; that this fall rope had been exposed to the weather since January 15, 1893; and that a spliced rope is as strong as a new rope, and a new rope is more liable to kink than an older one.

There was also expert evidence tending to show that the rope was as good as could be bought; that the fall, as exhibited, was first class except where it was worn; that what they call a long splice, made by unravelling and drawing the strands together for a certain distance and then by tucking them under, as in the case of this fall, made a proper splice, and that the relative strength is usually stronger on the splice; that there are the same number of strands in the splice, but with the ends it makes more strands; that it would run through a one and three quarters inch sheave all right; that there was no way to prevent kinks, nor to detect them, and that if a rope when kinked caught against anything like the block at the top of the mast it would cut it off; that splices were stronger and would wear longer than the original rope; and that a new rope was a little more likely to kink than an old one.

There was also other evidence in support of the plaintiff's contention that the splice was made in the best possible manner; that there was nothing the matter with the rope; and that the way it was cut showed that there must have been a kink.

At the close of the testimony, the defendants requested the judge to rule: 1. That upon all the evidence the plaintiff could not recover. 2. That the mere breaking of the rope was not *prima facie* evidence of negligence on the part of the defendants.

The judge refused so to rule, and, among other things, instructed the jury that, if they found that the rope was defective while in the defendants' care, that fact was evidence which, un-

explained, would warrant them in finding that the defendants were negligent. The defendants alleged exceptions.

J. Lowell, Jr., (*G. W. Wiggin & S. H. Smith* with him,) for the defendants.

W. S. Pinkham, (*J. D. Long* with him,) for the plaintiff.

HOLMES, J. This is an action of tort to recover for personal injuries caused by the fall of an iron block from a derrick upon the plaintiff, who was working in the defendants' employ. The fall was due to the breaking of a rope at a point where it had been spliced. The weight attached to the rope was not sufficient to break or to endanger the apparatus if in proper condition. The main question is whether the judge before whom the case was tried was right in refusing to rule that the mere breaking of the rope was not *prima facie* evidence of negligence on the part of the defendants, and in instructing the jury that, if they found that the rope was defective while in the defendants' care, that fact was evidence which, unexplained, would warrant them in finding that the defendants were negligent.

We are of opinion that the instruction was correct. *Res ipsa loquitur*, — which is merely a short way of saying that, so far as the court can see, the jury from their experience as men of the world may be warranted in thinking that an accident of this particular kind commonly does not happen except in consequence of negligence, and that therefore there is a presumption of fact, in the absence of explanation or other evidence which the jury believe, that it happened in consequence of negligence in this case. Presumptions of fact, or those general propositions of experience which form the major premises of particular conclusions of this sort, usually are for the jury. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence. See *Doyle* v. *Boston & Albany Railroad*, 145 Mass. 386, 387, 388; *Howser* v. *Cumberland & Pennsylvania Railroad*, 80 Md. 146.

It may be true that a rope properly spliced is stronger at the splice than elsewhere. But the jury might infer from the breaking that this rope had not been spliced properly. One witness who examined it testified that, so far as he could see or understand, the splice drew apart. At all events the rope broke at the

place where it had broken before and had been spliced, and it was for the jury to say what they would infer from that fact. Of course they were not bound to believe the testimony for the defence if it seemed to them incredible. We cannot say that they were wrong in rejecting the explanation that the rope probably kinked and caught in a wheel. Neither can we assume that the defect, if there was one, was hidden. If the jury were of opinion that defects in ropes great enough to make them break under a strain slight in proportion to the normal power of rope generally can be discovered by proper inspection, we know nothing to the contrary. It might be otherwise in the case of an iron chain.

We cannot say that the plaintiff was negligent. He had a right to expect due care from the defendants as to their permanent appliances. There was evidence that he was employed to do what he was doing; his position was seen by one of the defendants, and it may be that to do his work called on him at moments to be nearly under the block. *Snow* v. *Housatonic Railroad*, 8 Allen, 441, 450. *Hackett* v. *Middlesex Manuf. Co.* 101 Mass. 101. *Spicer* v. *South Boston Iron Co.* 138 Mass. 426. *Kilroy* v. *Foss*, 161 Mass. 138. *Exceptions overruled.*

EDITH SISE *vs.* ZABDIEL A. WILLARD & another, trustees, & others.

Suffolk. December 5, 1894. — June 21, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Life Interest — Termination of Trust.

A bill in equity to compel an absolute transfer to the plaintiff of a fund held for him by the trustee under a will cannot be maintained, if his interest in the fund is only a life interest coupled with a power of testamentary disposition.

FIELD, C. J. This is a bill in equity, brought by Edith Sise, one of the daughters of John Ware, late of Boston, deceased, testate, against the two trustees under his will, one of whom is

her husband, and, by amendment, the surviving wife and other children of said John Ware, and the children of the plaintiff have been made parties defendant. The first wife of the testator was living at the time the will was made, but died in the lifetime of the testator, and he married again, and made provision by a codicil for his second wife, who survived him. At his death he also left five children, all of whom are still living.

The object of the bill is to compel an absolute transfer to the plaintiff of the fund held for her benefit by the trustees, under the fourth and fifth articles of the will. The youngest of the children of John Ware has already attained the age of thirty-five years, and the property given in trust has been divided into six equal shares, and the trustees have set apart for the plaintiff one of these shares, which they hold in trust for her benefit, and the income of which they have paid to her from time to time. The children of the testator are one son and four daughters, and the share of the son was conveyed to him, in accordance with the provisions of the will, when the youngest child of the testator reached the age of thirty-five years.

The contention of the plaintiff is that the entire beneficial interest in the share set apart for her benefit belongs to her, and that she is entitled to have the trust terminated and this share of the property absolutely transferred to her. The contentions of the respondents are, that the plaintiff has an equitable interest in this share for her life only, with the power of testamentary disposition, and that the remainder after her death goes either to her issue, if she leave issue, or to the heirs or distributees of the testator, unless she makes some disposition of it by will or by an instrument in the nature of a will. They also contend that, if this is not so, and she has the entire beneficial interest, the will of the testator should be carried out during her life, and that the intention of the testator concerning the shares allotted to his daughters is clearly expressed in the will, in the following sentence of the fifth article: "But as to the shares of the said property which shall be set apart for my daughters, it is my will that the said trustees shall continue to hold them in trust for their benefit, and shall continue to pay over to them the income from their respective portions for their sole use, and upon their own receipt in writing, so long as they shall live," etc.

By the sixth article of the will the testator made provision for the issue of any child, in case any of his children should die leaving issue before his youngest child reached the age of thirty-five years, and without having disposed of his or her share of the property by will, but he made no provision in terms for the disposition of the share of the property allotted to his daughters, if any of them, after his youngest child attained the age of thirty-five years, should die leaving issue, and without having made a testamentary disposition of her share.

There is no provision in terms in the will for the disposition to be made of the share of the property allotted to each child, in case any child should die without having disposed of his or her share by will, and without leaving issue, whether the child die before or after the testator's youngest child reached the age of thirty-five years, although the son's share after that time became his absolute property, and would descend in the same manner as his other property.

Considering all the provisions of the will, we are of opinion that the plaintiff took only an equitable life estate. Up to the time when the division was to be made of the property into shares, the trust property was to constitute one trust, the income of which was to be paid in equal shares to all the children, and if any child died leaving issue and without having disposed of his or her share by will, his or her issue were to take their parent's share of the income; and when the time came for division, such issue were to take their parent's share of the principal. Up to that time, undoubtedly, the children of the testator had only a life interest, coupled with a power of testamentary disposition. When the time came for a division of the property into shares, the son's share was to become his absolute property, but each daughter's share was to remain in trust on a separate trust for her life, with the power of testamentary disposition, but that is all the change which the will in terms provides for.

If it be implied that on the death of each daughter after the division her share shall go to her issue, if she leave issue and make no testamentary disposition of the property, still such issue would take as legatees under the will, and not as heirs or distributees of their mother. There is absolutely no provision that on the death of any of the children without issue before

the division, or on the death of any of the daughters without issue after the division, if no testamentary disposition has been made, the share of each child shall go to his or her heirs or distributees. The gift is to the trustees, and the children take only equitable interests, and up to the time of the division this interest is clearly for life. After the division the son's share is absolute, and each daughter's share is to be held on a separate trust, but we can find no language in the will by which the interest of the daughters in the property is enlarged; it still remains, we think, an interest for life. *Collins* v. *Wickwire*, 162 Mass. 143. This is the principal distinction between the present case and *Forbes* v. *Lothrop*, 137 Mass. 523. The court in that case, from the language of the will, and particularly from the clause that at the death of the wife the whole property was "to be equally divided among all my children and their heirs by right of representation," decided that the intention of the testator was to give to his daughter Mary the whole equitable interest in her share, which would pass to her heirs or distributees if she at her decease made no disposition of it "by will or otherwise." We can find no equivalent words in the present will. In the view we have taken of the extent of the plaintiff's interest in the share set apart for her, it is unnecessary to consider whether, if the whole beneficial interest in the share absolutely belonged to her, she would be entitled to a decree for a conveyance, against the clear intention of the testator that the share should be held in trust for her during her life.

It is premature now to consider whether, on the death of the plaintiff leaving issue but having made no testamentary disposition of her share, that share will go to such issue. The bill must be dismissed.

So ordered.

J. L. Thorndike, for the plaintiff.

W. G. Russell, for Zabdiel A. Willard.

L. S. Dabney & J. D. Bryant, for Lucy A. Willard, a daughter of the testator.

EDGAR F. LEONARD *vs.* LOUISA J. SOUTHWORTH.

Norfolk. January 9, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Writ of Entry — Deed — Survivorship — Shifting Use.

A husband conveyed premises in fee to A. and B. as tenants in common, the survivor upon the death of the grantor's wife, who had a life estate, to take the whole, and a writ of entry was brought by the grantee of A., who died before the wife, to recover an undivided half of the premises from B. *Held*, that the provision regarding survivorship in the deed to A. and B. took effect as a shifting use.

WRIT OF ENTRY, dated October 13, 1892, to recover a parcel of land in Stoughton. Plea, *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the tenant, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion.

E. F. Leonard, *pro se*.

W. N. Osgood & J. L. Bates, for the tenant.

MORTON, J. The demandant contends that the effect of the deed given in 1885 by Albert Southworth to the tenant and Jedidiah A. Southworth was to convey in fee to the grantees as tenants in common the premises described in it, and that as he claims under Jedidiah, he is entitled to an undivided half. The question is whether this construction is correct. The deed sets forth that the grantor, "in consideration of one dollar and other valuable considerations paid by Jedidiah A. Southworth and Louisa J. Southworth," gives, grants, bargains, sells, and conveys unto them the premises in question, "Reserving to Harriet Southworth, mother of the grantees, all the rights which she may have in the granted premises; and provided that, should either of the grantees decease before their mother, Harriet Southworth, then the other grantee, his or her heirs and assigns, shall have the whole of said real estate, reserving to the said Harriet Southworth all the right which she may have in the granted premises. Being the same premises set off to me as a homestead by commissioners appointed by court." The haben-

dum is to them, their heirs and assigns forever, and the covenants are with them and their heirs and assigns forever. It appears from the agreed facts, that the grantor owned the premises in fee, and that they were held by him as a homestead under Pub. Sts. c. 123; that his wife obtained a divorce from him in March, 1867; that the premises were set off to her free from any interference by him; and that she died in April, 1890, and Jedidiah died in the November before, leaving a son, Elmer H. Southworth, who conveyed to the demandant, in February, 1892, the half which he now seeks to recover.

We understand that what was set off to the wife was the homestead estate for her life, and we think that the object which the grantor had in view is plain. He intended to convey the property to the grantees to hold subject to such rights as his wife had, and if either of the grantees died before she died, then the survivor was to take the whole, subject to her estate. The question is whether this purpose can be carried into effect consistently with the rules of law.

The tenant contends that the deed may be treated as a conveyance in joint tenancy. The difficulty with this is that the grant, habendum, and covenants are all to and with the grantees as tenants in common. The conveyance is to them as tenants in common. Pub. Sts. c. 126, § 5. It is only in case one of the grantees dies before the mother that there is a provision for an estate by survivorship. It is thus attempted to create an estate in fee simple to arise *in futuro* on the happening of a certain contingency upon another estate in fee simple, which can only be done by way of a use. As a conveyance to uses the deed is inartificial. But, as already observed, the intent is plain; and it has been held that no precise form of words is required to create a conveyance to uses, and that "a conveyance of land may always be construed to be that kind and species of conveyance which may be necessary to vest the title according to the intention of the parties, if such interpretation is not repugnant to the terms of the grant." *Chenery* v. *Stevens*, 97 Mass. 77, 85. The demandant admits, in substance, that, if a right of homestead had been given to Mrs. Southworth by the deed, a case similar to *Chenery* v. *Stevens* would have arisen. He contends that in the present case there is no conveyance to a use, that the gran-

tees are not seised to a use, and that there is no *cestui que trust* in whom a use could be executed. But we think that the deed may be construed so that the proviso shall take effect by way of a shifting use. There is a conveyance in fee to the use of the grantees as tenants in common, and upon the death of one of them before Mrs. Southworth the survivor is to take the whole. In other words, upon the happening of that event the use shifts, and is executed in the survivor so as to give him the whole estate subject only to the wife's rights. It is no objection that the previous use is declared in favor of the grantees. In such a case the shifting use takes effect in substitution of it. 1 Leake, Land Laws, 121. And it is well settled that several persons may be seised to the use of one of their number. 2 Washb. Real Prop. 117. 1 Leake, Land Laws, 119, 120. *Sammes's case*, 13 Co. Rep. 54.

We think, therefore, that the ruling of the Superior Court was right. *Judgment affirmed.*

EDWIN H. CRANDELL *vs.* FRED M. WHITE & others.

Suffolk. January 14, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Pleading — Constitutionality of Statute — Evidence — Statute — Instructions.

An action for money had and received can be maintained under St. 1890, c. 437.

The St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities," is constitutional.

In an action under St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities," against A. and B. to recover money alleged to have been paid first to A., the plaintiff's agent, who afterwards paid it over to B., a broker, for the purchase of certain securities, it is competent for the plaintiff to show that A. had no intention to perform the purchase by the actual receipt of the securities and payment of the price; and if B. wishes the testimony to be limited to its effect as against A. himself, assuming that it should be so restricted, he should request the court so to limit it.

While it is a general rule that separate and distinct acts unconnected with those in suit are not admissible for the purpose of raising an inference that a party did the particular thing which he is charged with doing, yet, in an action under

St. 1890, c. 437, relative to wagering contracts to recover money alleged to have been paid to a broker for the purchase of certain securities, evidence may be received of such acts, if so near in time to those in suit and so connected with them that they may fairly be regarded as having some tendency to show that the defendant had reasonable cause to believe that no intention existed actually to perform the contracts.

CONTRACT against Fred M. White and Charles L. Tibbetts, partners under the name of F. M. White and Company, and Herbert Wonson, to recover $11,800, alleged to have been paid first to Wonson, the plaintiff's agent, who afterwards paid it over to White. The plaintiff sought to recover under St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities"; and the declaration contained eighteen counts, the fourth of which was for money had and received.

At the trial in the Superior Court, before *Bond*, J., there was nothing to show that Tibbetts was a partner with White, and the judge directed the jury to return a verdict for Tibbetts, and permitted the case to go to the jury on the fourth count alone as to White and Wonson, directing a general verdict for the defendants upon the other counts in the declaration.

The jury returned a verdict against the defendant White alone for $12,858.04, and he alleged exceptions, in substance as follows.

It appeared in evidence that the controversy arose out of seven separate transactions for 100 shares of New York and New England, 200 shares of Union Pacific, 200 shares of New Jersey Central, 200 shares of Chicago, Burlington, and Quincy, 200 shares of Delaware, Lackawanna, and Western, 100 shares of Delaware and Hudson Canal, and 200 shares of Union Pacific Railroad Company, all bought between March 28 and May 13, 1892; that the amount paid to White on these contracts by Crandell, through his own agent Wonson, aggregated $11,800; and White testified that the stocks were sold by him on September 2, 1892, upon Wonson's orders to White.

White, called by the plaintiff, testified that he did business as a broker at 16 Devonshire Street, Boston, under the name of F. M. White and Company; that he was the only member of the firm; that he had known Wonson a little over two years; that he did not know Crandell, the plaintiff, never hav-

ing had any conversation with him; that he had seen him in the office during the summer of 1892; that Wonson had put in the seven orders in his own name, without disclosing the plaintiff's interest in the transactions, and had received receipts from him for the amounts paid on account of margins and dividends; that Wonson had something like $10,000 or $12,000 on deposit with him at that time; that at the time of purchase Wonson ordered the stocks protected in full; that he never knew of Crandell being interested in the contracts till the controversy arose about an adjustment of the interest account in September; that he bought the stock and received the certificates in each one of the seven transactions from Ames and Company, at No. 10 State Street; and that on September 2, 1892, he offered to deliver the stocks to Wonson, and later to the plaintiff's partner.

Wonson, called by the plaintiff, testified that he was not in any way connected with F. M. White and Company, but had traded with them; that he was the agent of the plaintiff, and all the contracts in controversy were made with the plaintiff's money; that he did not tell White it was the plaintiff's money, for the reason that it was the plaintiff's wish not to be known in the transaction; that, previous to any of the seven contracts in suit, he had a conversation with the plaintiff at his office on Summer Street, in which the plaintiff instructed him to keep whatever he bought protected in full, as he did not propose to be closed out, but always intended to keep his stocks good; that he did not intend to take more than he could take care of; that these instructions were never revoked; that in buying he was simply carrying out the instructions of the plaintiff; that he told White, at the time of buying the stocks, that he wanted them protected in full; and that he was present at the interview in September between White and Knowlton, the plaintiff's partner, when White offered to deliver the stocks to Knowlton, but that he did not see the certificates.

The following testimony of Wonson was offered by the plaintiff, to which a general objection was made by the defendant, the judge admitting the testimony, subject to the defendant's exception. Wonson testified that all the margins in the original orders were paid by the plaintiff to him in the office of

F. M. White and Company, and then in the presence of the plaintiff were carried by him to F. M. White and Company and paid immediately over to them; that he did not have any intention at the time of delivering the certificates to the plaintiff; that when he made the order for New York and New England stock and signed his own name, "H. Wonson," he had no intention of paying the full amount of $4,950 personally, nor did he have any idea of paying out the first $100, because it was not his property; and that he had no intention at any time of taking 100 shares of the stock as for himself personally. Wonson gave the same testimony in relation to the other shares purchased by him with the plaintiff's money.

The plaintiff testified that in March, 1892, he employed the defendant Wonson to buy stocks for him, as he did not wish to have his name known in the transaction, but was in the office of F. M. White and Company nearly every day; that he never had any interview with White; that he instructed Wonson to protect his stocks in full; and that, at the time when the contracts were made, he did not intend to receive the certificates or pay for them.

The plaintiff testified that within one week before the purchase of March 28 he closed out, through Wonson, a contract with White and Company, and, according to his recollection, White was present, and that White was present when all the business was done. The plaintiff gave similar testimony as to other transactions between March 23 and March 28, and stated that there was no delivery of certificates.

This testimony was objected to generally by the defendant, and admitted subject to his exception.

At the conclusion of the plaintiff's case, the defendant offered no testimony, but requested the judge to rule as follows:

"1. The fourth count in the plaintiff's declaration, which is the only count for the consideration of the jury, is a declaration at common law for money had and received, and does not bring him within St. 1890, c. 437, as to wagering contracts, and the plaintiff cannot recover. 2. The St. 1890, c. 437, is unconstitutional and void."

The judge refused to give the above rulings, and, among other things, instructed the jury as follows:

"Certain transactions were admitted which took place prior to the transactions which are involved in this suit. The only use that should be made of those is the effect which they ought to have, if they are of a certain character, upon the mind of White as to what the plaintiff, or Wonson, if Wonson was the only one he knew in the transaction, really intended in the matter. To illustrate, suppose he had been dealing prior to this time directly with the plaintiff; that they had during the week before or during the month before half a dozen of the same sort of transactions, in which it was clear that both parties understood that the stock was never to be delivered and paid for; that that was not the intention of the parties; and stocks were bought, margins put up, settlements were made and the money paid either one way or the other, as the result might be, as indicated by the standard they had agreed upon. Now, if he comes in the next day, or, as in this case, on March 28, and makes another precisely similar contract, it would then be a question, in view of all the other contracts that had been made, whether this contract was of the same kind, and was not intended ever to be carried out. Of course, that involves the inquiry whether the other contracts were of that class, and whether this one was precisely of the same nature.

"Now, if the other contracts did not relate to what was termed 'protected stock,' and this one did, or these others all did, and there was this difference between the unprotected and the protected stock, which I have explained, then the contracts were not of the same kind; they differed so materially, that if that is what was meant, that where the stock was protected it meant the purchase and delivery, then the others do not help you any with reference to the contracts involved in this suit. It is only when the others are just like these that they furnish reasonable ground for you to believe that these parties must have intended what was in their minds when they made the other contracts; — if they were precisely the same kind, or so similar that you cannot help but conclude that they must have thought these were just like the others. And therefore, with reference to the other transactions, I do not understand that they were made directly between the plaintiff and White; but it would make no difference with the principle whether they were made by the

plaintiff through Wonson with White, if they were just the same kind of contracts, and they were such contracts that you think that then the parties believed, not simply one of them, or that one of them believed and the other ought to have believed, had reasonable cause to believe, that that is what the other one intended; if these others that were made afterwards and involved in this suit were precisely similar to them, then you may use the consideration of these other contracts, bearing upon the question whether the defendant White did not have reasonable cause to believe that the contracts which were just like the prior ones in every respect were made with the same intention that the other ones were."

Full instructions were given, to which no exceptions were taken, with reference to the facts to be proved by the plaintiff to entitle him to recover against the defendant White, or against the defendant Wonson, or against both White and Wonson.

J. F. Libby, for the defendants.

G. A. O. Ernst, for the plaintiff.

MORTON, J. 1. The plaintiff was allowed to go to the jury only upon the fourth count, which was for money had and received; and the first question is one of pleading. At the conclusion of the evidence, the defendant White asked the court to rule that the count did not come within St. 1890, c. 437, and that the plaintiff could not recover. The court refused the ruling, and the defendant duly excepted. The statute, on which this action is based, provides in § 2: "Whoever contracts to buy or sell upon credit or upon margin any securities or commodities having at the time of contract no intention to perform the same by the actual receipt or delivery of the securities or commodities, and payment of the price, or whoever employs another so to buy and sell on his behalf, may sue for and recover in an action of contract," etc. An action for money had and received is an action of contract, and comes literally within the terms of the statute. There is nothing to show that the Legislature intended to limit the scope of the action. There was no bill of particulars annexed to the count; but no advantage was taken of that fact by the defendant, either by way of demurrer or by objection that the evidence by which it was sought to sustain the action was not admissible under the count as it stood, as

was the case in *Rogers* v. *Newbury*, 105 Mass. 533. If a bill of particulars had been called for, very likely the facts in regard to the various transactions, and whether they were legal or illegal, would have appeared from it. If not, the objection could have been met by a motion for additional specifications. The defendant's request was, in effect, for a ruling that an action for money had and received could not be maintained under the statute. A majority of the court think that it was rightly refused, that it came too late, and that the objection should have been taken by way of demurrer.

2. The defendant asked for a ruling that the statute was unconstitutional, and duly excepted to the refusal of the court so to rule. We discover no ground on which the statute can be held to be unconstitutional. The Legislature may well have deemed the transactions referred to in it a species of gambling. And it is too well settled to require discussion that laws aimed at the suppression of gambling are constitutional. The fact that the statute gives parties a remedy against agents whom they may employ does not render it unconstitutional. A remedy is given against them only so far as they are participants in transactions coming within the condemnation of the statute. Neither is the objection tenable that the statute is unconstitutional because it makes certain conduct *prima facie* evidence of the existence of a certain fact. *Holmes* v. *Hunt*, 122 Mass. 505. And there is nothing in the exceptions to show that the objection arose in regard to any evidence that was offered.

3. The objection to Wonson's testimony was a general one. If it was admissible, therefore, in any aspect of the case the objection was rightly overruled. He was employed by the plaintiff to buy and sell on his behalf, and was therefore properly made a party defendant under the express terms of the statute. As a person employed by the plaintiff to buy and sell, it was competent for the plaintiff to show that Wonson had no intention to perform the purchase by the actual receipt of the securities and payment of the price, and his own testimony to that was, from the nature of the case, the best attainable. If the defendant White wished the testimony to be limited to its effect as against Wonson himself, assuming that it should have been so restricted, he should have requested the court so to limit it.

4. The defendant White also objected to the introduction of evidence relating to the transactions during the five days next preceding that on which those in suit began. It is a general rule, that separate and distinct acts unconnected with those in suit are not admissible for the purpose of raising an inference that a party did the particular things which he is charged with doing. But we think in this case that the transactions objected to were of such a nature and were so connected with those in suit, and so near to them in time, that they might fairly be regarded as having some tendency to show that the defendant White had reasonable cause to believe that no intention existed actually to perform the contracts which form the basis of the present suit. Under the carefully guarded instructions of the presiding justice, we do not see how the jury could have given them any other effect than that to which they were properly entitled. *Exceptions overruled.*

H. CLAY BASCOM *vs.* J. HEBER SMITH.

Suffolk. January 15, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Law and Fact — Construction of Written Instrument as against Writer — Guaranty — Notice of Acceptance — Contract.

After the judge has construed a written contract with reference to facts assumed to exist when it was made, his leaving to the jury the determination of such facts is not a submission to them of the construction of the contract.

The rule of construing a writing most strongly against the party who wrote and proffered it, when it is reasonably capable of two constructions, and has been honestly understood and acted upon by the other party according to the construction which is most against the interest of the party proffering it, has been adopted by the court in certain cases of real ambiguity, but it was doubted whether there was need of invoking the rule in the present case.

A guaranty of "my willingness and intention to become responsible for the work of the new pattern, size No. 7, of the Duplex Stove Company, to the amount of $500, in the event of any such action on my part becoming necessary for any cause," means that if for any cause the company should be unable to pay for the new pattern, and it should become necessary for the guarantor to pay for it, he would do so to the extent of $500. Knowledge of the acceptance of a guaranty is equivalent to notice.

In an action upon a guaranty of the cost of a set of patterns to be made for a corporation, the defendant contended that he was not bound by the guaranty because he understood that the contract between the plaintiff and the corporation was to be for a set of patterns of wood and another set of iron, whereas the order actually given by the agent of the company, and executed by the plaintiff, was for a set of wooden patterns only. The defendant was a shareholder in the company, was familiar with its affairs, and had seen the correspondence between the plaintiff and the company, wherein, although nothing was said as to whether the patterns were to be of wood or of iron, the cost of wooden patterns only was estimated. The defendant also knew that the cost of iron patterns would largely exceed the amount which he had guaranteed. On this point the judge instructed the jury: "There is another matter to which I ought to refer, and that is the claim of the defendant that there was no guaranty of this contract, because he did not understand that the contract between the company and the plaintiff was a contract to make wooden patterns alone, but that he understood that the contract was to make a complete set of patterns, wood and iron both; and that, inasmuch as he understood it that way, that was the contract, and not the contract to make a set of wooden patterns alone, and he agreed to guarantee a contract which, it appears upon the plaintiff's own showing now, was not the contract which he understood he was guaranteeing, that therefore he is not bound. The claim is not correct. If a man undertakes to guarantee a contract which he may know the terms of upon inquiry, and he makes no effort to find out what the terms are, but guarantees it, and says, 'I will guarantee that contract,' and nobody misleads him about it, and he has an opportunity to know what it is if he sees fit, but does not take pains to find out, but guarantees it without knowing, he is bound. Now, whether that applies in this case you will determine upon the evidence." *Held*, that the instructions were correct.

CONTRACT on a guaranty. Trial in the Superior Court, before *Dunbar*, J., who allowed a bill of exceptions, in substance as follows.

In 1890 certain persons undertook the reorganization and capitalization of the Economo Duplex Stove Company, a corporation formed for the purpose of manufacturing stoves and ranges, with a view to manufacturing a more satisfactory range than the company had theretofore produced.

In pursuance of this plan the treasurer of the company, A. J. Webb, on August 8, 1890, wrote to the plaintiff, who was a manufacturer of stove patterns in Troy, New York, enclosing specifications for a new range, and asking for an estimate of the cost of patterns. In this letter he said: "We have some money on hand that would enable us to go part way, at least, with a set of patterns, and I think we can get support that will enable us to complete them." To this letter the plaintiff replied, on August 4, estimating the cost of wooden patterns of the proposed new range at from six to eight hundred dollars, and suggesting a personal interview.

In September of that year there was an informal meeting of the officers and stockholders of the company, at which the defendant was present, and the plans of reorganization and the preparation of new patterns were then considered.

The treasurer of the company testified that at this meeting a proposition was made by some one present to be one of several to advance a sum sufficient to order a complete set of wooden and iron patterns, and the president of the company, Walter H. Homans, testified that the defendant said he had a friend who intended to buy a thousand dollars' worth of stock, and that he, the defendant, would pledge himself $500 on this set of patterns if necessary; that after the informal meeting the defendant withdrew, and a meeting of the directors was held, at which, in reliance upon the defendant's guaranty of a sum to pay for the patterns, it was voted to send Webb to Troy to order them.

On the day following the meeting, the vote of the directors was brought to the attention of the defendant by Homans, who then, or later, obtained from him, out of the proceeds of the sale of certain shares of stock of the company held by him in trust, a sum of money to defray the expenses of Webb's journey to Troy, the purpose of which was understood by the defendant. On cross-examination, Homans testified that he did not understand that the order was to include wood and iron patterns; that nothing was said about wooden patterns, but it was understood simply that Webb was to go to Troy and order patterns, which, it was supposed by the witness, would be a complete set.

Thereafter Webb went to Troy, and ordered of the plaintiff a set of wooden patterns in case the cost did not exceed $500, and at the same time represented that the defendant, who was financially reliable, was to be the responsible party, and he suggested that the plaintiff write to the defendant to obtain a corroboration of his representations. The plaintiff, therefore, on October 7, 1890, wrote to the defendant:

"In minuting the preliminary details for a new set of range patterns for the Duplex Range Co., Mr. Webb mentions your willingness to, in some way, become responsible for work to the amount of $500, and suggests that you will doubtless drop me a note to that effect. Our transactions with Mr. Webb have so indorsed his unchallenged integrity that I regard this letter as

superfluous, but I write in harmony with his suggestion, and we hope to get up a real marketable construction."

On October 8, the defendant replied:

"Your esteemed favor of the 7th inst. just received. I feel sure that your confidence in Mr. Webb is well placed, but I hereby signify my willingness and intention to become responsible for the work of the new pattern, size No. 7, of the Duplex Stove Company to the amount of $500, in the event of any such action on my part becoming necessary for any cause. I suppose Mr. Webb has informed you of the approaching dissolution of the old company, under competent legal management, selected at my suggestion, and the prospect of a reorganization with a new charter and a working capital of $25,000; and this to be accomplished in the next few weeks, in season, I have no doubt, for the prompt settlement of your bill in full. The affairs of the company are in experienced and able hands, and with thoroughly enlisted interest, through the assurance of a handsome block of the stock of the new company.

"You give me hope of the 'real marketable construction'; this is essentially necessary to the success of the enterprise. Any failure or deficiency in this matter will block the wheels of the new company effectually. For a good working stove of well-nigh perfect mechanical construction and adaptation to average drafts of city houses confronts us at this juncture of our affairs, either as a 'will-o'-the-wisp' which cannot be attained, or as a solid fact. Even I myself am shaken in my faith in the enterprise, through the outrageous faults of construction of the range in my own kitchen, size No. 9, sold me by the Economo Duplex Stove Company last spring. Its fire pot is inadequate to heat the oven, even burning soft coal, without adding a fire of wood in the wood fire pot, so I am told by my cook, and its construction is such that it has warped the stove in such a manner that in three months more, at the present rate, I shall be obliged to have it taken out of my kitchen, and the range of any other company substituted, to the scandal of our friends. The present direct draft carries the heat right up the chimney, which should circulate around the stove. I do not pretend to be in the least an adept in this matter, and write you in the most friendly spirit, believing in your ability and interest in the success of our com-

pany, with the hope that you will labor earnestly (with Mr. Webb) in the correction of the mistakes in range No. 9.

"I have abiding faith in the underlying principles aimed at by the patents of this company, but I wish to see a stove in Boston that I shall not be ashamed to show my wealthy patients and friends, as I am getting to be ashamed of the one in my own kitchen. I presume, without doubt, that the principal trouble with my own stove, as with the five or six last made by you, lies in the fire pot. It is a radical fault, destructive, if continued, to the hopes of the company.

"I presume Mr. Webb is more thoroughly aware of this fault than myself, but I feel too deeply in this matter to remain silent, if any words of mine can help the company.

"It is strange that the range in Lexington, at Mr. Homans's house, should work so satisfactorily, as I know it does, and all the others of size No. 9 prove such total failures. The difference must lie in the adaptation of the fire pot, I suppose, for it seems to me it cannot be wholly a question of draft. My draft here, on the Back Bay, is fully as strong as his is."

The plaintiff testified that Webb ordered a set of wooden patterns; and stated to him that the sole condition upon which the order was given was that the defendant had guaranteed the expense to the amount of $500, and that the execution of the order was left contingent upon the defendant's confirmation of his statement; that the witness wrote to the defendant at Webb's suggestion, and relied on the defendant's assurance contained in his letter of October 8.

There was evidence that the plaintiff made a set of wooden patterns as ordered by Webb, in accordance with the specifications, at a cost of $500, for which he had not received payment.

About October 15, 1890, Webb sent to the defendant the specifications for the patterns, and, later, a letter of the plaintiff to him dated October 11, in which the plaintiff said: "Unless more work than we can foresee is required, we shall be able to produce the wood patterns, cast the iron patterns, file, joint, wax, and followboard complete for less than $900."

Webb further testified, for the plaintiff, that after his return from Troy he called on the defendant, with whom he talked over the whole matter, and that thereafter he kept him in-

formed of what was going on; that about October 8 the defendant asked him whether the plaintiff had sent his bill, and if he had not the defendant requested the witness to ascertain when he would send it, which the witness did; that at one of his interviews with the defendant the latter made a statement signifying that he expected to pay the bill when it came; not in terms, but in a remark to the effect that he would settle the bill if he had to sell a dog, or something of that sort.

There was evidence tending to show that, while the proposed reorganization was under consideration, and until after demand made for payment of the bill on February 17, 1891, Homans was in almost daily communication with the defendant, and both Webb and Homans testified that they had never heard any suggestions from him that he expected anything other than a set of wooden patterns to be made.

The defendant testified that, at the informal meeting, in response to a request of the president of the company for a statement of his views, he said that he was certain of having $500 paid to him by a friend for new stock of the company as soon as it was reorganized, but that he made no guaranty of any accounts to be opened by the company for new range or patterns, or any other statement in regard to guaranteeing as a basis for the action of the company, except the expression of his hope of selling the new stock; that although he was a shareholder, he was not an officer of the company; that in 1890 he was authorized by the company to attempt its capitalization, and to sell stock on commission; that the proceeds of one of such sales were, at the request of Homans, held by the witness in trust for the uses of the company, out of which from time to time he paid to Homans certain sums, including the $25 used by Webb for his expenses to Troy.

On October 28, 1890, the defendant wrote to Homans:

"I am feeling much more hopeful of our success ultimately. Mr. Chase called on me, and we had a pleasant chat for two hours last Friday. I guaranteed his stock, and should Mr. Bascom demand payment in advance of our reorganization and replenishment of the treasury by the raising of the $25,000, I shall now meet him as promptly as possible. I hope, however, that we shall be ready for his entire bill in January, thereby saving me

any loss through the guarantee of Mr. Chase's stock. I am hopeful that Mr. Chase will release me from this obligation of personal guarantee as soon as we are reorganized and the money put into the treasury, as promised by Mr. Houghton."

The defendant, in explanation of this letter, testified that he had arranged to sell to one Chase five hundred dollars' worth of stock in the company, with the agreement that he, the defendant would see that Chase suffered no loss thereby, and would make good the five hundred dollars' worth of stock unless Chase received it in some other way, and that the previous suggestions made by him with regard to furnishing money to the company for the purpose of getting patterns were based on this sale of stock to Chase, from which only he expected to get the money. On cross-examination he testified that his holding out the prospect of his being able to pay $500 was based upon his certainty of deriving that amount from Mr. Chase for the sale of the new stock under the reorganization; that he was promising this as treasurer; that he already held $290; that he was not actually treasurer of the company, but a trustee, and expecting, upon the reorganization, to become treasurer.

On February 14, 1891, Webb wrote to the plaintiff:

"From what I have heard indirectly from Dr. Smith I feel convinced that he will argue the matter of your bill. I am also satisfied that he will have nothing important to say to us here. I think he will write to you, and very likely has already.

"In view of what I now understand about the matter, I shall authorize you to state that there is no money in the treasury of the Economo Duplex Stove Company with which to settle your bill, and that the bill falls under the terms of Dr. Smith's agreement, wherein he assumed responsibility for the bill to the amount of five hundred dollars in case of emergency. I shall also advise you to the effect that, if you fail to hear from Dr. Smith at once, or if he discloses a disposition to delay the matter or evade the payment, you proceed immediately to demand the settlement of the account by him in accordance with the terms of his agreement, and then, if you fail to elicit a satisfactory response, that you proceed to collect the bill by law.

"I regret that I did not know of his disposition earlier. He had referred to the matter in conversation with me, and

stated explicitly that he should settle the bill. He does not now say that he will not pay it, but does speculate as to whether he must do so. This implication is my ground for the statements of this letter. Dr. Smith is financially good for the bill, and I do not believe he would ever allow himself to be sued for it. I believe that decided yet friendly demand for the settlement would be sufficient. The matter now evidently lies between you and Dr. Smith, and I do not know that I can help the matter along in any way. I have no recommendations to offer other than prompt and decided action upon your part."

On February 16, Homans wrote to the plaintiff:

"I think I owe you a few lines explaining the present state of affairs of the Economo Duplex Stove Company, especially as you have written Mr. Webb that you need a remittance from us for that part of the work on our new range which you have now done. I am carrying the whole enterprise this winter practically alone, and at a great disadvantage on account of having no stove to exhibit. Dr. Smith's stove is broken down through its imperfect fire pot. We have renewed it several times, but the plates have been badly warped and the stove is not fit to show. I cannot get people out to Lexington to see my own, which is in good order, because it is so far from Boston.

"Dr. Smith tells me that he has been unable to do anything for us whatever in the way of influence, on account of our not having the new range completed and sent to Boston for exhibition, as he expected was to be done. Stock which he had already conditionally sold could not be delivered on this account, as it was subscribed for conditionally upon the reorganization of the old company, and the possession of a complete working range such as we hope you have now under way.

"I am sorry that, through Mr. Webb's caution in ordering you to go no further than the completion of the wooden patterns, our money affairs have become so embarrassed again; for we were placing stock with every prospect of getting out of the hole we were in when Mr. Webb took this position regarding the new range. It practically trigged our wheels. Mr. Webb is a very cautious and thoroughly honorable man, and meant right. I suppose he thought we should before this have sold some of our stock, and ordered the completion of the new range.

"I have not cared to ask you such a favor without a remittance, and have been doing my best to dispose of an interest in our company in order to start things up. I am negotiating with several parties who have followed me about the past two months, but who offer me too low a figure; perhaps I have been asking too high. We shall come to an understanding, I trust, and as soon as we do you will have the remittance of the amount owed you by our company.

"You have dealt with us enough to know that we are honest, and also capable of paying our debts. If you will only have patience, everything will be all right.

"I hope you will not present your bill to Dr. Smith under all the circumstances, for we have been unable as a company to keep our pledges with him, having failed to reorganize as agreed, on account of our embarrassing situation with the old range and the completion of the new one blocked; neither have we been able to put ourselves in a position to deliver him the block of stock promised him, or to elect him treasurer of the company, as he expected. He is interested and friendly, believing in our range still, notwithstanding his hard experience with the one sold him; and if we can only get a new range under his eye, he will feel that he can conscientiously recommend our stock to his wealthy friends. As it is, he cannot in honor dispose of any of the stock, he says.

"Your correspondence had better be with me, as I am really the working and active representative of the company. I hope this letter will offer you a clear view of the situation of our affairs. I am far from being discouraged, but I am very tired of waiting so long for our affairs to turn towards success, which I believe is just ahead."

The defendant testified that the last letter, purporting to be signed by Homans and addressed to the plaintiff, was dictated by Homans at the defendant's house and in his presence, and that he was consulted with regard to said letter, and made suggestions, and there was evidence tending to show that the letter was afterwards written out by the defendant's stenographer and sent to Homans to be signed, but Homans denied having signed the letter, and the plaintiff denied having received it.

There was evidence tending to show that the defendant had

in his possession the stock certificate book and all the funds belonging to the corporation, the funds being the proceeds from sales of stock; that the defendant knew the resources of the corporation, and knew that it had no funds except such as might come from the expected sales of stock, and must have known that a complete range, or a set of both wood and iron patterns, would cost more than $500.

On February 17, 1891, payment was demanded of the defendant by letter.

The defendant contended that the contract between the plaintiff and the corporation, being a contract for wooden patterns alone, was not such a contract as was contemplated or intended either by the company or by himself; that it was not the contract which he understood was to be made, and was a contract so materially at variance with what the parties intended as not fairly to come within the terms of the guaranty, and that therefore he could not be bound.

At the close of the testimony the defendant requested the judge to rule that the evidence was insufficient to warrant a verdict for the plaintiff; but the judge declined so to rule, and the defendant excepted.

The defendant then requested the judge to rule: "1. That the letter of the defendant to the plaintiff, October 8, was not an absolute guaranty, but merely an offer of guaranty on certain conditions therein stated. 2. That acceptance was necessary within a reasonable time to bind the defendant on such guaranty before it could become operative as a subsisting contract between the defendant and the plaintiff. 3. That making the patterns was not an acceptance without notice to the defendant that such action was taken relying on said proposed guaranty, and such notice must be plain and explicit, and brought to the knowledge of the defendant. 4. That a delay of five months before notice to the defendant of any intention to hold him liable was unreasonable, and such notice after such a lapse of time was not sufficient to bind the defendant on the overture of guaranty in October. 5. That inasmuch as this was, upon the contention of the plaintiff, a promise to pay the debt of another, it comes within the statute of frauds, and the agreement, if any, must be in writing, and therefore oral expressions of a desire or intention to

settle the controversy without suit would not be sufficient to bind the defendant to pay the debt of the company. 6. That if the jury find that there was an offer of guaranty to the company, or a contract with the company, such guaranty or contract would not warrant a verdict for the plaintiff in this case, for, in order to recover, the plaintiff must prove a contract between himself and the defendant. 7. That the letters show not an absolute guaranty, but an offer of guaranty, which, to bind the defendant, should have been accepted within a reasonable time; and as there is no evidence of acceptance until the letter of February 17, calling for payment, there is no evidence of an acceptance within a reasonable time, and no evidence of any guaranty on which the defendant became bound to the plaintiff."

The judge declined so to rule, and the defendant excepted.

The judge instructed the jury in substance as follows.

The question in this case is, What is the contract? But precedent to that is the inquiry, What was the contract between the plaintiff and the Economo Duplex Stove Company, which, it is agreed, is the party originally responsible for the work done by the plaintiff? The plaintiff's theory of the case is, that in September or October, 1890, the Stove Company not having been successful in selling its ranges or in obtaining sufficient capital to carry on its business, an informal meeting of its stockholders was held to consider the prospects of the company, and to take measures to make the business a success; that the defendant was present at that meeting, and consulted with Homans, the president of the company, with reference to raising capital for the purpose, in the first place, of procuring a set of patterns for a new range, which it was hoped would be satisfactory, and a merchantable and effective article in the market. There was evidence that some one present at the meeting offered to be one of six to raise two hundred dollars apiece for the purpose of procuring a set of patterns, but that the offer was not accepted by any of the others; that subsequently the defendant said to Homans that he would be willing to be responsible to the extent of $500 for the purpose of getting a set of patterns made, such as they wanted, and that shortly thereafter the directors of the company voted to accept the proposition, and to authorize Webb to go to Troy to consult with the plaintiff and to contract with him

for a set of patterns; that after the meeting Homans went to the defendant and obtained from him the sum of $25 to pay the expenses of Webb in going to Troy, stating to the defendant why the money was wanted, and for what purpose it was to be used; that the money came from the proceeds of certain shares of the stock, said by Homans to have been owned by him and sold with his consent, which the defendant held in trust for the purposes of the company. After that Webb went to Troy and had an interview with the plaintiff, in which they discussed the details of the patterns, and Webb said to the plaintiff that he had come to order a set of patterns for other parties; that he was unwilling, as an officer of the company, to take the responsibility of ordering them, because there was no money in the treasury of the company to pay for them, but that Dr. Smith, who was financially responsible, had agreed to become responsible for the getting up of the patterns to the extent of $500; and he suggested that it would be well for the plaintiff, before the work was begun, to obtain a confirmation from Dr. Smith of his statement, whereupon the plaintiff wrote to Dr. Smith: "In minuting the preliminary details for a new set of range patterns for the Duplex Range Co., Mr. Webb mentions your willingness to, in some way, become responsible for work to the amount of $500, and suggests that you will doubtless drop me a note to that effect. Our transactions with Mr. Webb have so indorsed his unchallenged integrity that I regard this letter as superfluous, but I write in harmony with his suggestion, and we hope to get up a real marketable construction." In reply, the defendant, on October 8, 1890, wrote a letter of which the following is the portion which relates directly to the contention of the plaintiff that the two letters considered together constitute a contract of guaranty: "Your esteemed favor of the 7th inst. just received. I feel sure that your confidence in Mr. Webb is well placed, but I hereby signify my willingness and intention to become responsible for the work of the new pattern, size No. 7, of the Duplex Stove Company, to the amount of $500, in the event of any such action on my part becoming necessary for any cause." Thereafter the plaintiff completed a set of wooden patterns in accordance with the terms of the contract made with Webb, the specifications of which, the plaintiff contended, contemplated the manufacture of

wooden patterns only, and not iron. Thereafter, on October 28, 1890, the defendant wrote to Homans a letter, a portion of which is as follows: "I am feeling much more hopeful of our success ultimately. Mr. Chase called on me, and we had a pleasant chat for two hours last Friday. I guaranteed his stock, and should Mr. Bascom demand payment in advance of our reorganization and replenishment of the treasury by the raising of the $25,000, I shall now meet him as promptly as possible. I hope, however, that we shall be ready for his entire bill in January, thereby saving me any loss through the guaranty of Mr. Chase's stock. I am hopeful that Mr. Chase will release me from this obligation of personal guaranty as soon as we are reorganized and the money put into the treasury, as promised by Mr. Houghton."

There is evidence that, on February 16, 1891, a letter was written which, the defendant says, was dictated in his presence by Homans, to the composition of which he gave certain suggestions, and the contents of which he knew, which was taken subsequently to Homans to be signed, and which, as stated by Stiles, was signed by Homans, and that the letter addressed to Bascom at Troy was mailed. Part of it is as follows: "I hope you will not present your bill to Dr. Smith under all the circumstances, for we have been unable as a company to keep our pledges with him, having failed to reorganize as agreed, on account of our embarrassing situation with the old range and the completion of the new one blocked; neither have we been able to put ourselves in a position to deliver him the block of stock promised him, or to elect him treasurer of the company, as he expected." On February 17, 1891, the plaintiff demanded payment of his bill, according to the terms of the guaranty, to which no reply was made. In determining what this contract is, some light is thrown upon it by the parties themselves, and by their relations to the enterprise. The plaintiff is a manufacturer of patterns, and the defendant is a physician, who, interested as a stockholder in the company and desirous of its success, was present at the negotiations for a reorganization and capitalization. He had in mind the sale of stock to other persons interested in the company, and as a preliminary to such sale it was desirable that there should be a set of patterns or a complete range in order that the practical success of the enterprise might be demonstrated. These, and other circumstances to which attention has been called, are to be con-

sidered in determining what the contract was. It is not disputed that the contract between the plaintiff and the company was for a set of wooden patterns, and if that was so, what was the contract between the plaintiff and the defendant? In other words, is it established that there was a guaranty of the expenses to be incurred in making these patterns? That is the exact question.

It is claimed on the part of the plaintiff that this was an absolute contract of guaranty; that upon its face it is as though it were written in this way: "If you will make a set of patterns for the Economo Duplex Stove Company, I will be responsible for the expense of making them to the amount of $500. If they do not pay, I will." Or: "I will guarantee the payment of the bill." The defendant says that that is not so; that this is a conditional contract; that it is nothing more than an offer that, upon the happening of a certain contingency, he will be bound to pay it. Upon the face of the papers themselves there is this contingency about it, and only this: that he will be responsible for that bill to the amount of $500, in the event of any such action on his part becoming necessary. If we had nothing but the papers themselves to construe, it might be doubtful what they meant. But when the evidence in the case showing the relations of the parties toward each other, their action with reference to the original contract, and their knowledge of the circumstances and the facts, and the manner in which the parties themselves subsequently treated the contract is taken in connection with the papers themselves, then the contract, if the facts are such as the evidence, to which reference has been made, tends to establish, means this: "I will be responsible for the payment of the expense of making a set of patterns to the amount of $500, provided the company becomes unable for any reason, or is unable for any reason, to pay the amount." That is what it means in the light of those facts. It might be, as contended by the defendant, and it would be the law, that if there were a contingency involved in that letter, or one that could be inferred from it in the light of the circumstances upon a fair construction of it, the happening of which the defendant would not know, he would be entitled to notice of it before he would be bound. But in the light of these facts, if they are established, no possible contingeny could arise except the non-payment of the

bill by the company, and that was known to the defendant, who knew the condition of the company and expected to be its treasurer. No notice therefore of facts not within his knowledge, or of the acceptance of the guaranty, in view of these facts, if established, was necessary. So that the sum and substance of the agreement of the defendant is this: "I will pay this bill to the amount of $500, the expense of getting out this set of patterns, provided the company does not pay it." The defendant contends that he did not understand that he was making a guaranty by writing this letter, which was an absolute guaranty, but supposed he was making an offer of guaranty. A paper like that is to be construed most strongly against the man who writes it. If it is capable of two constructions, the court will adopt the one which is most favorable to the other party, because the man who writes the language is bound by it to any fair construction, any honest and reasonable construction, that can be put upon it, even although there is another that is more favorable to him.

There is another matter to which I ought to refer, and that is the contention of the defendant that there was no guaranty of this contract, because he did not understand that the contract between the company and the plaintiff was a contract to make wooden patterns alone, but that he understood that the contract was to make a complete set of patterns, wood and iron both; and that inasmuch as he understood it that way, that was the contract, and not the contract to make a set of wooden patterns alone; and he agreed to guarantee a contract which, it appears upon the plaintiff's own showing now, was not the contract which he understood he was guaranteeing, and that therefore he is not bound. The contention is not correct. If a man undertakes to guarantee a contract which he may know the terms of upon inquiry, and he makes no effort to find out what the terms are, but guarantees it, says, "I will guarantee that contract," and nobody misleads him about it, and he has an opportunity to know what it is if he sees fit, but does not take pains to find out, but guarantees it without knowing, he is bound. Now, whether that applies in this case will be determined upon the evidence.

No question was made in this case that there was not seasonable demand made for the payment of the bill, provided the guaranty is a guaranty by which the defendant is bound.

It is not contended that the defendant is bound to pay this

debt because of admissions that he made subsequently. Those were put in for the purpose of showing the situation of the parties, their relations to each other, their knowledge of the circumstances, and their subsequent action in interpreting the contract which it is contended was made.

The plaintiff must prove between himself and the defendant a contract of guaranty. An offer of guaranty would not be sufficient.

At the conclusion of the charge and before the jury retired, the defendant saved exceptions to the charge as to the following points. 1. As to the part of the charge wherein the letters of October 7 and 8 are construed as an absolute guaranty, and that no notice of acceptance was necessary. 2. As to the instructions that said letters are to be construed most strongly against the defendant. 3. As to that part of the charge instructing the jury as to the defendant's contention that the contract made at Troy for wooden patterns alone was so materially at variance with what the parties intended as not to come fairly within the terms of the alleged guaranty.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. O. Kyle, for the defendant.

H. E. Warner, for the plaintiff.

FIELD, C. J. The court undertook to construe the contract declared on with reference to all the circumstances which the evidence tended to establish as existing when it was made, and merely left it to the jury to determine whether the circumstances assumed had been established by the evidence. This is not leaving the whole construction of a written contract to the jury; and the jury, by their verdict, have found that the circumstances were as they were assumed to be, and have construed the contract in the same manner as the court.

The principle of construing a writing most strongly against the party who wrote it, and proffered it, when it is reasonably capable of two constructions, and has been honestly understood and acted upon by the other party according to the construction which is most against the interest of the party proffering it, was announced in the charge of the presiding justice, not as an instruction to the jury, but as the rule adopted by the court. It is a rule which has been adopted in certain cases

of real ambiguity, although we have some doubt whether, on the circumstances shown, there was any need of invoking it in the present case. *Barney* v. *Newcomb*, 9 Cush. 46.

Assuming that the defendant knew that Webb, in behalf of the Economo Duplex Stove Company, had requested the plaintiff to make a new set of range patterns, of which there is no doubt, the letters of October 7 and October 8, 1890, become intelligible enough. The plaintiff in his letter to the defendant of October 7, 1890, indicates that he wishes to have a note in writing from the defendant confirming what Webb had said, namely, that the defendant would become responsible to the plaintiff for work on the new set of patterns ordered of the plaintiff to the amount of $500, although the plaintiff politely says that he has such confidence in Webb's integrity that he regards a letter from the defendant as superfluous. The defendant, in his letter in reply, signifies in writing his present willingness and intention to become responsible to the plaintiff for work on such new set of patterns to the amount of $500. The whole letter of the defendant shows that he expected that the plaintiff would go on and make a new set of patterns as ordered by Webb, and the evidence shows that he knew that the plaintiff did go on and make the patterns. There was evidence that the defendant understood that the plaintiff in doing so was relying upon his agreement to become responsible to the amount of $500, and the jury must have so found. Upon such a finding no special notice of the acceptance of the guaranty or of the offer of guaranty was necessary. Knowledge was equivalent to notice. *Bishop* v. *Eaton*, 161 Mass. 496.

In view of the facts which the court assumed in its hypothetical construction of the contract, which facts the jury must have found, the construction which the court gave to the clause, "in the event of any such action on my part becoming necessary for any cause," seems to be the only reasonable one. It meant that if, for any cause, the company should be unable to pay for the new patterns, and it becomes necessary for the defendant to pay, he would pay for them up to the amount of $500.

The defendant contends that he is not bound, because it is said that he understood that the contract between the plaintiff and the company was, or was to be, for a set of patterns of wood

and another set of iron, whereas the order actually given by Webb was for a set of wooden patterns, and the plaintiff made only a set of wooden patterns, in conformity to the order.

Upon this point the instructions of the court were as follows: "There is another matter to which I ought to refer, and that is the claim of the defendant that there was no guaranty of this contract, because he did not understand that the contract between the company and the plaintiff was a contract to make wooden patterns alone, but that he understood that the contract was to make a complete set of patterns, wood and iron both: and that, inasmuch as he understood it that way, that was the contract, and not the contract to make a set of wooden patterns alone; and he agreed to guarantee a contract which, it appears upon the plaintiff's own showing now, was not the contract which he understood he was guaranteeing, that therefore he is not bound. The claim is not correct. If a man undertakes to guarantee a contract which he may know the terms of upon inquiry, and he makes no effort to find out what the terms are, but guarantees it, says, 'I will guarantee that contract,' and nobody misleads him about it, and he has an opportunity to know what it is if he sees fit, but does not take pains to find out, but guarantees it without knowing, he is bound. Now, whether that applies in this case you will determine upon the evidence."

We think that the instructions were correct. The meaning of the letters, construed with reference to the circumstances which the jury must have found, is that the defendant is to become responsible to the amount of $500 for the work done by the plaintiff upon the new set of patterns, size No. 7, of the Economo Duplex Stove Company, which Webb, acting in behalf of the company, had ordered the plaintiff to make. There is nothing in the letters indicating whether the new patterns were to be of wood or of iron, or whether there were to be two sets of patterns, one of wood and the other of iron, and the defendant guarantees payment to the amount of $500 for the work to be done by the plaintiff on the patterns, size No. 7, of the Economo Duplex Stove Company which Webb had ordered. As Webb ordered only wooden patterns to be made, the defendant guaranteed payment for the patterns so ordered to the amount of $500.

Exceptions overruled.

INHABITANTS OF ESSEX *vs.* FRANCIS A. BROOKS, executor.

Suffolk. January 22, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Contract to recover a Legacy — Jurisdiction — Probate Court — Statute — Collateral Legacies and Successions — Exemption of Charitable Societies.

The jurisdiction of the Probate Court to determine all questions in relation to a tax that may arise affecting any devise, legacy, or inheritance, under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," is not exclusive, and does not take away the right of a legatee to sue at common law in the Superior Court for his legacy.

A legacy to a town which contemplates the establishment and maintenance of a free public library for the use of the inhabitants of the town, and the erection of a library building and town hall, comes within the exemption of § 1 of St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," and is not subject to be taxed thereunder.

CONTRACT, against the executor of the will of Thomas O. H. P. Burnham, to recover a legacy. Writ dated September 12, 1893.

The first count of the declaration alleged that Burnham died on November 13, 1891; that in his will he gave to the town of Essex the sum of "twenty thousand dollars for the erection of a town hall and library for the use of its inhabitants"; that the defendant as such executor had in his hands ample funds for the payment of all debts due from the estate of Burnham, all charges of administration, and all bequests and devises; that the defendant as such executor had paid the plaintiff the sum of nineteen thousand dollars on account of said bequest, the same having been paid December 8, 1892, but denied his liability or obligation to pay the remaining one thousand dollars of said bequest, and the right of the plaintiff to receive said one thousand dollars, and without right retained said one thousand dollars in his hands, and, though due demand had been made therefor of him by the plaintiff, had refused and neglected, and still refused and neglected, to pay the same to the plaintiff; and that the defendant, as such executor, owed the plaintiff on account of said legacy said sum of one thousand dollars, with interest on said one thousand dollars from November 13, 1892,

and on said nineteen thousand dollars from November 13, 1892, to December 8, 1892.

The allegations in the second count were identical with those in the first count, except that the plaintiff declared on another provision of the will giving to the plaintiff town "the further sum of twenty thousand dollars in trust, to invest and keep invested in some safe security, the income whereof shall annually be expended by the officers of said town, for the purchase of books for said library for the free use of its inhabitants."

The defendant demurred to the declaration, assigning as ground therefor that he was required by St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," to withhold from the defendant and pay to the Treasurer of the Commonwealth five per cent of the bequests mentioned in said counts as a tax thereon, for the use of the Commonwealth, said five per cent being the two sums of one thousand dollars each retained by the defendant as set forth therein, to be by him paid over to the Treasurer of the Commonwealth.

The Superior Court having overruled the demurrer, the executor addressed a petition to that court, upon which a citation was issued, dated February 1, 1894, summoning in the Treasurer of the Commonwealth under the provisions of St. 1886, c. 281, entitled "An Act to permit a defendant in an action at law to require adverse parties claiming funds in his hands to interplead." The Treasurer at first objected to being made a party, but afterwards withdrew his objection, and a hearing was had on the petition, and it was dismissed by *Mason*, C. J., on February 13, 1894. No appeal or exception was taken to the overruling of the demurrer or the dismissing of the petition.

Thereupon the defendant filed an answer, which contained the following allegations: "And the defendant says he has paid over to the plaintiff ninety-five per cent of the amount of said legacies, or the sum of thirty-eight thousand dollars, December 8, 1892, and has reserved and retained five per cent thereof, or the sum of two thousand dollars, to enable him to comply with the provisions of St. 1891, c. 425, under the impression and belief that he is by said act required to deduct five per cent from the amount of said legacies as a tax thereon imposed by the

State, and is required to pay over said five per cent to the Treasurer of the Commonwealth as and for such tax, and that he became personally liable to said Treasurer as soon as he paid over to the town of Essex ninety-five per cent of the amount of said legacies as aforesaid, and still remains liable therefor to said State Treasurer, and liable to be sued therefor by him. And the defendant says he is advised and believes that it is provided in and by the fourteenth and sixteenth sections of said act that the Probate Court 'shall have jurisdiction to hear and determine' all questions arising in relation to the tax of five per cent imposed upon collateral legacies and successions as aforesaid, and especially in relation to the liability and duty of this defendant, as executor, to reserve the said sum of five per cent on said legacies and pay over the same to the State Treasurer, and that it is necessary that the Probate Court shall pass upon this question of his tax liability as preliminary to any settlement or adjustment of his accounts as such executor; and that for this reason this Court has no rightful jurisdiction of this action of the inhabitants of the town of Essex against this defendant, but that the exclusive original jurisdiction for the determination of the cause of action set up in the plaintiff's declaration is in the Probate Court of the county of Suffolk."

The Chief Justice found for the plaintiff, and assessed damages in the sum of two thousand two hundred and twenty-six dollars; and the defendant alleged exceptions which recited, among other things, that the defendant "contended that the determination of this question as a question of law had been conferred upon said Probate Court of the county of Suffolk, where the testatator resided, and that no settlement of the defendant's accounts, as such executor, could be made in that court until this question should have been passed upon by said Probate Court. It appeared that the defendant has made application to said Probate Court for the determination of the question of the liability of said executor to the Treasurer of the Commonwealth, as provided by said act, and that the Probate Court had declined to pass upon said question by reason of the pendency of this action in this court."

A. S. Hall, for the defendant.

H. Wardwell, (*F. C. Richardson* with him,) for the plaintiff.

MORTON, J. The defendant raises a preliminary question of jurisdiction. He contends that the Probate Court has sole jurisdiction, subject to appeal to this court, of the question whether the legacies are subject to a tax under St. 1891, c. 425. He bases this contention on the provisions of § 14 of that act, which are as follows: "The Probate Court having jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy, or inheritance under this act, subject to appeal as in other cases, and the Treasurer of the Commonwealth shall represent the interests of the Commonwealth in any such proceedings." We do not so construe the statute. By Pub. Sts. c. 136, § 19, it is provided that "every legatee may recover his legacy in an action at common law." There is nothing in St. 1891, c. 425, which expressly or by implication repeals that provision. The only effect of § 14 is to confer upon the Probate Court in which the estate of a decedent is in the process of settlement jurisdiction to hear and determine any question that may arise relating to any devise, legacy, or inheritance under the act, but does not take away the right of the legatee to sue at common law in the Superior Court, and have the question heard and determined there whether the legacy is subject to a tax. The executor had an opportunity to try the question in the Probate Court, and, not having availed himself of that opportunity, he cannot now object that the Superior Court had no jurisdiction, or insist that its judgment will not avail him in the settlement of his accounts in the Probate Court.

Upon the petition of the executor a citation was issued by the Superior Court summoning in the Treasurer of the Commonwealth, after a hearing upon and overruling of the defendant's demurrer. The Treasurer at first objected to being made a party, but afterwards withdrew his objection, and a hearing was had on the petition, and it was dismissed. No appeal or exception was taken to the overruling of the demurrer or dismissing of the petition, and the question is not therefore before us whether the ruling denying the petition was correct. It is said, and it appears inferentially perhaps from the papers, that the time has gone by within which the Treasurer could bring suit to recover

the tax, and we proceed to consider the main question, which is whether the legacies are exempt from taxation.

By St. 1891, c. 425, § 1, all property within the Commonwealth which shall pass by will or by intestate succession, or by deed, grant, sale, or gift to take effect after the death of the grantor, "other than 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 charitable, educational, or religious societies or institutions, the property of which is exempt by law from taxation, shall be subject to a tax of five per centum of its value, for the use of the Commonwealth." By the will in question the testator gave to the town of Essex, first, "twenty thousand dollars for the erection of a town hall and library for the use of its inhabitants"; then by a subsequent provision he gave "the further sum of twenty thousand dollars, in trust to invest and keep invested in some safe security, the income whereof shall annually be expended by the officers of said town for the purchase of books for said library for the free use of its inhabitants." The two provisions taken together contemplate the establishment and maintenance by the town, with the sums thus bequeathed, of a free public library for the use of the inhabitants of the town, and the erection of a library building and town hall. We think that the library thus established may fairly be called an educational or charitable institution, and that the legacies being given to the town for it come within the exemption of the statute, and are not subject to the tax. *Drury* v. *Natick*, 10 Allen, 169. *Williston Seminary* v. *County Commissioners*, 147 Mass. 427.

Exceptions overruled.

PATRICK F. DEGNAN *vs.* EBEN D. JORDAN & others.

Suffolk. January 23, 24, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Due Care — Report of Case — When Verdict to be set Aside.

If an elevator tender is wanting in due care in exposing himself to injury from the sudden descent of the elevator, he cannot recover in an action for personal injuries against his employer.

Even if in the report of an action for personal injuries there are material errors prejudicial to the plaintiff in a ruling in regard to the admission of testimony, a verdict directed for the defendant on the ground that the plaintiff was not in the exercise of due care will be set aside only in case there is evidence to warrant a finding of due care on his part.

TORT, for personal injuries occasioned to the plaintiff while in the defendants' employ as an elevator tender. Trial in the Superior Court, before *Hammond*, J., who, at the defendants' request, ruled that the action could not be maintained, directed a verdict for the defendants, and, at the plaintiff's request, reported the case for the determination of this court. If the ruling was right, the verdict was to be set aside, provided there was evidence to warrant a finding of due care on the part of the plaintiff; otherwise, judgment was to be entered on the verdict.

W. Schofield & A. E. Burr, for the plaintiff.

J. Lowell, Jr., (*S. H. Smith* with him,) for the defendants.

MORTON, J. The plaintiff was, at the time of the accident, an elevator tender in the employ of the defendants, and was forty-three years of age. He had been at work running the elevator about a fortnight, and, as he testified, understood the business fairly well. On the morning of the accident, he found the elevator below the level of the street floor, and tried, without succeeding, to open the door. Then he went down into the basement, as he had been told by the engineer to do in such a case. There he met a man by the name of Feehiley, who told him that he could not move the elevator. Thereupon the plaintiff stooped into the elevator well under the elevator, which was four or five feet from the floor, so that the whole upper part of

his body was under the elevator, for the purpose of reaching the elevator rope, which was in one corner, and as he pulled the rope the elevator came down on him, causing the injuries complained of. Neither the plaintiff nor Feehiley made any effort to report to the superintendent of elevators or to the engineer that there was anything wrong with the elevator. And we think that, in view of the notice he had from the situation of the elevator that something about it was probably out of order, his conduct in exposing himself to injury from its sudden descent was wanting in due care. *Murphy* v. *Webster*, 151 Mass. 121; *S. C.* 156 Mass. 48.

The plaintiff excepted to certain rulings in regard to the admission of testimony. But the manner in which the case is reported renders their consideration unnecessary. According to the report, even if there are material errors prejudicial to the plaintiff in the ruling in regard to the admission of testimony, the verdict is to be set aside only in case there is evidence to warrant a finding of due care on the part of the plaintiff.

Judgment on the verdict.

CYNTHIA E. SANDFORD *vs.* BELLE WRIGHT & another.

Plymouth. March 11, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Creditor's Bill — Judgment — Two Suits for the same cause of Action — Equity Jurisdiction — Statute — Amendment.

A debt need not be reduced to a judgment in order to maintain a bill in equity, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, to reach and apply in payment of a debt property of the debtor which cannot be attached or taken on execution at law.

A bill in equity, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, on a legal cause of action, should set out the cause of action as specifically as is required in an action at law.

While a court of law will not permit a defendant to be vexed at the same time, in the same jurisdiction, by the prosecution of two suits for the same cause of action by the same plaintiff, a court of equity, instead of dismissing the second

suit, usually permits the plaintiff to elect which suit he will proceed with, and when the plaintiff has brought an action at law and afterwards a suit in equity, if the plaintiff elects to discontinue the action at law, he usually is permitted to prosecute the suit in equity.

Whether a bill in equity, under St. 1884, c. 285, to reach and apply property of a debtor in payment of a debt, will lie when the claim is for less than twenty dollars, *quære.*

BILL IN EQUITY, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, against Belle Wright and the Soule Piano and Organ Investment Company, a corporation, to reach and apply, in payment of a debt alleged to be due to the plaintiff from the first named defendant for board and lodgings, certain sums of money which may become payable to her from the above named corporation upon certain contingencies which may occur in the future. Trial in the Superior Court, upon the bill and demurrer of the defendant Wright, before *Dunbar*, J., who sustained the demurrer; and the plaintiff appealed to this court. The facts appear in the opinion.

The case was submitted on briefs to all the judges.

C. F. Chamberlayne, for the plaintiff.

F. E. Sweet, for the defendant Wright.

FIELD, C. J. There is nothing in the first or second grounds of demurrer. The debt need not be reduced to a judgment in order to maintain a bill in equity like the present under the statutes, which give a remedy in equity to reach and apply in payment of a debt property of the debtor which cannot be attached or taken on execution at law.

The third ground of demurrer is, that it appears by the bill that there is an action at law pending in this Commonwealth between the same parties for the same cause of action, and that it is not "just or equitable that the said defendant shall be held to answer both suits concurrently."

The bill of complaint alleges that the principal defendant is indebted to the plaintiff in certain sums of money for board and lodgings furnished her, etc.; that a suit at law to recover said sums of money has been brought by the plaintiff against the defendant by trustee process in the Police Court of the city of Brockton, and that the trustee has made answer that there was due from the trustee to the defendant a sum of money less than the plaintiff's claim; and the bill is brought to reach certain

other sums which may become payable to the defendant from the trustee upon certain contingencies which may happen in the future. A bill of this nature on a legal cause of action should set out the cause of action as specifically as is required in an action at law. This bill contains no specifications whatever of the sums due for board and lodgings, or of how much board or what lodgings were furnished, or when they were furnished. If the demurrer had been put upon this ground, it must have been sustained; but this defect is a matter capable of amendment, and the Superior Court probably would have permitted the plaintiff to amend, upon terms or without terms, if this objection had been taken.

If the two suits were actions at law, and if the pendency of the former action had been pleaded in abatement in the second suit, that suit necessarily would abate, as the suits are both pending in the same jurisdiction. A court of law will not permit a defendant to be vexed at the same time, in the same jurisdiction, by the prosecution of two suits for the same cause of action by the same plaintiff. A court of equity will not permit this to be done; but, instead of dismissing the second suit, it usually permits the plaintiff to elect which suit he will proceed with, and when the plaintiff has brought an action at law and afterwards a suit in equity, if the plaintiff elects to discontinue the action at law, he usually is permitted to prosecute the suit in equity. *Colt* v. *Partridge*, 7 Met. 570. *Sears* v. *Carrier*, 4 Allen, 339. *Connihan* v. *Thompson*, 111 Mass. 270. *Insurance Co.* v. *Brune*, 96 U. S. 588. In the present case, we think that the demurrer should be sustained on the third ground taken, unless the plaintiff elects to discontinue the action at law. Upon proof, however, to the satisfaction of the Superior Court, that she has done this, the demurrer may be overruled, provided the plaintiff will amend her bill so as specifically to state her cause of action.

The fourth ground of the demurrer is, that it does not appear that the amount involved is sufficient to warrant the Superior Court in taking cognizance of the case. When this court had exclusive jurisdiction in equity it declined to take cognizance of such a bill as the present when the debt claimed did not amount to one hundred dollars. The St. 1884, c. 285, provided that a bill in equity of this kind may be maintained, although the plain-

tiff's debt does not amount to one hundred dollars. It does not, however, follow from this statute, that this court or the Superior Court is required to entertain a bill in equity when brought upon a claim of a very trifling sum, such as one cent or one dollar. By the neglect of the plaintiff specifically to state her cause of action, we do not know what the amount of her claim is. If this suit is prosecuted, and it should appear that the claim is for less than twenty dollars, it may be necessary to consider whether a bill for so small an amount ought to be entertained by the Superior Court; but this question is not now before us. The entry must be "Demurrer to be sustained and bill to be dismissed," unless the plaintiff discontinues her suit at law and obtains leave of the Superior Court to amend her bill by specifically setting out her cause of action, when the entry may be made by that court of "Demurrer overruled." *So ordered.*

WALTER S. RICE *vs.* LYMAN C. ALBEE.

Suffolk. March 12, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Pleading — Malicious Interference with another's Affairs.

The law of slander applies to a case of words privately spoken in order to persuade the person to whom they are spoken to do what he has a legal right to do, namely, to refuse to enter into certain contracts.

A demurrer to a declaration in an action of tort, for damages occasioned by words privately spoken by the defendant in order to persuade the person to whom they were spoken to do what he had a legal right to do, namely, to refuse to enter into certain contracts, is rightly sustained, if the declaration does not set out the words spoken in any form, and does not allege that they were falsely spoken.

TORT, for damages alleged to have been occasioned by words privately spoken by the defendant in order to persuade the person to whom they were spoken not to enter into certain contracts with the plaintiff.

The third count alleged that the plaintiff was engaged in the business of manufacturing cotton goods and ladies' underwear,

and had built up a valuable business, but needed more capital in order to carry on said business profitably; that he had entered into negotiations with one E. K. Wilson for forming a partnership, and for the sale of a half interest in the said business and property for ten thousand dollars; that the plaintiff and Wilson had agreed as to the terms of the contract of partnership and contract of sale, and had had drawn up articles of copartnership and a contract of sale, and were about to execute the same, when the defendant, knowing these facts, and with the unlawful purposes of interfering in the execution of said contract of copartnership and said contract of sale by said Wilson and the plaintiff, to the injury of said plaintiff in said business, did unlawfully, maliciously, and unjustifiably interfere between said Wilson and the plaintiff, and wilfully persuaded and induced the said Wilson, by taking said Wilson aside and speaking words affecting the plaintiff in his character and credit as a merchant, and disparaging said business and property, not to enter into the contract of partnership with the plaintiff or into said contract of sale; and that by reason of said unlawful, malicious and unjustifiable interference the said Wilson did afterwards refuse to sign the contract of copartnership with the plaintiff, and declined to execute the contract of sale, refusing to buy any interest whatsoever in the plaintiff's business and property. Wherefore, and by reason thereof, the plaintiff was unable to negotiate said contract of copartnership and contract of sale with said Wilson, and lost the services of said Wilson as a partner and the money and capital needed to carry on said business profitably, and was deprived of the benefit of said sale and of said contracts and lost the profits and advantages thereof, and in consequence thereof the plaintiff failed and became insolvent, and lost the benefit of the good will of said business and all the property connected therewith, and the plaintiff was caused mental suffering and injury to his feelings to his damage in the sum of fifteen thousand dollars.

In the Superior Court the defendant demurred to the third count on the grounds that it "does not set forth any cause of action substantially in accordance with the statutes relating to pleading"; that it "does not show any unlawful act done by the defendant in interfering between said Wilson and the plaintiff,

as therein alleged"; that it "appears to be intended as a count for slander, and yet it does not set forth the words or the substance of the words alleged to have been spoken by the defendant, nor does it set forth that any words were spoken of or concerning the plaintiff"; and that "no words actionable in themselves are set forth, and no facts or circumstances are set forth, constituting anything said by the defendant, or anything done by him, a cause of action."

The demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court.

S. Williston, (*J. W. Saxe* with him,) for the plaintiff.

It is actionable to interfere maliciously with obligations of another actually existing or about to be formed, or with another's business affairs, to his damage.

This principle has been exemplified in various cases. Some of the earliest relate to the enticement of apprentices and servants to leave their masters. *Carew* v. *Rutherford*, 106 Mass. 1. *Walker* v. *Cronin*, 107 Mass. 555. *Sherry* v. *Perkins*, 147 Mass. 212. *Hart* v. *Aldridge*, Cowp. 54. *Hartley* v. *Cummings*, 5 C. B. 247. *Evans* v. *Walton*, L. R. 2 C. P. 615. *Bowen* v. *Hall*, 6 Q. B. D. 333. Ames, Torts, 585.

So the enticement, with improper motive, of a wife to leave her husband, has long been held actionable. *Hadley* v. *Heywood*, 121 Mass. 236. *Winsmore* v. *Greenbank*, Willes, 577. Ames, Torts, 592.

More recently it has become settled law in most jurisdictions that the malicious procurement of a breach of contract is actionable. *Walker* v. *Cronin*, 107 Mass. 555. *Lumley* v. *Gye*, 2 E. & B. 216. *Bowen* v. *Hall*, 6 Q. B. D. 333. *Temperton* v. *Russell*, [1893] 1 Q. B. 715. *Van Horn* v. *Van Horn*, 23 Vroom, 284; 24 Vroom, 514; 27 Vroom, 318. Ames, Torts, 612.

It is equally actionable to prevent the formation of a bargain or contract. *Carew* v. *Rutherford*, *Walker* v. *Cronin*, and *Sherry* v. *Perkins*, *ubi supra*. *Morasse* v. *Brochu*, 151 Mass. 567. *Tarleton* v. *M'Gawley*, Peake, 270. *Evans* v. *Walton*, L. R. 2 C. P. 615. *Temperton* v. *Russell*, [1893] 1 Q. B. 715. *Van Horn* v. *Van Horn*, *ubi supra*. See also *Benton* v. *Pratt*, 2 Wend. 385; *Rice* v. *Manley*, 66 N. Y. 82.

And if the intent be malicious, the falsity of words used in

persuasion is not a necessary element. *Walker* v. *Cronin* and *Morasse* v. *Brochu*, *ubi supra*. See also *Riding* v. *Smith*, 1 Ex. D. 91; *Temperton* v. *Russell*, *ubi supra*; *Old Dominion Steamship Co.* v. *McKenna*, 30 Fed. Rep. 48; *Delz* v. *Winfree*, 80 Texas, 400; 8 Harv. Law Rev. 1, 6; *Randall* v. *Hazelton*, 12 Allen, 412; *O'Callaghan* v. *Cronan*, 121 Mass. 114; *Dudley* v. *Briggs*, 141 Mass. 582; *Tasker* v. *Stanley*, 153 Mass. 148.

F. P. Goulding, for the defendant.

FIELD, C. J. The only acts alleged against the defendant in the third count are that he took Wilson aside, and by speaking words to him affecting the plaintiff in his character and credit as a merchant, and by disparaging the business and property of the plaintiff, persuaded and induced Wilson not to enter into the contract of partnership and the contract of sale, the terms of which had been orally agreed upon and were to be reduced to writing, and when this had been done the writing was to be signed by the parties. It is alleged that the defendant did this unlawfully, wilfully, maliciously, and unjustifiably. The words spoken are not set out either according to their tenor or their substance, and it is not alleged in what way they affected the plaintiff in his character or credit, or in what way by the words spoken the defendant disparaged the plaintiff's business and property. It is not alleged that the words spoken were false. It is alleged that by the words spoken Wilson was persuaded and induced not to enter into the contracts, but it is not alleged that he was deterred from entering into the contracts by any acts or threats, or in any manner except by persuasion. No interference is alleged with an existing business or with existing contracts. We do not deem it necessary to consider the cases which relate to a malicious interference with an existing business or with existing contracts, or those which relate to the enticing away of servants actually employed or under contracts of employment, or the enticing away of a wife or husband. This is a case of words privately spoken in order to persuade the person to whom they were spoken to do what he had a legal right to do, namely, to refuse to enter into certain contracts. We think that the law of slander should apply to this case. The case, we think, in principle, is like the common case of words spoken of a servant or other person on an occasion not privi-

leged, for the purpose and with the effect of preventing him from obtaining employment which otherwise he might have obtained. In slander the truth of the words spoken is a complete defence, whether the words on their face appear to be actionable or are made actionable by reason of special damages, and whether the words affect the person spoken of in his reputation, or in his profession, employment, or property. In the present case we do not know that the words spoken were defamatory, but if they were they must have been falsely spoken to be actionable, and, *a fortiori*, this should be true if the words spoken were not defamatory. As the third count does not set out the words spoken in any form, and does not allege that they were falsely spoken, we are of opinion that the demurrer was rightly sustained. *Judgment affirmed.*

CLARISSA PIERCE & another *vs.* CITY OF BOSTON.

Suffolk. March 13, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Land taken for Public Improvement — Damages — Evidence — Experts — Value.

Evidence of the distance which a house has been moved is incompetent as a basis for an inference as to its strength and the character of its construction.

An expert on real estate values cannot be asked whether a tract of land containing a little less than ten thousand feet is large enough for both a house and a stable.

An expert on real estate values, who, on cross-examination, denies that several years previous to the controversy he had said that he was not familiar with land values in a certain locality, cannot be contradicted on that point.

An expert on real estate values who has estimated the value of certain land may be asked on cross-examination, for the purpose of controlling the reasons given by him for his opinion, whether he had not for one or two years held for sale other land in the vicinity, and had been instructed to ask therefor a price which was about one third of the valuation placed by him upon the land in question.

An expert carpenter and builder who has examined the exterior of a house and has measured its exterior dimensions, but has not been inside of it, is competent to express an opinion as to its value in reply to a hypothetical question describing the interior of the house.

At the trial of a petition for the assessment of damages for land taken by the right of eminent domain on the issue of value, evidence is admissible of sales of other land in the vicinity two years before the taking, where it appeared that there

had been no more recent sales, and that there had been no great increase in values since then.

At the trial of a petition for the assessment of damages for land taken by the right of eminent domain, on the issue of value evidence is admissible of sales of other land in the vicinity, notwithstanding some differences in size and the character of the buildings thereon between the other estates and the estate in controversy, if, in the opinion of the presiding judge, on all the evidence, there were material considerations common to and affecting the value of all the estates in the vicinity.

PETITION for the assessment of damages for the taking, by the city of Boston, under the provisions of St. 1875, c. 185, of a tract of land, containing 28,790 square feet, with the buildings thereon, situated at the corner of Pond and Prince Streets in that part of Boston called Jamaica Plain. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

One Atwood, called as a witness for the petitioners, testified that he had examined the dwelling-house standing on the land of the petitioners when the land was taken, on April 29, 1892, and that the house had since been removed therefrom to Custer Street. The petitioners then offered to show the distance from their land to Custer Street, for the purpose of showing the strength and character of the construction of the building, so far as that could be inferred from the fact that the building had been moved that distance. The judge excluded the question, and the petitioners excepted.

The respondent having, on the cross-examination of a witness for the petitioners, inquired as to the price for which a parcel of vacant land, containing a little less than ten thousand feet, situated on the corner of Orchard and Pond Streets, was sold by Brewer to Gill, the petitioners asked one Downes "whether the lot was large enough for both a house and stable," but the judge excluded the question, and the petitioners excepted.

Roswell S. Barrows was called by the petitioners as an expert regarding the value of the land and buildings, and, after stating that, in his opinion, they were worth $30,592 at the time of the taking, he stated on direct examination, among other things, as reasons for his opinion, "that small lots in the locality have been, and I would say are at present, in very good demand. There have been few places in that locality that have been placed on the market. They have been disposed of quite readily."

On cross-examination it appeared that for one or two years he had had in his hands for sale the Clark estate on the opposite corner of Pond and Prince Streets, with an asking price, including the house and land, which he was instructed by the owners to ask for it. Thereupon the respondent was permitted to ask him, first, if that asking price, throwing in the buildings, was not a quarter of the price that the witness put on the land and buildings in suit, and then whether it was not about one third; and the witness, subject to the exception of the petitioners, answered that possibly it was about one third.

No other evidence was offered of the size or shape of the Clark land, nor as to the size or character of the buildings upon it, nor as to the similarity or dissimilarity of the estate to the land of the petitioners, and it did not appear that the witness had been consulted by the owners as to the price which they should fix, or what reasons induced the owners to fix upon this price, or whether the witness approved of it. The jury did not examine the Clark estate at the time of the view, but it was in their sight as they stood on the land taken from the petitioner, and the Clark house was pointed out to them by the counsel for the respondent.

The respondent called as a witness one Merritt, who testified that he was a carpenter and builder; that he had measured the exterior dimensions of the house on the land of the petitioners, and had examined it thoroughly on the outside, but, having been unable to get into it, had not examined the interior. He said that from what he had seen of the exterior and from the description of the interior he could give a judgment of the value of the house, and was then asked the following question: "Taking a building of the size and dimensions of the building that you have described, assuming it to have below a parlor and a sitting-room, halls, back stairs in the main part; in the L, kitchen and dining-room and a store-room, and in the one story L, back, a summer kitchen; and up stairs to have two rooms in the front or main body of the house, and two rooms in the L, and two rooms up in the attic, lighted by a dormer window, to be finished with fine wainscoting down stairs, — below, and of the dimensions that you found, — what, in your opinion, would be the fair market value of this house, finished in the manner

which I have described?" Consider, also, "that the cellar was divided by brick partitions into three parts, that the height of the first story was ten feet in the main building and nine feet in the second story; that these two attic rooms were lighted by dormer windows; that the rooms in the L were lower studded than those in front," and "that there was an open fireplace in the parlor, and another open fireplace up stairs."

The petitioners objected to this question, on the ground that sufficient data were not furnished for the opinion of an expert; but the judge permitted the question to be answered, and the petitioners excepted.

The respondent also called one Pratt, who testified that he had lived on the estate of his father in Jamaica Plain nearly all his life; that after the death of his father the estate was sold, in May, 1890; that the estate consisted of about sixty thousand feet of land, with a large house and stable, about a minute's walk from the street cars on Centre Street, and about a minute and a half from Jamaica Pond, and perhaps five minutes' walk from the petitioners' estate. The house was a large square house, French roof, with twelve or thirteen rooms, and a small L. The house was then from thirty-one to thirty-three years old. The stable was arranged for four horses; there was a large carriage-house, and an L on each side, one where cows were kept, another for storage. The witness was then asked the amount of the sale, to which the petitioners objected; and in answer to questions by the petitioners, he stated that the estate was about two hundred feet in depth, with a frontage of more than that on Pond Street. The witness further testified, that there had been a general increase in values in Jamaica Plain in each year since the sale; that electric cars had been substituted for horse cars in October, 1891, and that this had affected values on the streets through which the cars ran, and streets adjacent thereto.

One Beaumont, called as a witness by the respondent, testified that he bought the estate known as the Duff estate, on Burroughs Street, in May, 1887, and sold it in May, 1890; that the estate consisted of nearly sixty thousand feet of land, containing a large house nearly fifty years old, stable, outbuildings, and fruit trees.

There was no evidence as to the similarity of these estates to the land of the petitioners other than plans and maps, and the general knowledge of the jury of the vicinity. No evidence of a sale of either estate had been offered by the petitioners, and it appeared from the statements of experts on both sides that no sale had occurred in the vicinity for some time previous to the taking, and, with the exception of the purchases by the city, no sales had occurred in the immediate vicinity for a great many years previous to the taking. The judge admitted evidence of the price for which the estates were sold.

The respondent called as an expert one Viaux, who testified that he was a real estate broker and was familiar with real estate values in Jamaica Plain. On cross-examination he testified that in 1890 he was trying to purchase the Curtis estate in Jamaica Plain; that he knew L. L. P. Atwood, and, knowing that he had made several sales of estates on Centre Street, near the Curtis place, he went to him for the purpose of verifying the prices which he had heard that Atwood obtained at the sales, and got Atwood to go with him to Centre Street and show him the estates which had been sold. He denied that he ever told Atwood that he was not acquainted with real estate values in Jamaica Plain.

The petitioners called Atwood in rebuttal, and asked him whether Viaux had told him that he was not acquainted with real estate values in Jamaica Plain; but the judge excluded the question, and the petitioners excepted.

The jury returned a verdict for the petitioners in the sum of $19,535.85; and the petitioners alleged exceptions.

R. M. Morse, (*J. Duff* with him,) for the petitioners.

T. M. Babson, for the respondent.

MORTON, J. The petitioners do not rely much upon their exception to the exclusion of the question to Atwood as to the distance of Custer Street from their land, or the question to Downes whether the land sold by Brewer to Gill was large enough for a house and stable, or on the question to Atwood as to the statement made to him by Viaux, and we think it only necessary to say that, after considering them, we discover no error in the rulings.

1. The witness Barrows was offered by the petitioner as an

expert regarding the value of the land and buildings, and, after stating what in his opinion they were worth, stated on direct examination, among other things, as reasons for his opinion, "that small lots in that locality have been, and I would say are at the present time, in very good demand. There have been very few places in that locality that have been placed on the market. They have been disposed of quite readily."

It appeared on cross-examination that he had had for one or two years the estate on the opposite corner in his hands for sale, with price, including the house and land, which he was instructed by the owner to ask for it. Thereupon, the respondent was permitted to ask him, first, if that asking price, throwing in the buildings, was not a quarter of the price that the witness put on the land and buildings in suit, and then whether it was not about one third; and the witness answered that possibly it was about one third. We think that the evidence was admissible, not for the purpose of showing the asking price of land in the vicinity, but as tending to control the reasons for the opinion which the witness had previously expressed as to the value of the land and buildings in controversy. *Brown* v. *Worcester*, 13 Gray, 31.

2. The question put to the witness Merritt was properly admitted. It was for the jury to say how much the fact that he had not seen the interior should affect the weight to be given to his testimony. As an expert carpenter and builder, he would have been competent to express an opinion without having seen the house at all. *Cook* v. *Castner*, 9 Cush. 266.

3. The petitioners object that the sales of the Pratt and Duff estates were not admissible, first, because too remote in point of time, and, secondly, because the estates were not similar to that of the petitioners. The fact that the sales were about two years before the taking did not of itself render them incompetent. *Benham* v. *Dunbar*, 103 Mass. 365. There was testimony tending to show that, with the exception of the purchases by the city, no sales had occurred in the immediate vicinity for a great many years previous to the taking, and none in the vicinity for some time before that, so that none more recent than those in question were obtainable. The rise in values does not appear to have been so great as to render them incompetent;

and while the introduction of electric cars had affected values on the streets through which they ran and on streets adjacent thereto, it is sufficient to say that the petitioners' estate was not on a street through which electric cars ran or on an adjacent street.

The question of similarity presents more difficulty, but we cannot say that they were so dissimilar as to render the admission of the sales clearly wrong. The fact that the two estates were considerably larger than the petitioners' estate would not of itself make evidence of the sales incompetent; nor would the fact that the buildings might not have been precisely like those on the estate of the petitioners. *Patch* v. *Boston*, 146 Mass. 52. There may have been material considerations common to and affecting the value of all estates in the vicinity, which upon examination of the plans and maps, and a consideration of the other evidence, in the opinion of the presiding judge, rendered the prices paid for the two estates competent, notwithstanding some differences between them and the estate of the petitioners. In all such cases much must be left to the discretion of the court, and we cannot say that this discretion in this instance was erroneously exercised. See *Lyman* v. *Boston*, *post*, 99. *Bowditch* v. *Boston*, *post*, 107.

4. The fact, if it was a fact, that the witness Viaux may have told the witness Atwood in 1890, two years or thereabouts before the taking, that he was not acquainted with real estate values in Jamaica Plain, related to a collateral and immaterial matter, and was properly excluded by the court. *Davis* v. *Keyes*, 112 Mass. 436. *Brooks* v. *Acton*, 117 Mass. 204. *Roberts* v. *Boston*, 149 Mass. 346.

Exceptions overruled.

EDWARD H. R. LYMAN, trustee, *vs.* CITY OF BOSTON.

Suffolk. March 13, 14, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Land taken for Public Improvement — Damages — Evidence — Expert.

On a petition for a jury to assess damages for the taking of land under a statute for the purposes of a public park, questions were put by the petitioner, on cross-examination, to a witness, A., who owned land near to the land in question, whether there were not restrictions upon his estate, and whether they did not enter into the price, which questions were excluded. Subsequently an attorney testified at length to the state of the title, describing the restrictions, and saying that he never was fully satisfied as to the title, but that he was content for the purchaser to take it. A. testified as to the price which he paid, and the circumstances surrounding the sale, and to his conversation with the seller regarding it. *Held*, that the petitioner was not prejudiced by the exclusion of the questions.

On a petition for a jury to assess damages for the taking of land under a statute for the purposes of a public park, the petitioner has no exception to the exclusion of a question, on cross-examination, to a witness who owns land near to the land in question, as to whether there was any topographical resemblance between his estate and the estate in question.

It is not necessary, in order to qualify a witness as an expert as to value of real estate, that he should have lived in the locality about which he is testifying, or should have bought, or sold, or owned land there. His competency depends upon other considerations, such as his knowledge of values in the particular locality, the extent of his experience regarding real estate in the city or town where the property is situated, and the attention which he has given to the subject generally.

PETITION for a jury to assess the damages for the taking, by the Board of Park Commissioners of the city of Boston, for the purposes of a public park, under the provisions of St. 1875, c. 185, of a tract of land bordering upon Jamaica Pond, containing 53,566 square feet, with a dwelling-house and stable thereon. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the petitioner for $18,704; and the petitioner alleged exceptions, in substance as follows.

At the time of the taking, and for more than forty years prior thereto, the premises had been occupied by Mrs. Susan B. Lyman as a residence. In October, 1893, the buildings were torn down, and material changes made in the condition of the grounds and shrubberies.

Edward D. Rice, called as a witness by the respondent, testified that he lived in Jamaica Plain, on Pond Street, some distance beyond the corner of Prince; that his house was not in sight on the plan used in the case, neither was it in sight from this place really (indicating on the plan) on the land in question; that he bought the estate in June or on July 1, 1891, having had to wait some time for the deeds, as there were several things that had to be straightened out before they could be made; that it was a portion of an estate that was sold by public auction, some time in May, consisting of about two hundred thousand square feet; that it had upon it a dwelling-house situated in practically the same place as the new house; that there was also a stable on the place, which still remained; and that the new house was smaller than the old, which was a good, fair, old-fashioned house.

Rice testified, on cross-examination, that the depth of the estate from Pond Street was nearly six hundred feet, and that about a third of the land was quite low, and under water at times during the winter. He was then asked if there were restrictions upon building on a considerable part of the land. To this question the respondent's counsel objected, and the judge ruled that the petitioner could not prove the restrictions except by production of the deed. The petitioner then asked the witness whether, when he made his bargain for the land, at the price at which he bought it, he was told, and that entered into the terms of the trade, that there were restrictions upon building between that house and one Bacon's property. To this question the respondent objected, and the judge excluded the question. The petitioner then asked the witness whether or not the price agreed upon between him and the person from whom he bought the property was fixed with reference, among other things, to the restriction of not building on that portion of the land. To this question the respondent objected, and the judge excluded it. The petitioner then asked the witness whether the price for the land which was agreed upon was a price that was fixed irrespective of restrictions upon the property. To this question the respondent objected, and the judge excluded it. The petitioner then asked the witness if there was any view of Jamaica Pond from the land, and he replied that there was not, and that no portion of the estate bordered on the pond. He was then asked

if there was any topographical resemblance, anything in the features of the land in its general aspect, in his land, that was similar to the Lyman property. To this question the respondent objected, and the judge excluded it.

The judge then said that the witness might describe the lot, and the witness testified as follows as to the Lyman and his own estate: "My land contains about five acres, and my house sets in the middle of the lot; it is about five hundred feet fronting on Pond Street, and it is covered with large old English and American elm trees and other trees, and fruit trees, and, as I said, my house is located there, and my barn over in this corner, partly on my land, and partly on Mr. Billings's land. The house sets on a very, quite sharp, rising ground, over which is a terrace; and I should say the terrace — I have never measured it — is twenty feet above the driveway; and then the circular driveway, which you see on the plan here, and this house setting here where these figures are, — the circular drive goes round there, and the land slopes down very rapidly to the street on both sides until it is below the level of the street, so that the property consists of about — well, I should say half of it might be called high land, and half of it might be called low land. The valuable part to me, of course, is where my house sets, and my land back of it. I have n't been to examine the Lyman estate to answer any questions about it, but it is located on Jamaica Pond."

In answer to a question asked by the respondent, the witness replied that he paid for the 212,000 feet of land, including the house and stable, in June, 1891, $20,133.33.

On cross-examination, the petitioner asked the witness whether or not the price which was fixed upon the land between one Billings, the former owner, and himself was fixed with reference to the circumstances of his personal relations to him, and of the object which Billings and the other adjacent owners had in inducing him to come there and buy. The respondent objected to this question, and the judge excluded the same, but permitted the witness to be asked as to what conversation took place between him and Billings.

The witness then testified as to his conversation with Billings, as to the reason why the price was fixed at the sum at which it was fixed; that walking down town one morning Billings

asked him why he did not buy the estate, and he replied that he could not afford to; that Billings told him that he could afford to, and that he could buy it for $20,000, that is, the "five acres of land and all buildings, the front part of it"; that he agreed to purchase it; that shortly after Billings, who was his personal friend, said in conversation, "Well, I do not know as you are going to get that land after all," and that he replied, "Why not? I thought you sold it to me," and Billings answered that several gentlemen had bought this whole property with him, and that he was appointed to furnish the money and carry out the trade with the aid of a lawyer; that he found that one of these gentlemen had promised to give a friend of his an opportunity to buy the property, and that, if he did not take it, he, Rice, would have an opportunity; that shortly after Billings told him that the person referred to was not going to buy, and he, Rice, could have the estate, "and finally, to make a long story short, he agreed to buy back — to deliver what he sold me, and then buy back — a certain portion of the land, a strip of land, give me a lease of the barn, two thirds of which now belongs to him, and is on his land, and the other is on my land"; that the land upon which two thirds of the barn was situated he had a lease of for ten years; that the strip of land which he got was a strip running from the back of the land to Pond Street; and that when he had fixed the price testified to he had taken into account selling Billings the strip about twenty feet in width and six hundred feet in length.

The witness further testified that he was present at the auction sale, and that the property was bid off to the parties interested by Mr. Welch, their attorney.

Before the judge passed upon this evidence it appeared that, when the jury viewed the premises, the counsel for the petitioner and respondent being present, the jury also viewed the land which was sold to Rice. The petitioner then renewed his objections to the admissibility of the sale, but the judge said, the jury having viewed the land, he still thought the evidence was competent.

Subsequently Mr. Francis V. Balch, called by the respondent, testified at length, without objection, to the state of the title, describing the restrictions, and saying in substance that he never

was fully satisfied as to the nature of them, that he did not regard the title as absolutely clear, but that he was content for Rice to take the title, and he, Balch, passed it.

At the conclusion of Mr. Balch's evidence, the petitioner renewed his objection to the admission of the sale to Rice, and moved that the testimony be stricken out; but the judge declined to grant the motion.

The respondent called as experts James M. Meredith, Frederick H. Viaux, Albert R. Whittier, and John C. Cobb. The petitioner objected that the witnesses were not qualified, and he excepted to rulings permitting them to testify. All of them except Cobb testified that they were real estate brokers doing business in Boston, and all of them except Whittier, that they were members of the Real Estate Exchange in Boston. Meredith, Viaux, and Whittier testified that they had followed the prices, and kept acquainted with the value of real estate in the city and suburbs, including Jamaica Plain. Cobb said that on several occasions he had appraised land at Jamaica Plain, and had made investigations for that purpose; that he was familiar with sales of land and values there, and he was engaged in the management, care, and development of real estate in Boston, in South Boston, and in the suburbs. All of them testified that they had examined the premises in question before the trial, though after the buildings had been removed. Meredith also said that he had advised people as to sales of land in Jamaica Plain. Viaux said that he was acquainted generally with the streets and buildings in Jamaica Plain and property around the pond. Whittier stated that he had testified as an expert to values of real estate there; that he had known of sales there, and had known of the real estate in controversy for many years. Cobb also said that he was familiar with it.

It appeared that none of them had ever lived in Jamaica Plain, and that, with the exception of Meredith, — and in his case it was several years before the taking in question, — they had not bought, or sold, or owned land there.

R. M. Morse, (*J. Duff* with him,) for the petitioner.

T. M. Babson, for the respondent.

MORTON, J. 1. The questions put by the petitioner to the witness Rice, on cross-examination, whether there were not re-

strictions upon his estate, and whether they did not enter into the price, were excluded, on the ground that the restrictions could only be shown by the production of the deed. Subsequently Mr. Balch testified at length, without objection, to the state of the title, describing the restrictions, and saying in substance that he never was fully satisfied as to the nature of them, that he did not regard the title as absolutely clear, and that he was content for Rice to take it, and passed it. Rice gave the price which he paid for the property, and testified to the circumstances surrounding the sale, and to his conversations with Billings regarding it. The facts explanatory of the title and the sale were all before the jury, and they could judge whether the restrictions were accounted material, and affected the price. It does not seem to us that the petitioner was prejudiced by the exclusion of the questions. It was much better to have the witness describe the two estates than to permit him to express his opinion on their topographical similarity. The petitioner has no valid exception to the exclusion of the question to Rice, whether there was any topographical resemblance between his estate and the Lyman estate.

2. The next exception is that the Rice estate was so dissimilar to the Lyman estate that the price paid for the former furnished no just guide to the value of the latter. The dissimilarity is alleged to consist of the restrictions upon the Rice estate, and in the size, shape, topographical features, and situation of the two estates. It is also said that the sum paid for the Rice estate did not tend to show its market value, but involved other matters besides the value of the land and buildings, and included buildings of whose value the jury had no means of judging. It is well settled that sales of land similarly situated, and not too remote in point of time, are admissible to determine the value of land taken for public purposes. From the nature of the case no two estates can be exactly alike. The question in each case is whether the similarity is sufficient to afford material assistance to the jury in determining the value of the estate in controversy, or whether the dissimilarity is such that the jury will be liable to be misled and prejudiced by the evidence. It is evident that there may be considerable difference in the size, shape, situation, use, and immediate surroundings of two estates, and perhaps in other re-

spects, and yet the price which one brought may be of substantial assistance in determining the value of the other. There may be general considerations applicable to both alike which largely affect their value, and render it proper that the price paid for one should be considered in arriving at the value of the other, notwithstanding the differences between them. *Benham* v. *Dunbar*, 103 Mass. 365. Much must of necessity be left to the discretion of the presiding judge on the question whether the similarity is such as to render the testimony competent. But his discretion is not an unlimited one. *Chandler* v. *Jamaica Pond Aqueduct*, 122 Mass. 305. If in the present case he had excluded the evidence because the two estates were not sufficiently alike, we should have hesitated to disturb the ruling. On the other hand, we cannot say that the restrictions were of such a character, or the dissimilarity of the two estates so great, that the evidence would tend to mislead or prejudice the jury, and would be of no material assistance to them in arriving at the value of the land in controversy, and that its admission was clearly wrong. The facts in regard to the sale and explanatory of it were, as already observed, all before the jury, and they could consider what effect, if any, they naturally would have had on the price, and how far that represented the actual market value. The fact that it included buildings could also be taken into account by them. *Patch* v. *Boston*, 146 Mass. 52, 57.

3. The remaining exception relates to the competency of the four experts called by the city, — Meredith, Viaux, Whittier, and Cobb. The petitioner objected that they were not qualified, and excepted to rulings permitting them to testify. All of them except Cobb testified that they were real estate brokers doing business in Boston, and all of them except Whittier that they were members of the Real Estate Exchange in Boston. Perhaps Whittier was a member also, though it did not appear. Meredith, Viaux, and Whittier stated that they had followed the prices and kept themselves acquainted with the values of real estate in the city and suburbs, including Jamaica Plain.

Cobb stated that on several occasions he had appraised lands at Jamaica Plain, and had made investigations for that purpose, and that he was familiar with sales of land and values there, and that he was engaged in the management, care, and develop-

ment of real estate in Boston, in South Boston, and in the suburbs. All of them testified that they had examined the premises in question before the trial, though after the buildings had been removed. Meredith also stated that he had advised people as to sales of land in Jamaica Plain. Viaux said that he was acquainted generally with the streets and buildings in Jamaica Plain and property around the pond. Whittier stated that he had testified as an expert to values of real estate there, that he had known of sales there, and had known the real estate in controversy for many years. Cobb also stated that he was familiar with it. We think that the rulings admitting them to testify as experts were correct. It is true that it appears that none of them had ever lived in Jamaica Plain, and that, with the exception of Meredith, and in his case it was several years before the taking in question, they had not bought or sold or owned land there. But it is not necessary in order to qualify a witness as an expert as to values of real estate that he should have lived in the locality about which he is testifying, or should have bought or sold or owned land there. If he has done that, it may give additional value to his opinion; but the fact that he has not done it does not destroy his competency as an expert. That depends on other considerations, such as his knowledge of values in the particular locality, the extent of his experience regarding real estate in the city or town where the property is situated, and the attention which he has given to the subject generally. *Bristol County Savings Bank* v. *Keavy*, 128 Mass. 298. It is possible that districts might be so widely separated in a metropolitan area that the general knowledge which a real estate broker might have of values would not be regarded as a sufficient qualification in regard to a particular neighborhood. We do not, however, think that that is true of Boston and Jamaica Plain. See *Amory* v. *Melrose*, 162 Mass. 556.

On the whole, we discover no error in the rulings.

Exceptions overruled.

CHARLES P. BOWDITCH & another, executors, *vs.* CITY OF BOSTON.

Suffolk. March 14, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Land taken for Public Improvement — Damages — Evidence — Instructions.

On the assessment of damages for the taking of land by a city under a statute for a public park, the petitioner has no ground of exception to the admission of evidence of the sale of a neighboring estate two and a half years before the taking in question, if it cannot be said that the estate was so unlike the petitioner's estate that the price paid for it would furnish no criterion as to the value of the latter, and that the ruling admitting it was clearly wrong, as it must appear to have been to justify the court in holding that the discretion of the presiding justice was improperly exercised; and if it does not appear that the introduction of electric cars in the neighborhood about a year and a half after the sale had affected prices so much, or that the general rise in values had been so great, as to render the sale misleading as a standard of comparison.

On the assessment of damages for the taking of land by a city in December, 1892, under a statute for a public park, the petitioner has no ground of exception to an instruction to the jury that, if the scheme of public improvement existing in April, 1892, when all the land in the neighborhood except the petitioner's estate and two adjoining estates had been taken, did not contemplate the taking of the petitioner's land, he would be entitled to recover damages for the enhanced value resulting from such scheme, but that if it did he would not; and it is competent for the jury to find that the scheme contemplated the taking of the petitioner's land from facts presented and from inferences to be drawn therefrom, although there is no direct evidence to the point.

PETITION for a jury to assess the damages for the taking, in December, 1892, of land of the petitioners' testator, under St. 1875, c. 185, by the Board of Park Commissioners of the city of Boston, for the purposes of a public park.

At the trial in the Superior Court, before *Richardson*, J., it appeared that the premises, containing 152,384 square feet, were, at the time of taking, the homestead estate of the late Francis Parkman, and included two dwelling-houses, a stable, and a greenhouse; that in 1891 the city of Boston had bought the Rindge estate, adjoining the petitioners' land on the north, and the Frothingham estate, so called, for park purposes; and that in April, 1892, it had taken for park purposes all of the estates surrounding Jamaica Pond except the land of the peti-

tioners and the two estates immediately adjoining on the south, on one of which, as appeared from the map and plans used at the trial, was a large ice-house, or, perhaps more correctly, a block of ice-houses. It further appeared that electric cars, running from the city proper, were introduced into Jamaica Plain in October, 1891.

The defendant offered in evidence the sale by a witness, Francis B. Beaumont, of the estate known as the Duff estate, on Burroughs Street, Jamaica Plain, made in May, 1890, which estate consisted of about 60,000 feet of land, with a large house, stable, grapery, and outbuildings. The witness testified that the estate did not border on Jamaica Pond, but was five hundred feet from it; that there was a view of the pond from the estate, and that the same was a perfectly level piece of land. No other evidence was offered relating to the estate at the time, but the atlas of West Roxbury and a large plan showing the two estates and their relation to each other were already in evidence. The defendant then asked the witness to state the price for which said estate was sold, to which the petitioners objected, on the ground that the estate was not shown to be similar or similarly situated, and that the sale was remote in time, and was made before the introduction of electric cars and the taking of the other estates about Jamaica Pond; but the judge admitted the evidence, and the petitioners excepted. No sales of similarly situated estates had been offered in evidence by the petitioners, and it appeared from the statements of experts that there had been for many years no sales of land, other than those to the city, nearer than Pond Street, and no sale of a large estate with a house and stable on it in that part of Jamaica Plain more recent than that of the Duff estate, and the judge said that he admitted the sale for that reason.

At the request of the defendant, and against the petitioners' objection, the judge instructed the jury as follows:

"Something has been said to you as to the application of the rule which the Supreme Court have laid down in these cases, as to how far a jury should consider improvements which the city had already made, and I propose to give you this instruction on that point. If the taking of other lands on the pond and in that vicinity in April, 1892, for a public park, included all the

land which the defendant proposed taking, or contemplated improving, then the jury will give a value enhanced, if it was enhanced, by the taking in April, 1892. If, however, the proposed improvement existing on or prior to April, 1892, then included this land of the petitioner, and was part of the plan and scheme then existing, I think you cannot give the petitioner the value enhanced by the taking of April, 1892."

Thereupon the judge read from *May* v. *Boston*, 158 Mass. 21, 29, 30, and then said:

"In other words, it seems to me that means this: that if the scheme of public improvement was thought to be completed, so far as the taking of land was concerned, in April, 1892, and the plan then and theretofore existing included only the lands colored on that plan [referring to a plan in evidence], then you would have a right to take into account the value of the land of the petitioners' testator enhanced by the taking of the other lands, if it was enhanced, I mean; and they would have a right to recover for the enhanced value. If, however, the plan and scheme then existing, and before that existing, involved the land of the petitioners' testator as well as that which was taken, then, under the rules and principles laid down by the Supreme Court, it does not seem to me that they would be entitled to the enhancement of the value to their land, if it was enhanced, by the taking in April, 1892. It is a question of fact.

"It is claimed by the petitioners that there was no evidence at all that the original plan did include the taking of these three lots of land. While it is not for me to say whether there was or not, I have only stated this general rule, and if it is applicable to the case you should adopt it and use it."

After this instruction had been given, to which the petitioners duly excepted, claiming that the only rule of damages applicable to the case was the fair market value of the land at the time of the taking, the petitioners requested the judge to instruct the jury that no evidence had been submitted as to whether the scheme of public improvement, as adopted by the park commissioners in April, 1892, included the taking of the land of the petitioners' testator, or contemplated the taking of the same; but the judge declined to give this instruction, and the petitioners excepted.

No direct evidence had in fact been offered by either party as to the action of the park commissioners in reference to the plan of park improvement, either as contemplated or determined upon, except that the actual purchases and takings by the city prior to December, 1892, had been put in evidence, as heretofore stated. But one of the real estate experts who testified for the respondents gave as among the reasons for his opinion that the land of the petitioners had not increased in value by reason of the takings of April, 1892, that every one knew that the park plans contemplated taking the estate of the petitioners' testator, and all the remaining lands on Jamaica Pond, and that no purchaser would pay an increased price for it, as he would know that his land would be taken before any work was done to improve the park lands taken in April, 1892; and counsel for the city so argued to the jury. Many of the experts who testified for the petitioners had given, among other reasons for the value they placed upon the estate, the fact that the estate was bounded on one side by a park, and was increased in value thereby.

Except as above, no reference had been made to the plans, purposes, or intentions of the park commissioners, only so far as they had been declared by their purchases and taking by eminent domain of lands on or near Jamaica Pond.

The jury returned a verdict for the petitioners in the sum of $47,500; and the petitioners alleged exceptions.

R. M. Morse, (*J. Duff* with him,) for the petitioners.

T. M. Babson, for the respondent.

MORTON, J. We cannot say that the Duff estate was so unlike the estate of the petitioners' testator that the price paid for it would furnish no criterion as to the value of the latter, and that the ruling admitting it was clearly wrong, as it must appear to have been in order to justify us in holding that the discretion of the presiding judge was improperly exercised. *Paine* v. *Boston*, 4 Allen, 168. *Shattuck* v. *Stoneham Branch Railroad*, 6 Allen, 115. *Patch* v. *Boston*, 146 Mass. 52.

It does not appear that the introduction of electric cars had affected prices so much, or that the general rise in values had been so great, as to render it misleading as a standard of comparison. The fact that the sale was two and a half years before

the taking in question did not of itself render it incompetent. *Benham* v. *Dunbar*, 103 Mass. 365.

The remaining question relates to the instruction given by the court, that, if the scheme of public improvement existing in April, 1892, did not contemplate the taking of the land of the petitioners' testator, they would be entitled to recover damages for the enhanced value resulting from such scheme, but that, if it did, they would not; and to the refusal of the court to rule that there was no evidence that the scheme adopted in April, 1892, included or contemplated the taking of the land of the petitioners' testator. The petitioners do not controvert the correctness of the general rule of law as stated by the court, and it must be regarded as established in this State. *Dorgan* v. *Boston*, 12 Allen, 223. *Benton* v. *Brookline*, 151 Mass. 250. *May* v. *Boston*, 158 Mass. 21. They contend that there was no evidence to warrant its application to the case before the court, and that its only effect was to mislead the jury. *Brightman* v. *Eddy*, 97 Mass. 478.

It appeared in evidence from the plans, that in 1891 the defendant had acquired for park purposes the estate adjoining that of the petitioners' testator on the north, and also an estate known as the Frothingham estate, and that in April, 1892, it had taken for park purposes all of the estates surrounding Jamaica Pond except the land of the petitioners' testator and the two estates immediately adjoining it on the south. It also appeared from the map and plans used at the trial, that there was on one of the estates not taken a large ice-house, or, perhaps more correctly, a block of ice-houses. One of the defendant's experts, in giving reasons for his opinion that there had been no increase in value by reason of the taking in April, 1892, said that every one knew that the park plans contemplated taking the estate of the petitioners' testator, and all remaining lands on Jamaica Pond, and that no purchaser would pay an increased price, as he would know that his land would be taken before any work was done to improve the park lands taken in April, 1892. It also appeared that the land of the petitioners' testator, and we infer the remaining estates, were taken in December, 1892, only some seven or eight months after the taking in April of the same year. We think that upon this evidence it was com-

petent for the jury to find that the scheme or plan, as it existed in April, 1892, contemplated as a part of it the taking of the land of the petitioners' testator, and of the remaining estates around the pond, and that the instructions that were given were therefore pertinent. It was open to argument, in the absence of evidence to the contrary, that the park commissioners could hardly have entered upon a scheme for the purpose of improving and beautifying the lands around Jamaica Pond as part of a system of public parks, and at the same time have contemplated leaving in the foreground, from different points of view around the pond, an unsightly block of ice-houses, and that it was more reasonable to infer, from the fact that they had acquired so much land around the pond in April, and that this was taken within so few months after, that the taking of it formed a part of the scheme as it then existed.

We think that the exceptions should be overruled, and it is so ordered. *Exceptions overruled.*

EDWARD M. FARNSWORTH *vs.* JAMES F. MULLEN.

Suffolk. March 14, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Memorandum added to Promissory Note — Presentment and Demand — Exceptions.

A contention which is not shown by the bill of exceptions to have been made in the Superior Court is not open in this court.

It is no defence to an action on a promissory note by an indorsee against an indorser, that there was no sufficient presentment to and demand upon the maker, who no longer resided or had a place of business at the place designated in the note, if the evidence shows that due diligence was used by the notary to find the maker.

CONTRACT, against James F. Mullen, upon the following promissory note:

"$1,000. Boston, Feb. 2, 1893. Four months after date, I promise to pay to the order of James F. Mullen one thousand dollars, payable at . Value received. L. H. McDermott. [In pencil] 76 Chauncy Street."

Indorsements: "James F. Mullen, Theodore Pinkham, Congress Street [in pencil], C. M. Farnsworth, F. & Hoyt [in pencil]."

At the trial in the Superior Court, without a jury, before *Dunbar*, J., the defendant requested the judge to rule that, upon all the evidence, the plaintiff was not entitled to recover, because there was no evidence of demand on the maker, and no legal excuse for the omission thereof. The judge declined so to rule, and ruled, as matter of law, that, there being no dispute as to the facts relating to the question of diligence, due diligence had been used to find the maker, and found for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. O. Kyle, for the defendant.

W. F. Kimball, for the plaintiff.

BARKER, J. This case turns upon the effect to be given to the act of the defendant, Mullen, the payee and first indorser of the note, who, upon transferring it to Pinkham, the second indorser, and being inquired of by him as to the address of McDermott, the maker, replied, "I will fill his address out," and thereupon wrote upon the face of the note, below the maker's signature, the words "76 Chauncy Street," and delivered the note with his own blank indorsement to Pinkham. The note was afterwards indorsed in blank by Pinkham and transferred to the plaintiff, who in turn indorsed it in blank and transferred it to a bank, its holder at maturity.

The maker of the note had no knowledge of the memorandum. He lived in Boston, was a bookkeeper, and at the maturity of the note his place of business was at 88 Essex Street and his residence 16 Scotia Street. The note was dated February 2, 1893, and matured on June 5, 1893. The maker had been employed as a bookkeeper in an office on the fourth floor of 76 Chauncy Street until October, 1892, when he left that office. When he began to work at 88 Essex Street, or to live at 16 Scotia Street, does not appear. The only demand of payment was made by the notary at the office at 76 Chauncy Street, on June 5, the last day of grace, shortly after two o'clock in the afternoon, and the notices of dishonor were sent before three o'clock on the same afternoon. The maker was not at

76 Chauncy Street when the demand was made, and then had no place of business there.

The contention that the notices were sent too soon is not open, because it is not shown by the bill of exceptions to have been made in the Superior Court, and the defendant is now restricted to the questions which his bill of exceptions shows were there raised and ruled upon. We therefore have no occasion to consider whether the memorandum placed by Mullen upon the note estops him from contending that the note was not dishonored when the notices were sent.

The effect of a memorandum upon the face of a promissory note has been often considered. See *Heywood* v. *Perrin*, 10 Pick. 228; *Perkins* v. *Franklin Bank*, 21 Pick. 483; *Demond* v. *Burnham*, 133 Mass. 339; *Saunderson* v. *Judge*, 2 H. Bl. 509; *Exon* v. *Russell*, 4 M. & S. 505; *Price* v. *Mitchell*, 4 Camp. 200; *Williams* v. *Waring*, 10 B. & C. 2; *Trecothick* v. *Edwin*, 1 Stark. 468; *Woodworth* v. *Bank of America*, 19 Johns. 391. Following the decision in *Demond* v. *Burnham*, the effect to be given to the words "76 Chauncy Street" in the present case is to treat them as a part of the date of the note, and as raising a presumption, not conclusive, that the maker resided or had a place of business at 76 Chauncy Street. *Smith* v. *Philbrick*, 10 Gray, 252. 3 Kent Com. 96. *Demond* v. *Burnham*, *ubi supra*. A demand made either at the residence or the place of business of the maker is of course good when no place of payment is stated in the note. But if at the maturity of the note the maker no longer resides or has a place of business at the place designated in the note, and that be known to the holder, diligence must be used to find him. 3 Kent Com. 96, 97. *Smith* v. *Philbrick*, *ubi supra*.

In the present instance the memorandum was added to the note by the defendant Mullen, before its maturity and before it came into the possession of the plaintiff, or of the bank which held it when it became due, and which was charged with the duty of demanding payment. Having thus added the memorandum, Mullen cannot be allowed to say that the holder shall act as if there were no such memorandum. Looking at the circumstances stated in the bill of exceptions, we think the presiding justice was right in ruling that due diligence had been used to find the maker of the note.

The memorandum gave the holder a right to suppose that the maker's place of business was at 76 Chauncy Street. Having this information, it was not incumbent upon the holder to make inquiries before the day of maturity. The notary used due diligence in going with the note, shortly after two o'clock in the afternoon of the last day of grace, to the place indicated in the memorandum as the maker's place of business for the purpose of demanding payment. If upon his arrival there he had found any circumstance to indicate that the maker of the note did not have a place of business there, it would have been his duty to prosecute further inquiries. But we find nothing in the circumstances which should have informed him that the office at 76 Chauncy Street was not the place of business of the maker of the note. The replies which the notary received there justified him in believing that the information given by the defendant in the memorandum was correct.* The ruling that due diligence was used was right.

Exceptions overruled.

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* The notary testified as follows: "I received the note from Mr. Patch, the cashier of the Shoe and Leather Bank, June 5, shortly after two o'clock, after the bank had closed. I went immediately to 76 Chauncy Street, stepped into the elevator and told the boy I wanted to go to McDermott's office. He stopped at the fourth floor, I should say, and pointed to an office. There was a name on the door (what name I do not remember), but I don't think McDermott's name was on the door. I went into the office the elevator boy directed me to, and there saw a gentleman sitting at a desk. I inquired if McDermott was in, and he replied, 'No, he is out.' I asked him what time he would come back, and he said he did not know. I presented the note and asked if he had any funds to pay it; and he replied there was no one there to pay it. I left the office and went to Mr. Farnsworth's, and asked him if he had any better address for McDermott than 76 Chauncy Street. He asked me to call on James F. Mullen (the defendant) and ask him where McDermott was to be found. I went to the store of James F. Mullen & Co., and inquired for Mr. Mullen, as I did n't see him. I knew who Mr. Mullen was by sight, — had a passing acquaintance with him. I was told that Mr. Mullen was out. I handed the bookkeeper the note, and asked him if he knew McDermott, and asked him where he was to be found. He looked at the note, and said, '76 Chauncy Street.' I asked whether Mr. Mullen would be in, and he said he did n't know whether he would or would not. I then went directly to my own office, and when I got there I looked in the latest Boston Directory (1892) and did not find the name of the maker. I telephoned to the store of J. F. Mullen & Co., and asked if Mr. Mullen had been in, and the reply was that he had not been in."

HOLLIS B. PAGE *vs.* GRACE V. COOK.

Suffolk. March 15, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Promissory Note payable when Payor and Payee mutually agree.

A promissory note payable "when payor and payee mutually agree" is to be construed as meaning that it is payable on demand when and after the payor ought reasonably to have agreed.

CONTRACT, upon a promissory note, of which the following is a copy: "$500. Boston, May 1, 1891. On demand, after date I promise to pay to the order of Hollis Bowman Page five hundred dollars, payable when payor and payee mutually agree. Value received. Grace V. Cook."

Answer: 1. A general denial. 2. That the suit was prematurely brought. 3. That while the plaintiff was a pupil of the defendant he deposited in her hands five hundred dollars, as a payment for instruction in singing, then already and to be thereafter received, as the plaintiff should request, until the entire five hundred dollars should be expended; that the plaintiff had received much valuable instruction, and the defendant had requested him to continue to receive instruction; and that the defendant had been and was ready to fulfil her contract, and had so informed the plaintiff verbally and by written communication.

Trial in the Superior Court, before *Sheldon*, J., who directed the jury to return a verdict for the defendant, and reported the case for the determination of this court, in substance as follows.

It appeared that the note was given by the defendant to the plaintiff in consideration of the sum of five hundred dollars, delivered by him to her. There was no evidence that the parties had ever agreed upon a time when the note should become payable; but it appeared that the plaintiff had, before the date of the writ, demanded payment of the defendant, and the defendant had refused payment; and it was agreed that thirty dollars had been paid upon the note.

If the ruling was wrong, the verdict was to be set aside, and judgment was to be entered for the plaintiff for the amount of

the note, with interest from the date of the writ, to wit, June 27, 1893; otherwise, judgment was to be entered on the verdict.

N. F. Hesseltine, for the plaintiff.

E. J. Jones & C. W. Cushing, for the defendant.

MORTON, J. According to the literal construction of this note, although the defendant promises to pay the plaintiff the sum named when he demands it, she may escape the performance of his promise by refusing to agree with the plaintiff when it shall be paid. We think that it hardly could have been the intention of the parties to put it into the power of the defendant thus to avoid payment, and that it is more reasonable to construe it as meaning that it is payable when and after the payor ought reasonably to have agreed. *White* v. *Snell*, 5 Pick. 425. *Sloan* v. *Hayden*, 110 Mass. 141. *Black* v. *Bachelder*, 120 Mass. 171. *Hawkins* v. *Graham*, 149 Mass. 284. *Crooker* v. *Holmes*, 65 Maine, 195. *Works* v. *Hershey*, 85 Iowa, 340. *Lewis* v. *Tipton*, 10 Ohio St. 88. The promise to pay is absolute. It is only the time of payment which is left to future agreement. Evidently it is expected from the tenor of the note that the parties will agree, and that a time will be fixed, and that the note will be paid. But no time is fixed within which that agreement is to be made. The law will therefore imply a reasonable time. Besides it is the payment, not the non-payment, of the note for which the parties are providing. If the payor does not within a reasonable time agree when the note shall be paid, there is nothing unjust nor at variance with the real meaning of the contract in holding that the payee may thereupon demand payment, and, if the note is not paid, proceed to collect it. The case of *Barnard* v. *Cushing*, 4 Met. 230, is distinguishable. The question chiefly discussed in that case was whether the indorsement on the note constituted a part of it, and the court held that it did. The indorsement expressly provided, not only that the payees would receive the amount of the note when convenient for the promisors to pay, but that they would not compel its payment. In bringing suit the payees proceeded therefore in direct violation of their agreement. Possibly, if the question arose now, a different result might be reached from that arrived at in that case.

According to the terms of the report the entry must be,

Verdict set aside, and judgment for the plaintiff for the amount of the note, with interest from the date of the writ.

LEONARD A. BLANCHARD & another *vs.* MARY J. LOW, administratrix.

Suffolk. March 15, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Recovery of Money paid under a Mistake of Fact.

Money paid under a mistake of fact, to which the plaintiff's negligence has in no way contributed, may be recovered by him in an action of contract.

CONTRACT, to recover $660.60 received by the defendant to the plaintiffs' use. Trial in the Superior Court, without a jury, before *Mason*, C. J., who allowed a bill of exceptions in substance as follows.

It appeared in evidence that the defendant's intestate, Benjamin Low, was the owner of a schooner whereof one McKinnon was master; that on or about February 21, 1893, McKinnon, acting for Low, proceeded to Boston with a part of a cargo of herring belonging to Low then on board the schooner, there to sell the herring if he could find a purchaser, or, if he deemed it advisable, to employ a commission merchant to sell the same, and that upon the arrival of the vessel at Boston the master went to the office of Potter and Wrightington.

The plaintiffs called as a witness one Charles W. Wrightington, a member of the firm of Potter and Wrightington, who testified that the master came to his office and offered to sell him the fish; that fifty cents a hundred was the canning price for herring at that time, and that he only bought for canning purposes; that he said he would take some of the fish at half a cent per pound; that the master told him he might have what he wanted at that price, and that it was agreed that he might send his teams to the vessel, and that whatever fish were delivered to the teams there he might have for half a cent per pound; that orders were given for his teams to be sent to the schooner, but that he knew nothing personally about the delivery of the fish; and that the captain said he thought he might get one dollar a hundred weight for some sold to pedlers and others, but that whatever were delivered to his firm they could have for fifty cents.

The plaintiffs also called as a witness H. Staples Potter, of said firm, who testified that he was present in the room at the time Wrightington had his conversation with McKinnon; that he heard Wrightington make the offer of fifty cents a hundred; that he asked Wrightington in the presence of the captain if he had made the purchase, and he said he had, and told him to tell Mayo, their superintendent, to send for them; and that he, Potter, then directed Mayo, over the telephone, within hearing of the captain, to send teams to the schooner for the herring.

Thereafter the master met the plaintiff Blanchard upon the wharf near the vessel, and employed the plaintiffs to sell said herring on commission. The captain testified that he said to Blanchard, "Do the best you can to handle them for me." He agreed to pay to the plaintiffs ten per cent of the proceeds of the sale, and in consideration thereof the plaintiffs agreed to sell and deliver the herring and guarantee payment for those sold by them, and, after paying the usual charges for wharfage and towage and deducting the commission, to remit the balance of the proceeds to Low. It appeared that five per cent was the usual commission charged for selling fish under like circumstances, and that the additional commission was charged on account of the guaranty on the part of the plaintiffs to collect the proceeds of the fish sold by them; that the plaintiffs authorized and instructed Fred Blanchard, one of their employees, to take orders for the fish, to weigh and deliver them, to collect payment at the time of delivery from pedlers and other purchasers whom he did not know to be responsible, but not to require payment at the time of delivery from purchasers of known responsibility, and to use his own judgment as to whom he should sell for cash and to whom he should give credit. It appeared from the testimony of the plaintiff Blanchard, and of McKinnon, that at the time the plaintiffs were employed to sell the cargo nothing was said to them by McKinnon about any previous sale to or conversation with Potter and Wrightington. It also appeared that all the fish were delivered in the following manner. The orders for the same were taken by Fred Blanchard, who then directed the mate of the schooner to pass up some fish; that the fish were then passed in baskets to Fred Blanchard, who weighed them, and delivered them to the purchaser.

The drivers of teams belonging to Potter and Wrightington came with the teams to the schooner, and informed Fred Blanchard that they wanted a load of herring; that thereupon Blanchard ordered the mate of the schooner to pass the fish; that the fish were then passed to Blanchard, who, after weighing them, had them put on to the teams of Potter and Wrightington, and gave to each teamster, when his wagon was full, a memorandum showing the number of pounds of fish in the wagon, written on a printed bill-head of Blanchard and Towle, the latter of whom was Blanchard's partner. The said Fred Blanchard then charged the fish to Potter and Wrightington on a slate which he had for that purpose, and that slate was afterwards given to the plaintiff Towle, who charged Potter and Wrightington on the books of his firm at the rate of one cent per pound for the fish delivered to their drivers as aforesaid. There were delivered to Potter and Wrightington in the manner aforesaid 73,400 pounds of fish; and one cent a pound was the market price of said herring, and a reasonable and fair price for the same.

It did not appear that the master was on board the vessel or anywhere about the place when the fish were delivered, or that he gave any orders to anybody about the delivery thereof, except that he told the mate to deliver the fish to the plaintiffs or their order, and there was no evidence of a delivery to Potter and Wrightington except in the manner aforesaid. It also appeared that, after all the fish were delivered, the plaintiffs settled with Low on the basis of one cent per pound for all fish delivered by them, after deducting a commission of ten per cent and paying wharfage and towage charges advanced by them.

It appeared that, some days after the settlement, the plaintiffs sent to Potter and Wrightington a bill for $734 for 73,400 pounds of fish, claimed by them to have been sold by the plaintiffs to said Potter and Wrightington; that Wrightington, of the firm of Potter and Wrightington, told the plaintiff Blanchard that he would not pay the bill because he had purchased the fish from the master of the schooner at half a cent per pound. It further appeared that at the time the fish were put upon Potter and Wrightington's teams nothing was said about the price thereof, or that they had purchased them of the master, and that the plaintiffs supposed that they were selling to Potter and Wrightington at the market price.

The defendant asked the judge to rule that, upon the evidence, the plaintiffs were not entitled to recover. The judge refused so to rule, and found as a fact that a complete sale of the fish received by Potter and Wrightington was made by the captain to Potter and Wrightington, and found for the plaintiffs; and the defendant alleged exceptions.

J. J. Flaherty, for the defendant.

R. T. Babson, for the plaintiffs.

MORTON, J. There was evidence tending to show that the captain had authority from the defendant's intestate to sell the fish, and that he sold to Potter and Wrightington what fish they might want at half a cent a pound. The fish were in bulk, and the quantity which Potter and Wrightington would take was uncertain, and it was necessary to weigh and separate them from the rest of the cargo. No title to any specific quantity passed therefore at the time of the bargain. *Young* v. *Austin*, 6 Pick. 280. *Merrill* v. *Hunnewell*, 13 Pick. 213. *Scudder* v. *Worster*, 11 Cush. 573. *Foster* v. *Ropes*, 111 Mass. 10. The sale was an executory one. The subsequent arrangement made with the plaintiffs on behalf of the defendant's intestate by the captain, without the knowledge or consent of Potter and Wrightington, to sell the cargo on commission, could not affect or avoid the previous contract with Potter and Wrightington; and when they sent their teams to the vessel for fish pursuant to directions which there was evidence that the captain knew or understood, the delivery must be referred to the contract between the principals rather than to the mistaken belief on the part of the agents of the defendant's intestate that it was a sale effected through their own instrumentality. It was competent for the court to find, upon the evidence before it, that in sending the money as they did to the defendant's intestate the plaintiffs were acting under a mistake of fact, to which their own negligence had in no way contributed.

The question as to the admissibility of the evidence relating to usage has not been argued, and we treat it as waived.

Exceptions overruled.

DANIEL McGILVRAY *vs.* WEST END STREET RAILWAY COMPANY.

Suffolk. March 15, 18, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Assault by Street Railway Conductor — Scope of Employment.

A street railway company is not liable for an assault committed by one of its conductors while not acting within the scope of his employment by the company.

TORT, for damages alleged to have been occasioned to the plaintiff by one of the defendant's servants assaulting him while such servant was acting within the scope of his employment.

Trial in the Superior Court, before *Hopkins*, J., who ruled that there was no evidence to go to the jury upon which it was competent for them to find a verdict for the plaintiff, and directed a verdict for the defendant; and the plaintiff alleged exceptions, in substance as follows.

The plaintiff testified that he jumped on the car in East Cambridge and asked the conductor if it went as far as Prospect Street; that the conductor did not seem to hear him, and he took it for granted that it was all right, and paid his fare; that it then turned into the stable on Cambridge Street near Eighth Street, and he got off the car, and after an altercation with the conductor as to the contract to carry him to Prospect Street not being carried out, he walked along with him until opposite the stable door; that he put his left foot upon the step, the other being down, and had his hands in his pockets talking with him, and the conductor said, "Are you looking for trouble?" and he said, "No, I am not looking for trouble, I am waiting a little while for another car"; and the conductor pushed him around and snapped his leg off.

On cross-examination, the plaintiff further testified that the conversation between him and the conductor took place after he had left the car and gone on the sidewalk, and after he knew that it was the end of the route; that he got off at the point in the street where the track running into the stable leaves the

straight track in the street, and that he walked with the conductor on to the sidewalk. There was also evidence by another witness that the track along there was in the usual position in the centre of the street; that it was twelve or fifteen feet from the railroad track to the sidewalk on the side of the street toward the stable; that the sidewalk was the ordinary one, though not paved; that the switch was where cars were turned to go into the stable; that from that point down to the stable door where the accident happened was about thirty feet, or a little more; and that there were signs on the buildings, "Positively no admittance. Apply at the office." It also appeared that the street cars stopped for passengers to get on or off cars at a point in the street in front of the stable, and that it was the custom for passengers to collect there to take the cars; it was also the starting point for some of the cars.

L. M. Child, for the plaintiff.

W. B. Sprout, for the defendant.

BARKER, J. If we assume in favor of the plaintiff that upon the evidence the jury might find that he had paid his fare through to Prospect Street, and that, in addition to his right to remain unmolested upon the public street, he had the right, upon leaving the car which had been switched into the stable, to inquire of the conductor why the contract to carry him to Prospect Street was not carried out, and to enter the stable to ascertain when and how he could be carried to his destination, yet the verdict for the defendant was rightly ordered. The only reasonable inference to be drawn from the whole evidence is, that, while waiting in the public street to take one of the defendant's cars, he saw fit to engage in an altercation with a person who was in fact one of the defendant's servants, and received from him an assault which was not made for any purpose which the jury could find to be part of the defendant's business. The defendant had no control over the place where the plaintiff was, and no duty to protect the plaintiff there from any assaults, although it would be responsible to him for assaults committed upon him there as elsewhere by its servants in the scope of their employment. The suggestion that it could be found within the scope of that employment for a servant to punish him for asserting his rights against the defendant is

of course untenable; nor is there in the suggestion that the assault was for the purpose of putting him out of the defendant's premises sufficient ground to warrant submitting the case to a jury. *Exceptions overruled.*

FRANK J. MALONEY *vs.* WILLIAM J. CASEY & trustee.

Essex. March 18, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Savings Bank charged as Trustee — Bond — Discretion of Justice — Rule as to Deposits.

The statutes do not make the liability of a savings bank to be charged as trustee depend upon the plaintiff's complying with the rules of the bank, which were intended to regulate the conduct of a depositor in his relations with the bank; and it is unnecessary to determine whether it is within the power of the Superior Court to order the plaintiff to give a bond of indemnity to the trustee before entering judgment charging the trustee.

TRUSTEE PROCESS. Writ dated March 27, 1894, upon which the plaintiff attached, as the property of the principal defendant, a deposit to his credit in the hands and possession of the Haverhill Savings Bank of Haverhill.

Trial in the Superior Court, without a jury, before *Sherman*, J., who reported the case for the determination of this court, in substance as follows.

Judgment having been entered, by agreement, in favor of the plaintiff against the principal defendant upon the entry of the writ, the Haverhill Savings Bank, summoned as trustee of the principal defendant, filed its answer, alleging that at the time of the service of the writ it had a deposit of $654.79 standing in the name of William J. Casey, but that it did not know whether that deposit was or was not the property of the principal defendant, and later filed an amended answer, in which it alleged that when the deposit was made it had, and ever since had had, a rule that "no payment will be made without the presentation of the deposit-book," and that it ought not to be charged as trustee of the principal defendant until the book

issued to William J. Casey had been surrendered. Counsel for the plaintiff and the defendant having agreed that at the time of the service of the writ upon the alleged trustee there was a deposit to the credit of one William J. Casey of $667.87, that the alleged trustee did not know whether the principal defendant was or was not the William J. Casey who made the deposit, and that at the time when the deposit was made, and ever since, the bank had had the rule or by-law as to the withdrawal of money by depositors already referred to, the judge found that the principal defendant was the person who made the deposit, that the book issued on account thereof had been lost, that the principal defendant had not made any assignment or transfer of the deposit, or given any order for its payment, and ordered the bank adjudged a trustee of the principal defendant on account of the deposit. The bank requested the judge to order that judgment should not be entered against it as trustee without the production of the deposit-book, unless the plaintiff filed a bond to the satisfaction of the court conditioned to save the bank harmless. The judge refused to make such order.

If the findings, orders, and refusals by the judge were correct, and if the judge was authorized to make them, the order adjudging the bank trustee of the principal defendant on account of the deposit was to be affirmed; otherwise the court was to make such orders as law and justice might require.

I. A. Abbott & F. H. Pearl, for the trustee.

S. W. Clifford, for the plaintiff.

FIELD, C. J. We deem it unnecessary to determine whether it was within the power of the Superior Court in this case to order the plaintiff to give a bond of indemnity to the trustee before entering judgment charging the trustee. In ordinary actions at law, although there is no statutory authority, it has been deemed within the power of a court of common law to order such a bond to be given by the plaintiff to the defendant in certain cases where, on equitable considerations, a bond seems to be necessary or desirable to indemnify the defendant against the claims of other persons than the plaintiff on account of the same cause of action. This practice was adopted from the practice in suits in equity. *Potter* v. *Cain*, 117 Mass. 238. *Schmidt* v. *People's National Bank*, 153 Mass. 550.

The Pub. Sts. c. 183, § 33, are as follows: "When a savings bank or an institution for savings is charged as trustee, and in the opinion of the court there arises upon the answer a doubt as to the identity of the defendant, the court may in its discretion require the plaintiff to give bond, with surety or sureties to be approved by the court, and conditioned to save such bank or institution harmless from any loss or damage arising out of a payment by it pursuant to the order of the court." This is the only statutory provision on the subject in trustee process, and the finding of the court in the present case that the principal defendant is the person who made the deposit makes this section inapplicable. The trustee in this case is protected by the judgment of the court against assignments of which it had not received notice at the time it was charged. It is only when a trustee, having notice of an assignment, neglects to bring it to the notice of the court, or neglects to notify the assignee of the pendency of the suit, that the judgment charging the trustee is no bar to an action for the benefit of an assignee. *Wardle* v. *Briggs*, 131 Mass. 518. If we assume that the Superior Court had the power to order a bond in the present case, it was largely within its discretion whether it would exercise the power, and the facts found by that court show that there was no error in law in refusing to order a bond if under the circumstances the exercise of such a discretion is subject to revision by this court.

The last contention is, that by the rules of the savings bank it was provided that "no payment will be made without the presentation of the deposit-book," etc., and that, as it has been found that the deposit-book in this case had been lost, and could not be presented, the bank is not liable to be charged in trustee process. Whether a depositor under such a rule can maintain an action against the bank without having presented or caused to be presented to the bank the deposit-book when the demand for payment is made, or whether the rule would be held not to apply to, or would not be enforced in, cases where the bank-book has been lost or destroyed, need not be considered. The statutes on trustee process plainly intend that credits in savings banks shall be subject to attachments by that process. These statutes have made no provision for compelling the principal defendant to surrender his deposit-book, and without such

compulsion the plaintiff usually could not obtain the book. The credits are attached and applied to the payment of the defendant's debt to the plaintiff, against the will of the defendant, and it has not been made a condition of the attachment that the plaintiff shall conform, in bringing his action, to all the rules which the defendant is required to observe before he can bring an action against the bank. The plaintiff in trustee process, where the depositor is the principal defendant, is not required to give the notice which the depositor is often required to give before he can demand payment of the bank. It is for the Legislature to say on what terms trustee process shall be maintained to reach the credits of the principal defendant, and the rules of the bank are not regarded as essential conditions, on a compliance with which the indebtedness of the bank to the depositor necessarily depends. We are of opinion that the statutes do not make the liability of the bank to be charged as trustee depend upon the plaintiff's complying with the rules of the bank, which were intended to regulate the conduct of a depositor in his relations with the bank.

Judgment charging the trustee affirmed.

ALBERT F. RICH *vs.* WILLIAM H. JORDAN.

Suffolk. March 20, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Contract of Charter — Owner of Vessel pro hac vice — Agency.

The owner of a vessel is not liable for bait furnished to the master while sailing under a written agreement by him and the crew, whereby they chartered the whole of the vessel for a stated period, and agreed to furnish all necessary fishing gear, including bait, etc., at their own expense, and to pay the owner a certain proportion of the fish which might be caught in the prosecution of the enterprise; and the right of the owner to terminate the charter at any time does not take the case out of the general rule until the right is exercised.

CONTRACT, against the general owner of the schooner James A. Garfield, for bait furnished and delivered to the master. The case was submitted to the Superior Court, and, after judgment

for the defendant, to this court, on appeal, upon agreed facts, the material portions of which are as follows.

The goods were ordered of the plaintiff by Samuel Bartell, the master; and the plaintiff, supposing that the master was acting as agent of the owners, delivered the goods, and charged them on his books to the schooner and her owners. The master and other members of the crew on the one part, and the defendant on the other, had previously entered into a written agreement, made without the knowledge of the plaintiff, which was still in force, and which recited that the owner let the whole of the vessel and appurtenances for six months to the master and crew, who were to furnish all necessary fishing gear, including bait, at their own expense, and to pay the owner a certain proportion of the fish that might be caught in the prosecution of the enterprise. The agreement also recited that neither the defendant nor the vessel should be liable for any debts for fishing gear, outfits, etc., and that the defendant might at any time cancel and terminate the charter-party by taking possession of the vessel.

E. P. Carver, for the plaintiff.

J. J. Flaherty, (*R. T. Babson* with him,) for the defendant.

LATHROP, J. Under the contract of charter made between the owner of the vessel and Bartlett and others, the latter became the owners of the vessel *pro hac vice*, and had the entire control and management of her for six months, subject to the right of the general owner to cancel and terminate the charter-party by taking possession of the vessel at any time wherever the vessel might be found. While Bartlett and his associates remained in control, none of them had any authority to bind the general owner for bait, or was for this purpose the agent of the general owner. *Urann* v. *Fletcher*, 1 Gray, 125. *Baker* v. *Huckins*, 5 Gray, 596. *Tucker* v. *Stimson*, 12 Gray, 487.

The plaintiff, however, contends that the right to cancel and terminate the charter at any time takes the case out of the general rule. But it is clear that, until the right is exercised, the general owner has no control, and the charterers are not his agents, except so far as he may have specially constituted them such. *Cutler* v. *Winsor*, 6 Pick. 335.

Judgment for the defendant.

MOSES W. REED *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. March 21, 1895. — June 21, 1895.

Present: FIELD, C. J., MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Offer of Proof — Negligence.

An employee, who, while attempting with another to place a heavy iron casting on a truck, is injured by the jarring of the floor occasioned thereby, causing other castings to fall in the direction of the truck, cannot recover for the injuries from his employer, if he fails to prove that the castings were in a dangerous position, and that the employer knew it, or that they had remained in this position so long a time that the employer ought to have known it.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court before *Hopkins*, J., who, upon the plaintiff's offer of proof, ruled that he was not entitled to recover and directed a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

J. W. Pickering, for the plaintiff.

W. Hudson, for the defendant.

LATHROP, J. We are of opinion in this case that the plaintiff's offer of proof fails to show any negligence on the part of the defendant. There was a lot of iron castings standing upon the floor of a building owned by the defendant, which weighed from two hundred and fifty to three hundred pounds apiece. The plaintiff was sent to help one Bishop move them. Bishop and the plaintiff attempted to place one of these castings upon a truck, and for that purpose took hold of it and tipped it over against the truck, when the jarring of the floor occasioned thereby caused the other castings to fall down in the direction of the truck; and the plaintiff was injured. The plaintiff also offered to show that he was in the exercise of due care; and that "the floor was old, broken, and decayed in some places."

There was no offer to show that there was any structural defect or weakness in the building, or that the floor was in bad condition near the place of the accident. The offers of proof were very vague and indefinite.

It cannot be contended that the defendant was bound so to construct and maintain its building that the floor would not jar, under any circumstances, or under the weight tipped over upon it in this case. The cause of the accident was the falling over of the castings. If it was a proper thing to tip over a casting upon the truck, then it was an improper thing to place other castings in such a position that they would fall over upon being jarred. But there is no offer to prove who put them there, or how long they had been there. Presumably they were put where they were by the fellow servants of the plaintiff. To hold the defendant responsible there should have been an offer to prove that they were in a dangerous position, and the defendant knew it, or that they had remained in this position so long a time that it ought to have known it.

Exceptions overruled.

ISAAC M. STRAUSS *vs.* UNITED TELEGRAM COMPANY.

Suffolk. March 22, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Action by Holder of Bond — Burden of Proof — Statute — Negotiable Security.

In an action to recover interest on the bond of a corporation by the holder thereof, which bond contains an absolute promise to pay interest on certain specified days, the burden of proof is not on the plaintiff to show that income has been earned; and while a provision that "interest shall be cumulative, and if any of the payments cannot be made on the dates named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so," may afford a defence to the company, if it can show that income has not been earned, it cannot be regarded as constituting the earning of income a condition precedent to the maintaining of an action, or as imposing the burden of proof upon the holder of the bond.

A bond of a corporation, which declares that the corporation is indebted to the bearer in a certain sum which it promises "to pay to the bearer hereof, or, if it be registered, to the registered holder thereof," at a certain time and place, "with interest thereon at the rate of five per cent per annum," and which contains nothing on its face to show to whom it was originally issued, is a negotiable bond, and the holder thereof may maintain an action in his own name to recover the interest thereon which is due.

LATHROP, J. This is an action of contract, in eighteen counts, in which the plaintiff seeks to recover the interest alleged to be due on eighteen five-hundred-dollar bonds of the defendant corporation, on January and July 1, 1893, and on January 1, 1894. The plaintiff is not the person to whom the bonds were originally issued, but he is a holder for value, and is also a registered holder. The bonds are under seal, are signed by the president and secretary of the corporation, and are of the following tenor:

"Know all men by these presents, that the United Telegram Company, a corporation duly organized and existing under the laws of the State of New Jersey, for value received, is indebted to the bearer in the sum of five hundred dollars lawful money of the United States, which sum it hereby promises to pay to the bearer hereof, or, if it be registered, to the registered holder thereof, thirty years after the date hereof, at its office or agency in the city of Boston, Massachusetts, with interest thereon at the rate of five per cent per annum, payable semiannually, on the first days of January and July in each year, the first payment to be made on the first day of January, A. D. 1891. Said interest shall be cumulative, and if any of the payments cannot be made on the dates named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so. In the event, however, of the non-payment of any interest due on this bond, and if such default shall continue for nine months after maturity and demand of payment, then the principal of this bond shall at the option of the holders of a majority of this issue become due and payable, and it shall be lawful for the holders of a majority of the total issue of these bonds to enter into and upon all and singular the property owned by said company, and to take possession thereof, and to sell and dispose of the same at public auction for the benefit of all the bondholders. This bond is one of a series of four hundred bonds of like amount, tenor, and date, numbered consecutively from one to four hundred inclusive, and while in the nature of an income bond shall be a first lien on all the property of the said company; and the said company hereby agrees with the holder hereof that it will not issue any mortgage or other lien on its property, or any obligation that shall constitute a lien

prior to this on the assets of the company. No suit either at law or in equity, except to enforce the payment of interest as heretofore set forth, is to be brought on this obligation against the corporation during the term for which this bond is to run. In case, however, this corporation is adjudged to be insolvent or bankrupt by due process of law, then the principal of this obligation is to become at once due and payable. This bond shall not become valid or obligatory until the certificate authenticating the same, which is indorsed hereon, shall be signed by Theodore L. Cuyler, Jr., of the city of New York, as registrar, or by his successor duly appointed.

"In witness whereof the United Telegram Company has executed and attested this bond by its President and Secretary, and has caused its corporate seal to be hereunto affixed at Jersey City, State of New Jersey, this first day of July, A. D. 1890."

Neither of the parties in this case offered any evidence in the court below as to the ability or inability of the defendant to pay interest on the bonds, or whether sufficient income had been earned or not. If the bonds in question had contained simply a promise to pay interest out of the income earned, it may be conceded that the promise would be merely conditional, and the burden would be on the plaintiff to show that sufficient income had been earned to warrant the payment of interest. *Corcoran* v. *Chesapeake & Ohio Canal*, 1 MacArthur, 358. But the bonds in question contain an absolute promise to pay interest on certain days specified. The words which follow, "Said interest shall be cumulative, and if any of the payments cannot be made on the dates named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so," may afford a defence to the company, if it can show that income has not been earned, but cannot be regarded as constituting the earning of income a condition precedent to the maintaining of an action, or as imposing the burden of proof upon the holder of a bond. The case is very similar in this respect to that of *Marlor* v. *Texas & Pacific Railway*, 19 Fed. Rep. 867, before the Circuit Court of the United States for the Southern District of New York. The bond in that case contained an absolute promise to pay interest annually, and contained a recital that it was secured by a mort-

gage of certain lands which constituted a lien upon the net income of a part of the railway. Then followed this clause: "And in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest." It was held that, as there was an absolute promise to pay, the plaintiff by proving his ownership made out a *prima facie* case; and it was said by Judge Wallace: "The fact, whether the net earnings of the defendant's railway are sufficient in any one year to pay the interest or not, is one peculiarly within its knowledge, and it is not incumbent upon a holder of the bond to assume the burden of proving the negative." See also *S. C.* 22 Blatchf. 464, and, on appeal, *nom. Texas & Pacific Railway* v. *Marlor*, 123 U. S. 687, 689.

We are of opinion that on this point the judge in the court below rightly ruled in favor of the plaintiff.

The remaining question in this case is whether these bonds are negotiable, so that the plaintiff may maintain an action thereon in his own name, although he was not the person to whom they were originally delivered, and no consideration moved from him to the defendant.

In 1852, an act was passed by the Legislature of this Commonwealth in the following words: "All bonds and other obligations, under seal for the payment of money purporting to be payable to the bearer, or some person designated, or bearer, or payable to order, which have been or hereafter shall be issued by any corporation or joint stock company, are hereby made negotiable in the same manner and to the same extent as promissory notes are now negotiable." St. 1852, c. 76. This was re-enacted in the Gen. Sts. c. 53, § 6, and in the Pub. Sts. c. 77, § 4, where it reads as follows: "A bond or other obligation under seal issued by a corporation or joint stock company for the payment of money, if purporting to be payable to order, to bearer, or to a person designated or bearer, shall be negotiable in the same manner and to the same extent as a promissory note." While the language just quoted differs slightly from that of the St. of 1852, the meaning is undoubtedly the same.

This statute has been liberally construed, and the negotiability of bonds has been maintained where the language did not fall within the terms of the statute.

In *Chapin* v. *Vermont & Massachusetts Railroad*, 8 Gray, 575, the defendant issued bonds in 1849, payable to ——, and purporting on their face to be secured by a mortgage. This mortgage was subsequently ratified by the Legislature. St. 1850, c. 233. In an action on one of the bonds, the court held that the bond did not come within the terms of the statute, but it was also held that it was clearly the intention of the defendant in issuing the bonds that they should pass from hand to hand and be negotiable; and the court said: "It is therefore fairly to be presumed, and indeed it is an unavoidable implication from all their proceedings, that they consented that any *bona fide* holder of one or more of these bonds, for value, might perfect the contract by inserting at his own pleasure his name as obligee of the bond in the blank space which had been left in it for that purpose. And this is undoubtedly one of the things which it was the object and design of the statute to ratify and confirm."

The opinion in the case last cited rests partly upon the ratification of the mortgage by the St. of 1850, c. 233, but it may be questioned whether there is anything in the language of the statute to justify the last sentence quoted, or whether the Legislature intended anything more than to ratify a mortgage, the power of the defendant to make which was in doubt.

In another action on one of the same bonds, which was finally determined in favor of the plaintiff by the Supreme Court of the United States, no reference was made to the effect of the St. of 1850, and the decision was put upon the broadest ground. Mr. Justice Nelson said: "As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country dealing in them, as well as the repeated decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question." *White* v. *Vermont & Massachusetts Railroad*, 21 How. 575.

In *Haven* v. *Grand Junction Railroad*, 109 Mass. 88, 96, an interest warrant payable to bearer, detached from a bond, was held to be negotiable, so that it could be enforced by a holder for value. No reference is made in the opinion to the statute.

In *Union Cattle Co.* v. *International Trust Co.* 149 Mass. 492, coupon bonds were issued by the plaintiff, a corporation, payable to the defendant, trustee, or bearer, on November 1, 1896, and were expressly made subject to the conditions of an agreement between the parties, whereby a sinking fund of not less than fifty thousand dollars nor more than one hundred thousand dollars was to be applied each year to the purchase or drawing at par of said bonds, and the whole issue might be drawn at par on November 1, 1891, or any coupon day thereafter. These bonds were held to be negotiable "by virtue of the Pub. Sts. c. 77, § 4, as well as by custom, notwithstanding the conditions referred to in them."

On these authorities, we are of opinion that the bonds in question are negotiable bonds, and that the plaintiff may maintain an action upon them in his own name. Any other conclusion would make the bonds a fraud upon purchasers in good faith. There is nothing upon the face of the bonds to show to whom they were originally issued. They were undoubtedly intended by the original parties to them to be negotiable; and if the plaintiff cannot recover in his own name, he is without remedy. See 1 Wait's Act. & Def. 688, and cases cited; *Carr* v. *Le Fevre*, 27 Penn. St. 413, 418; *Bunting* v. *Camden & Atlantic Railroad*, 81 Penn. St. 254; *Society for Savings* v. *New London*, 29 Conn. 174.

Exceptions overruled.

R. D. Weston-Smith, for the defendant.

O. B. Mowry, for the plaintiff.

WILBUR P. RICE *vs.* FRANCIS DOANE & another, assignees.

Suffolk. March 22, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Partner's Private Debt — Proof of Debt against the Estate of a Firm in Insolvency.

If A., the creditor to the amount of five hundred dollars of B., who is one of two partners, gives his check for that amount to the firm, and gives B. a receipt for five hundred dollars, and B. gives A. the firm's note for one thousand dollars, without the assent or knowledge of the other partner, and there is nothing in their dealings with each other, or in B.'s dealings with A. or other parties, which expressly or impliedly authorizes B. to give the firm's note in payment of his own private indebtedness, the transaction is, in substance, paying the private debt of B. to the extent of five hundred dollars, and A. can only prove his claim for five hundred dollars with interest against the estate of the firm in insolvency.

APPEAL from a decision of the Court of Insolvency, allowing the claim of the plaintiff against the insolvent estate of a partnership for five hundred dollars, instead of one thousand dollars. Trial in the Superior Court, without a jury, before *Mason*, C. J., who reported the case for the determination of this court, in substance as follows.

On May 15, 1893, William W. Winkley and Edwin D. Dresser were, and for some years had been, manufacturers and dealers in stationery, as equal partners, under the firm name of Winkley, Dresser, and Company. Winkley gave his attention to the practical conduct of the merchandise transactions, including purchase of stock and preparation of goods, and was not familiar with the books or the financial management of the business. He knew that the firm obtained loans or discounts from time to time as the business required, but did not know the amounts, nor from whom these were obtained. Dresser had entire charge of the books and of the financial management, secured loans or discounts at his discretion for the needs of the business, using the firm name to indorse or sign paper therefor. The firm was of good financial repute and excellent credit. The partners were not limited by the articles of copartnership as to the amount which they should severally draw from the common

fund, and each drew as he had occasion without consulting the other, having proper charge made of the sums so drawn. The partners did not keep separate bank accounts, but checks upon the firm deposit were given in payment of private bills of each partner as a convenient mode of drawing from the common fund. There was an understanding between the partners that the amount drawn by either should not exceed two thousand dollars per year.

In the spring of 1893, Dresser was building a house for his own use, and drew from the firm various sums which he applied to payment of bills incurred therein. A short time previous to said May 15, Dresser paid the plaintiff by the firm's check four hundred dollars upon an indebtedness of nine hundred dollars incurred in building said house. On said May 15 the plaintiff called upon Dresser for payment of the remaining five hundred dollars due him, whereupon Dresser told the plaintiff that the firm was a little short, and if he would lend the firm one thousand dollars for sixty days, he, Dresser, would pay the plaintiff's bill. The plaintiff assented, and gave to Dresser a receipt for the five hundred dollars due him, and his check to the order of the firm for five hundred dollars; and Dresser gave to the plaintiff the firm note for one thousand dollars, payable in two months from date, which note has never been paid, and is the note now offered in proof against the insolvent estate. The plaintiff had no distrust of the financial standing or credit of either Dresser or the firm, but had entire confidence in both. It did not appear whether Dresser had drawn more than his partner from the firm, nor whether he had drawn more than the understanding between the partners permitted; but the plaintiff had no knowledge that Dresser was withdrawing more than he could rightfully do, if such was the fact, nor had he any other cause to know or suspect that Dresser was misusing the credit of the firm than the form of the transaction in question. Both Dresser and Rice acted in the transaction in good faith, intending to effect the payment of Dresser's private debt to Rice with money properly withdrawn by Dresser from the firm, and also to effect a loan of one thousand dollars to the firm from Rice.

The form of the transaction was adopted only as a convenient form of adjusting the balance arising. The partner Winkley

had no knowledge of the transaction, and never assented to it in any way; neither had he knowledge that the firm note had in any case been given to pay a private debt of either partner, nor had he ever assented that it should be given for such purpose. On these facts the Chief Justice allowed the claim of the plaintiff only for five hundred dollars paid by him to the order of the firm, with interest.

If the above order was erroneous in law, the claim was to be allowed for the full amount of the note, with interest.

S. L. Whipple, for the plaintiff.

B. W. Warren, for the defendants.

MORTON, J. When Rice called on Dresser for payment of the balance of five hundred dollars, the latter told him that the firm was short, and that if he would lend the firm one thousand dollars for sixty days, he would pay the bill. Thereupon Rice gave his check for five hundred dollars to the firm, and gave Dresser a receipt for five hundred dollars, and Dresser gave him the firm's note for one thousand dollars, payable in sixty days. This transaction was, in substance, paying the private debt of Dresser to the extent of five hundred dollars with the firm's note. Its real character is not affected by the fact that neither Rice nor Dresser intended any fraud, or went through the form of lending and borrowing a thousand dollars for the firm; they adopted the form which they did only as a convenient mode of adjusting the balance. Although each partner had authority to draw checks on the firm deposit in payment of private debts, and Dresser had done that once with Rice, and although Dresser had authority to borrow money for the firm and give its notes therefor, there was nothing in their dealings with each other, or in Dresser's with Rice or other parties, which expressly or impliedly authorized him to give the firm's note in payment of his own private indebtedness. The note was taken by Rice with knowledge of the fact that it was given in part for the private indebtedness of Dresser, and it would have been good in his hands as against the firm only to the extent of the money actually furnished to the firm, unless assented to by the other partner. *Daniels* v. *Hammond*, 154 Mass. 165.

But the court expressly found that "the partner Winkley had no knowledge of the transaction, and never assented to it in any

way; neither had he knowledge that the firm note had in any case been given to pay a private debt of either partner, nor had he ever assented that it should be given for such purpose."

We think that the ruling of the learned Chief Justice of the Superior Court was right.

Order allowing the claim of Wilbur P. Rice only for five hundred dollars, with interest, affirmed.

JAMES O'LAUGHLIN *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 25, 1895. — June 21, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Assault — Rule of Railroad Company — Evidence — Instructions.

While, in an action to recover damages for an assault in being ejected from the train of a railroad company, the defendant should be permitted to introduce in evidence one of its rules as to the manner in which passengers should conduct themselves to support its contention that the conductor was justified in ejecting the plaintiff, yet it cannot be said that the defendant is harmed by its exclusion if the rule of law given by the judge to the jury for their guidance was more specific than the rule of the company, but was the same in substance.

TORT, to recover damages for an assault alleged to have been committed upon the plaintiff by an employee of the defendant. At the trial in the Superior Court, before *Maynard*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, in substance as follows.

The plaintiff offered evidence tending to show that, while a passenger upon one of the defendant's trains, he was forcibly ejected by one of the defendant's conductors from the car in which he was riding. He contended that this assault was committed by the conductor by the authority of the defendant within the scope of his employment as a conductor. The defendant offered evidence tending to show that the plaintiff while upon its train was intoxicated, and in its car publicly and openly used profane and indecent language, and so improperly conducted himself that its conductor was justified in forcibly ejecting him,

which evidence was contradicted by the plaintiff and his witnesses. The defendant also contended that the conductor in ejecting the plaintiff had used only such a degree of force as was necessary in order to overcome the resistance made by the plaintiff, which evidence was also contradicted. The defendant contended that it was bound in law to use all reasonable and proper means to provide for the safety, comfort, and convenience of its passengers, and that it was not only its right, but also its duty, to suppress all disorderly conduct and indecent language, and to expel from its cars any person whose conduct or condition was such as to render acts of impropriety, rudeness, or indecency either inevitable or probable. The defendant was permitted to prove that there was a rule of the railroad as to the manner in which passengers should carry themselves. In order to prove this rule the defendant then offered in evidence Rule 72 of the Boston and Maine Railroad, which was objected to as immaterial, and excluded by the judge upon that ground, the judge stating, after the rule had been shown to him, that the rule only stated the law, and that he would instruct the jury that that was a part of the law; and the defendant excepted.

The judge instructed the jury as follows:

"Railroad corporations are public corporations to some extent. They are what are known as quasi public corporations. They are bound to take every person who presents himself in a proper manner, and carry him upon their trains. And being obliged to do that, of course it is right and reasonable for them to have reasonable rules and orders, and have reasonable and proper conduct upon their trains; and I might say, so far as the passengers are concerned, so far as this passenger is concerned, he has a right when he engages his passage upon the train that the railroad officials shall see to it that he is not annoyed by unseemly talk, by improper talk, by improper actions, upon the train; that is, it is the duty — and I am speaking now of the rights of the passengers — or it becomes the duty of the railroad corporation, on behalf of all the passengers, to see to it that no person upon that train, either a railroad official or a passenger upon that train, shall conduct himself improperly, either by conversation which is improper conversation, swearing, or improper or indecent language, or by intoxication, or by violence of any kind; it is not

only the right of the railroad, but it is the duty of the railroad, to see that all things of that kind are suppressed, and are not countenanced or allowed upon the train, so as to be an annoyance to the passengers upon the road; because, when a passenger contracts for transportation from one point to another, he has a right to have it in a way that he can enjoy it reasonably and properly. . . . Each passenger must conduct himself towards the other passengers so as not to annoy them; and if any passenger does not do that it is the duty of the railroad corporation to see that he does it; and, if it is necessary in order to maintain that degree of order on the train, the railroad corporation has the right, even between stations, to eject a passenger, and use force if it is necessary."

The rule which was excluded was as follows:

"Rule 72. In his interview with passengers he [the conductor] must be civil and obliging. He must see that order and decorum are preserved in the cars, and prevent the annoyance of passengers by the rude and improper conduct of others."

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

W. I. Badger, for the defendant.

E. R. Anderson, (*C. W. Bartlett* with him,) for the plaintiff.

FIELD, C. J. The rule of the company should have been admitted in evidence, but a majority of the court are unable to see that the defendant was harmed by the exclusion of it. *Commonwealth* v. *Power*, 7 Met. 596. *O'Brien* v. *Boston & Worcester Railroad*, 15 Gray, 20. *Wills* v. *Lynn & Boston Railroad*, 129 Mass. 351. *O'Neill* v. *Lynn & Boston Railroad*, 155 Mass. 371. The rule was very general in its terms, and the rule of law given by the court to the jury for their guidance was more specific than the rule of the company, but was the same in substance.

Exceptions overruled.

HELEN A. WELLINGTON *vs.* INHABITANTS OF BELMONT.

Middlesex. March 25, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Tax on Personal Property — Abatement — Statute.

If any part of personal property assessed to the owner in the town of which he is an inhabitant, and also in the city in which it is situated, is properly taxable to him in the town of which he is an inhabitant, the remedy against that town is by an application for an abatement, and not by a suit at law to recover the alleged excess.

Quarrying stone and breaking it up for use on roads and other similar purposes is not a manufacturing business within the meaning of Pub. Sts. c. 11, § 20, cl. 2, which provides that "all machinery employed in any branch of manufactures shall be assessed where such machinery is situated or employed."

CONTRACT, to recover back a tax paid under protest. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

The plaintiff was the wife of Arthur J. Wellington, and was an inhabitant of the town of Belmont on May 1, 1892. The property on which was assessed in 1892 the tax sought to be recovered was personal property of the plaintiff, consisting of a building, without permanent foundations, situated in Salem, on land of the Boston and Maine Railroad, placed there with the consent of the railroad, and of machinery in the building, and near and about the building, on the land. The plaintiff's husband in 1892, under the name of the Massachusetts Broken Stone Company, carried on the business of quarrying and breaking stone, to be used in macadamizing roads and for other similar purposes, and in said business used the building and machinery. There had been no lease of the property. The tax was laid on the property as personal estate; and it was also taxed to the plaintiff in that year in Salem as personal estate. The tax sought to be recovered was paid on December 9, 1893, by the plaintiff, after a protest in writing signed by her, and this action was brought within three months after such payment.

H. Wardwell, for the plaintiff.

J. B. Goodrich & J. S. Richardson, for the defendant.

MORTON, J. The plaintiff was an inhabitant of Belmont and was assessed there for the building and machinery as personal property. She was also assessed for them as personal property in Salem, where they were situated. If any part of the property (assuming it all to be personal) was properly taxable to her in Belmont, this action cannot be maintained. In such a case the remedy of the party aggrieved is by an application for abatement, and not by a suit at law to recover the alleged excess. *Bourne* v. *Boston*, 2 Gray, 494. *Richardson* v. *Boston*, 148 Mass. 508. It is admitted, in substance, that the plaintiff was taxable in Belmont unless the building and machinery were employed in manufacturing within the meaning of Pub. Sts. c. 11, § 20, cl. 2. The business carried on was "that of quarrying and breaking stone to be used in macadamizing roads and for other similar purposes," and the building and machinery were used in it. We do not see that the business of quarrying stone and breaking it up for use on roads and other similar purposes is any more a manufacturing business than mining coal and breaking it up into merchantable sizes, or farming and cutting ice. *Byers* v. *Franklin Coal Co.* 106 Mass. 131. *Hittinger* v. *Westford*, 135 Mass. 258. *Ingram* v. *Cowles*, 150 Mass. 155. Quarrying and dressing granite could hardly be said to be manufacturing it, though moulding clay into different sizes and shapes and then burning it fairly may be said to be manufacturing brick. Still less could simply crushing granite into smaller and smaller pieces be said to constitute manufacturing, as that word is ordinarily used, though there is a remote sense in which it may be true.

We think that the ruling of the court was right, and that according to the report there must be judgment for the defendant, and it is

So ordered.

JAMES BOYLE *vs.* JOHN B. GOULD & another.

Middlesex. March 25, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Jurisdiction of Inferior Court to enforce Mechanic's Lien.

A proceeding to enforce a mechanic's lien in an inferior court must be brought in that court within whose judicial district the land lies.

LATHROP, J. This is a petition to enforce a lien, under the Pub. Sts. c. 191, for labor performed on a house situated in Newton, in the county of Middlesex. The petition is to the Second District Court of Eastern Middlesex, whose judicial district comprises Waltham, Watertown, and Weston. Pub. Sts. c. 154, § 2. The city of Newton is "a judicial district under the jurisdiction of the police court thereof." Pub. Sts. c. 154, § 1. The petitioner is described in the petition as of Waltham. In the Superior Court the petition was dismissed, on the ground that the land was without the jurisdiction of the Second District Court of Eastern Middlesex; and this is the only question which is before us on the petitioner's appeal.

A petition under the Pub. Sts. c. 191, is essentially a proceeding *in rem;* and the only decree which the court can make, if the lien is established, is a sale of the property and the distribution of the proceeds. §§ 24 *et seq.* By § 10, if the petition is brought in the Superior Court, it must be "in the county where the building or structure is situated," thus treating it as in the nature of a local action.

Section 11 is as follows: "When the amount of the claim does not exceed three hundred dollars, the lien may be enforced by petition to a police, district, or municipal court, or trial justice; and such courts and justices shall have like power and authority within their jurisdiction as are conferred by this chapter upon the Superior Court, and the parties shall have like rights of appeal as exist in other civil cases." It seems to us very clear, that the words "within their jurisdiction" are not to be interpreted solely with reference to the amount claimed, but that they mean that each court, be it police, district, or mu-

nicipal, shall, if the land is within its judicial district, enforce a lien to the amount stated.

The question remains as to the effect of the St. of 1893, c. 396, entitled, "An Act revising and consolidating the laws relating to district and police courts." This act does not in terms repeal any part of the Pub. Sts. c. 191. Section 68 provides: "The provisions of this act so far as they are the same as those of existing laws shall be construed as a continuation of such laws and not as new enactments, and references in laws to provisions of law which are re-enacted herein shall be construed as applying to such provisions so incorporated in this act."

The only direct reference to the Pub. Sts. c. 191, is in § 12, which gives to district and police courts original and concurrent jurisdiction with the Superior Court of actions to enforce liens under the Pub. Sts. c. 191, where the amount of the claim does not exceed one thousand dollars. The only effect of this is to change the jurisdiction given by the Pub. Sts. c. 191, § 11, to police and district courts, from three hundred dollars to one thousand dollars.

Section 13 of the St. of 1893, c. 396, begins as follows: "Civil actions brought in said courts shall be brought in the court in whose district some one of the parties lives or has his usual place of business." It is hence argued that the petition in this case was rightly brought. But we are of opinion that the words "civil actions" refer to transitory and personal actions, and not to local or statutory actions, such as the one before us. The principal object of the act was to revise and amend the Pub. Sts. cc. 154, 155, the first relating to police, district, and municipal courts, and the second to trial justices, so far as they applied to district or police courts. None of the provisions of the chapters last cited have any reference to proceedings to enforce liens. This jurisdiction was, as we have seen, specially conferred by the Pub. Sts. c. 191, § 11, upon inferior courts, when the amount in issue was three hundred dollars. The St. of 1893 in no way affects § 11, except by increasing the amount to one thousand dollars.

There is of course no reason why a proceeding to enforce a mechanic's lien, which must be brought in the county where the land lies, if the proceeding is in the Superior Court, may be

brought out of the county, if the proceeding is in an inferior court. Yet, if the petitioner's view is correct, the proceeding in the latter case may be brought in Berkshire County, if the petitioner lives there, while the land is in Essex County. We do not think that the Legislature intended this, or that apt words to express such an intent have been used.

Taking the statutes together, we are of opinion that a proceeding to enforce a mechanic's lien in an inferior court must be brought in that court within whose judicial district the land lies. The petition was, therefore, rightly dismissed for want of jurisdiction. *Petition dismissed.*

C. F. French, for the petitioner.

L. C. Weed, for the respondents.

PATRICK J. WHALEN *vs.* MICHAEL COLLINS.
JOHN HARDIGAN & others *vs.* SAME.

Middlesex. March 25, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

When Mechanic's Lien not enforceable.

The statutes do not authorize the holder of a mechanic's lien, at his own option, to establish and enforce it upon a part only of the land subject to the lien.

TWO PETITIONS, under Pub. Sts. c. 191, to enforce mechanic's liens for labor furnished in the erection of a building in Waltham. Trial in the Superior Court, before *Lilley*, J., who reported the case for the determination of this court, in substance as follows.

It appeared that the building was situated wholly upon the land described in the certificates and petitions, which description was the same in each case, and was as follows: "Said lot is situated on Willow Street in said Waltham, and is bounded and described as follows, namely: beginning at the southerly point of the premises on Willow Street and thence running along Willow Street fifty-six (56) feet; thence turning and running

along land of Michael Collins one hundred and forty-nine (149) feet; thence turning and running along land of Emerson and Thomas Morrisey fifty-seven (57) feet; thence turning and running along land of Ellen Finnerty one hundred and forty-nine (149) feet to the point of beginning." The land so described formed a part of the larger tract of land, belonging to the respondent, described as follows: "On the east on Willow Street ninety-five (95) feet; on the south on land now or late of Thomas Emerson and others one hundred and fifty (150) feet; on the west on land now or late of the said Emerson ninety-five (95) feet; and on the north on land now or late of the said Emerson one hundred and fifty (150) feet." The southerly line of the part upon which the liens were claimed coincided with the southerly bound of the tract last described; the easterly and westerly lines of the land described in the certificates and petitions coincided with the easterly and westerly lines of the land last described so far north as the part described in the certificates and petitions ran; and the northerly line of the land described in the certificates and petitions ran completely through the tract last described from east to west.

The judge found, upon the evidence, that there was not any physical division of the entire tract in question, nor any intention on the part of the respondent to divide the same; that the north line of the tract described in the certificates and petitions would pass through the eaves of another house standing on the premises north of the line, and that the eaves projected seven inches in one place south of the line; but that the lot itself would not be disadvantageously divided by a line drawn through it from east to west within the tract described in the certificates and petitions, and without running through any building. There was no evidence as to whether the rights of third parties would be injuriously affected by such division. The respondent contended that the liens could not be maintained upon such portion of the entire tract. The petitioners requested the judge to rule that it was not necessary that liens should be claimed upon the entire tract of land upon which the buildings stood, provided that all the land under the building upon which the labor was performed and furnished was included in the description of the lot upon which the liens were claimed. The judge refused so to

rule, and ruled that the liens could not be claimed upon a part of the entire tract, and found for the respondent.

If the ruling requested should have been given, or if the ruling given was erroneous, the cases were to stand for trial; otherwise, judgment was to be entered for the respondent.

E. I. Smith, for the petitioners.

G. L. Mayberry, for the respondent.

BARKER, J. The statute gave the petitioners a lien upon the building which they had helped to erect, "and upon the interest of the owner thereof in the lot of land upon which the same is situated." Pub. Sts. c. 191, § 1. The words quoted have been held to mean the whole lot on which the building stands, although the lot is capable of division, and although there are upon it other buildings which are part of the same realty, if nothing has been done by the owner to indicate a purpose to divide the lot. *Quimby* v. *Durgin*, 148 Mass. 104, 107, and cases cited.

The present question is whether a lien so given can, at the option of the holder of the lien, be established upon a part only of the whole lot. The holder of the lien must first file in the registry of deeds a statement which must contain "a description of the property intended to be covered by the lien." Pub. St. c. 191, § 6. His next step is a suit to enforce the lien by a petition which must contain "a description of the premises subject to the lien." Pub. Sts. c. 191, § 13. Notice of this petition is to be given to the owner of the land, and to the debtor, who often is not the owner, "and to all other creditors who have a lien of the same kind upon the same estate." All these persons are interested in the result of the suit, and may become active parties to it. Pub. Sts. c. 191, §§ 16–23. If the lien is established, the court orders a sale of the property, and if part of it can be separated from the residue and sold without damage to the whole, and if the value of such part is sufficient to satisfy all debts proved in the case, the court may order a sale of such part; if such sale appears to be for the interest of all parties concerned. Pub. Sts. c. 191, §§ 24, 25. If all the claims against the property covered by the lien are ascertained at the time of ordering the sale, the court may order the officer who makes the sale to distribute the proceeds; but if all the claims are not

then ascertained, the proceeds may be brought into court and distributed. But although all creditors who have a lien of the same kind upon the same estate are to have notice of the suit, and may appear and have their respective liens established and enforced in it, they do not lose their liens by omitting so to do, and each may bring his separate suit to enforce his own lien. *Sexton* v. *Weaver*, 141 Mass. 273.

From this outline of the statute it appears that, while other persons than the owner of the land and the petitioner who asks for its sale may be interested in the result of the sale, and while the law recognizes that the sale of a part only of the land may be all that is necessary, the decision of the question whether the lien shall be enforced by a sale of the whole land or of a part is given to the court, which may order a partial sale only when such a sale appears to be for the interest of all concerned. To allow a petitioner to claim and enforce his lien by a petition under which the court can order the sale of but a part of the land covered by the lien, is to enable the petitioner to take from the court important powers explicitly conferred, and the exercise of which may be essential not only to the rights of the landowner, but of other creditors having similar liens on the same estate. Under such a petition the court cannot order a sale of the whole property covered by the lien, for the petition does not embrace it all; nor can it divide the property and sell separately such a part of the whole as it may deem best, for an arbitrary division has already been made by the petitioner. By such a course a division of the owner's property not contemplated by the statute is forced upon him, at the option of the holder of the lien, and a forced division not authorized by law is a wrongful interference with the rights of a landowner, although the two parcels may be worth as much as the whole. Such a course is also prejudicial to the rights of others having similar liens upon the same estate. If they appear in the suit and establish their liens under the petition, they are restricted to a fund which is less than that to which the statute has given them a right; and if they do not appear, but bring subsequent petitions of their own, the sale of the whole land which is subject to their liens will be interfered with by the sale of a part of it under the former petition.

While there may be instances in which no pecuniary harm

would result to any one from allowing a petitioner to enforce a lien upon a part only of the land, the legal damage of an enforced division at the option of one to whom the law has given no such option must, in every such case, be done to the owner. Besides this, such statutes should be so construed as to give the fullest relief and protection to all when the remedy given is pursued in the plain and obvious way pointed out by the statute, and one who attempts to pursue the remedy in some other manner cannot justly complain if he fails. We think, therefore, that the ruling requested by the petitioners, "that it was not necessary that liens should be claimed upon the entire tract of land upon which the buildings stood, provided that all the land under the building upon which the labor was performed and furnished was included in the description of the lot upon which the liens were claimed," was rightly refused, and that the ruling "that the liens could not be claimed upon a part of the entire tract" was right.

Judgments for the respondent.

WILLIAM E. MANNING *vs.* JOHN F. REYNOLDS & others.

Suffolk. March 26, 27, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Writ of Prohibition — Poor Debtor — Postponement of Examination — Presence of Citation at Hearing — Departure without Leave.

The magistrate, in pursuance of a previous request of the creditor's counsel, has a right to postpone the examination of a poor debtor.

The presence of the citation at a poor debtor hearing is not necessary, if the debtor has been ordered to appear and is in court, and his counsel has entered a general appearance.

A debtor departs without leave and without justification if no fact appears in the record of the court or outside of it to justify the departure.

PETITION for a writ of prohibition to restrain John F. Reynolds, the judgment creditor, Prescott Keyes, special justice of the District Court of Central Middlesex, and Henry C. Sherwin, a deputy sheriff, from arresting or causing the arrest

of the petitioner as a poor debtor, upon an execution issued in favor of Reynolds.

At the hearing, before *Morton*, J., it appeared that the petitioner, having received a citation, personally appeared conformably thereto, on November 21, 1894, at the court-room of the District Court of Central Middlesex holden at Concord, at 8.30 o'clock in the forenoon, and remained until after and past the hour of nine o'clock in the forenoon; that the court at nine o'clock convened, Prescott Keyes, Special Justice, sitting; that the poor debtor case entitled "John F. Reynolds of Boston, Judgment Creditor, *v.* William E. Manning of Acton, Judgment Debtor," was called; that the petitioner was present and answered; that John F. Reynolds was not present, neither was any one in his behalf present, and thereupon the petitioner made a motion in writing that he be discharged; that the justice said that he had received a telephonic communication from counsel of the creditor, from Boston, asking to have the case continued, and against the protest of the petitioner, and in the absence of the creditor, or any one in his behalf, the justice continued the case until December 8, 1894, at eight o'clock in the forenoon, at said court-room; that upon December 8, the petitioner appeared with counsel in the court-room a long time before nine o'clock in the forenoon, and there remained until 9.07 o'clock, until which time the said court had not convened; that the court then convened, with the special justice sitting; that the counsel for the debtor entered his appearance in writing, and up to that time no appearance had been entered for the creditor, but the special justice then entered the appearance for the creditor of Messrs. Barry and Blanchard of Boston, neither of whom was present on this occasion, nor had up to that time by themselves entered their appearance; that present in their behalf was a Mr. Bayley; that the debtor, by his counsel, took up the written motion filed by the debtor on November 21, 1894, and the justice overruled it; that the debtor then called for the citation, but the citation was not in court, the officer never having returned it to the court; that the debtor thereupon claimed to be discharged, as the court had no jurisdiction, for the reason that the citation had not been returned by the officer; that the justice overruled the motion, and ordered that the debtor be sworn for examination; that the

debtor did not submit to the jurisdiction of the court, and departed; that since then the court has issued an order for the arrest of the debtor, and the same is in the hands of Henry C. Sherwin, deputy sheriff for the county of Middlesex; and Sherwin has notified the petitioner that he, in pursuance of said order, will arrest the petitioner.

The justice ordered the petition to be dismissed, and, at the request of the parties, reported the case for the determination of the full court, the order of dismissal to be affirmed, or such other disposition to be made of the case as might seem proper.

P. J. Casey, for the debtor.

J. H. Blanchard, for the creditor.

HOLMES, J. 1. The magistrate, in pursuance of a previous request of the creditor's counsel, postponed the examination of the debtor. This he had a right to do. The discretion given him by Pub. Sts. c. 162, § 18, is not cut down by § 68, at least so far as this case is concerned. See *May* v. *Foote*, 7 Allen, 354.

2. We do not perceive the need for the presence of the citation at the hearing. The debtor had been ordered to appear, and was in court, and his counsel entered a general appearance.

3. After this general appearance the magistrate's record shows that "the debtor departs without leave." No fact appears in the record or outside of it to justify the departure. It is not necessary to go into any further considerations.

Petition dismissed.

COMMONWEALTH *vs.* PHILANDER B. HALL.

Suffolk. April 1, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Expert — Evidence as to Handwriting — Cross-examination — Discretion of Presiding Justice.

One acquainted with the handwriting of another may testify concerning it.

The excepting party has no ground of exception to the refusal to permit him to cross-examine a witness as to his qualifications as an expert before he is admitted to testify to the merits, if the excepting party suffers no harm from such refusal.

INDICTMENT in eight counts. The first, third, fifth, and seventh counts charged the forging of certain orders; and the second, fourth, sixth, and eighth counts charged the uttering of the same.

Trial in the Superior Court, before *Mason*, C. J., who allowed a bill of exceptions, in substance as follows.

The evidence of witnesses for the government tended to show that the defendant, in person, presented the several orders set out in the indictment, and obtained the articles named in the orders. Several of the witnesses for the government testified that, at the time of the presentation of the orders by the defendant, they examined the signature, and believed it then to be the signature of D. E. Graves, whose name was signed thereto.

The government then called Graves as a witness, who testified that he had known the defendant since 1890, and that he was employed in a drug store in Warren; that the store was occupied on one side by one Dr. Hastings, whose clerk the defendant was from 1890 to 1892, the other half being occupied by the witness as a jewelry store; and that the defendant, during witness's absence, generally had charge of both sides of the store.

Thereupon, the several original orders set out in the indictment were shown to the witness, and he testified that he knew the handwriting in which the orders were written, and that he had frequently seen the defendant write. He was then asked, "In whose handwriting are these orders, if you know?"

The defendant thereupon objected to the admission of evidence by this witness as to the handwriting, and asked that he be permitted to examine the witness at this point as to the extent of his acquaintance with the defendant's handwriting, before his testimony on the same should be admitted.

The Chief Justice overruled the objection, and refused to then allow the defendant's counsel to interrogate the witness with reference thereto, to which rulings the defendant excepted, and the Chief Justice allowed the witness to answer the question, and the witness answered that he believed the orders to be in the handwriting of the defendant. At the same time the Chief Justice stated that the defendant's counsel could cross-examine the witness on this point when the whole direct ex-

amination of the witness was ended. The witness further testified that no part of the orders was written by himself or by his authority.

This was all the evidence introduced on behalf of the government to prove the handwriting, and the defendant in his cross-examination of Graves, made no inquiries in reference thereto.

The Chief Justice instructed the jury that they had a right to consider the evidence of Graves as to the handwriting, for the purpose of determining whether the defendant was guilty of the charges of forgery.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. M. Lesser, for the defendant.

M. J. Sughrue, First Assistant District Attorney, for the Commonwealth.

MORTON, J. The witness Graves was clearly competent to testify as an expert to the handwriting of the defendant. He testified that he had seen him write frequently, and there was nothing to control this testimony. It is well settled that one acquainted with the handwriting of another may testify concerning it. *Keith* v. *Lothrop*, 10 Cush. 453. *Commonwealth* v. *Nefus*, 135 Mass. 533, 534. *Hopkins* v. *Megquire*, 35 Maine, 78. *Hammond* v. *Varian*, 54 N. Y. 398. *Lewis* v. *Sapio*, Mood. & Malk. 39. *Garrells* v. *Alexander*, 4 Esp. 37. *Tharpe* v. *Gisburne*, 2 C. & P. 21. Best, Ev. (1st Am. ed.) § 232, n. 1. The defendant objects that he had a right to cross-examine the witness as to his qualifications before he was admitted to testify to the merits. Without undertaking to say that in no case would a refusal to permit it to be done operate to the prejudice of the party claiming the right, the defendant fails to show that it resulted in any harm to him in the present instance. He had an opportunity to cross-examine later, and did not see fit to avail himself of it. As the testimony was left, there was nothing to impeach the competency of the witness. The determination of the question whether a witness is qualified as an expert is for the trial court. *Nunes* v. *Perry*, 113 Mass. 274. *Commonwealth* v. *Sturtivant*, 117 Mass. 122. The presiding judge may conduct the examination himself, or may permit it to be made by counsel; ordinarily no harm can result if the adverse party is given an opportunity at

some stage of the case to test the qualifications of the witness, though perhaps the more general and better practice is to permit it to be done as a part of the preliminary examination. Without meaning to say that the court would have the right to refuse any cross-examination on the question of qualifications, we think that in the present case the course pursued was within the discretion of the court as to the order of the trial. See *Sarle* v. *Arnold*, 7 R. I. 582; *Fort Wayne* v. *Coombs*, 107 Ind. 75. 1 Greenl. Ev. § 440, n. *c*.

Exceptions overruled.

FRANK E. HALL *vs.* THE JUSTICES OF THE MUNICIPAL COURT.

Suffolk. April 1, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Writ of Prohibition — Discharge in Insolvency — Action — Pleading — Judgment — Execution.

Where, after B. has received his discharge in insolvency, A. brings an action against him on a claim which was provable against B.'s insolvent estate, but which A. did not prove against it, the failure of B. to appear and plead his discharge in insolvency under Pub. Sts. c. 157, § 83, is not a waiver of his rights, but after execution has issued the discharge may be set up as a bar to an application for a certificate authorizing the arrest of B.

PETITION for a writ of prohibition to restrain the justices of the Municipal Court of the city of Boston from proceeding to hear the application of a judgment debtor for a certificate authorizing the arrest of the petitioner.

The case was submitted on agreed facts, which alleged that on June 11, 1890, Joseph W. Parker sold to the petitioner clothing to the amount of forty-five dollars; that in May, 1891, the petitioner filed his petition in insolvency, receiving his discharge on June 23, 1892; that the bill of Parker was not proved against the insolvent estate of the petitioner; that in December, 1894, Parker began an action against the petitioner in the Municipal Court for the city of Boston to recover the price of the

clothing; that the petitioner did not appear, and did not make any answer, but suffered judgment to be recovered against him by default, without either pleading or proving his discharge in insolvency on January 4, 1895, and that execution issued thereon on January 8, 1895, and the execution contained the usual clause authorizing the arrest of the defendant; that a citation directing the petitioner to appear before the Municipal Court of the city of Boston, and submit to an examination touching his estate, was issued on January 28, 1895, returnable on February 4, 1895; that due service of the citation was made upon the petitioner, and he appeared in response thereto and filed a demurrer, annexing thereto a copy of his discharge in insolvency; that the filing of this demurrer was the first attempt made by the petitioner to plead or prove his discharge in insolvency; and that upon the hearing upon the demurrer the respondents declined to dismiss the application of the creditor, and assumed jurisdiction of the matter, and directed the petitioner to submit himself to the further examination of the creditors.

Hearing before *Knowlton*, J., who was of opinion that a writ of prohibition should be issued; but, at the request of the respondents, reserved the case for the consideration of the full court, such judgment to be entered as law and justice might require.

J. W. Keith, for the respondents.

S. L. Powers, (*R. A. Sears* with him,) for the petitioner.

HOLMES, J. The petitioner suffered judgment by default on a debt for necessaries. He had a discharge in insolvency before the action was brought. The debt was provable, but was not proved in the insolvency proceedings, and therefore was not discharged. Pub. Sts. c. 157, §§ 26, 84. But by § 83 the debtor, after obtaining his certificate of discharge, "shall also be forever thereafter discharged and exempt from arrest or imprisonment in any suit or upon any proceeding for or on account of a debt or demand provable against his estate." The words could not be stronger or more explicit. They apply to an arrest in the suit on which judgment was recovered against the petitioner. *Everett* v. *Henderson*, 150 Mass. 411, 414. This is not denied, but it is argued that he lost his right by not pleading the discharge in that suit. The statute does not say so, but on the contrary gives the protection in absolute terms. No doubt

when a discharge is a bar to a judgment it is proper to plead it. But, as pleadings are addressed to the judgment, not to the execution, as the plaintiff in the suit mentioned was entitled to judgment, and as a judgment for a debt commonly says nothing about arrest or the modes by which it is to be enforced, there is not even a technical ground for the argument. The petitioner was not called on to move until an attempt was made to arrest him. When that attempt was made, the discharge was brought to the attention of the court on the record, and thereupon it had notice of a fact which had ended its power to authorize an arrest. *Writ to issue.*

COMMONWEALTH *vs.* GEORGE B. HUGO & others.

Norfolk. April 2, 1895. — June 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Intoxicating Liquors — Jurisdiction — Sale and Delivery.

On the trial of an indictment for exposing and keeping for sale intoxicating liquors in a town in the neighborhood of Boston, A., a licensed dealer in intoxicating liquor in Boston and the owner of an express run by him between Boston and the town, and B. and C., who were his servants in running the express and were paid by him to deliver liquors in the town, may be properly convicted if there was evidence on which the jury might find that the liquors were not delivered until they reached in the town the hands of those ordering them, and that until then they were at the risk of the defendant A.

INDICTMENT, charging George B. Hugo, Albert P. Hauck, and Mark J. Cody with exposing and keeping for sale intoxicating liquor in the town of Hyde Park. At the trial in the Superior Court, before *Maynard*, J., there was evidence tending to show that the defendant Hugo was a licensed dealer in intoxicating liquors in Boston; that he was also a common carrier of merchandise between Boston and Hyde Park, being the proprietor of an express route; that the defendants Hauck and Cody were in his employ as such common carrier, in the capacities of messenger and driver, respectively; that on July 11, 1894, one Rooney, a police officer of Hyde Park, arrested the defend-

ants Hauck and Cody, and searched the express wagon which they were then driving in the streets of Hyde Park; that upon it, among other articles, were found eleven cases of lager beer, each marked with the name of the person to whom they were to be delivered, and two packages containing intoxicating liquor, also so marked; and that there were numerous orders in blank, in the following form:

"Hyde Park, Mass., 189 .

"To . Purchase for me, as my agent, from Boston, Mass., the following articles, delivery of which you will accept for me, as my agent, from said in said Boston, to be shipped by at my expense.

Article. Price. Name. Address."

There was also found on the team an expressman's book, containing a list of the articles upon the wagon, and against them the names of the persons to whom they were to be delivered, corresponding exactly to the marks and names upon the boxes and packages containing intoxicating liquor.

One Concannon testified that previous to July 11, and within the time mentioned in the indictment, he stopped the defendants Hauck and Cody, who were driving along the street in said Hyde Park, and told them that he wanted them to purchase for him twelve bottles of lager beer of George B. Hugo and Company, in Boston; that thereupon he was told by one or both of the defendants Hauck and Cody, that he must sign an order similar to the one above given; that he instructed the defendant Hauck to sign it for him, as he, Concannon, was unable to write his name; that the beer so ordered was a part of the intoxicating liquor seized by Rooney on July 11; that he paid Hauck the price of the twelve bottles of beer at the time of giving the order; that it was to be at his risk after being set apart for him in the store of George B. Hugo and Company in Boston; that it was to be delivered to him in Hyde Park that night by said Hugo's express; and that the beer had never been received by him, having been confiscated to the use of the Commonwealth.

One Davis testified that on July 3 he gave to the agent of Hugo's express an order for one half-barrel of ale; that on the evening of that day it was delivered to him by the defendant

Hauck, who refused to take the money therefor; that a month afterward the defendant Cody called upon him in Boston with a bill from George B. Hugo and Company; and that he paid a part of the price of the ale. This was controverted by the defendants, and the fact of payment was left to the jury.

Rooney testified that he had seen the defendants Hauck and Cody delivering beer from the express wagon on pay-days, at a mill in Hyde Park, to operatives who he knew were too poor to advance the money for it.

There was other evidence, uncontradicted, that Hugo's express had places of business for the receipt of orders in four places in Hyde Park, and in two general express offices in Boston; that no business of the express was done in the licensed place of business of the defendant Hugo in Boston; that the course of business pursued by the defendant Hugo was to furnish blank orders similar to the one above given, to be filled out by persons who desired the service of the express for any purpose, left at one of the various places of business of the express in Hyde Park, and, if it was desired that a purchase should be made of anything, accompanied by the money; that in so far as the business of the express related to the carrying of intoxicating liquor, and as that liquor came from the defendant Hugo's licensed place in Boston, the *modus operandi* was to forward the order containing the money to George B. Hugo and Company in Boston, and that thereupon the defendant Hugo, if the order met his approval, caused the liquors required by the order to be separated from his general stock, set apart and marked with the name of the person sending the order, and, in case of liquors other than beer, the quality and price of the article sold. Hugo testified that in no case where money accompanied the order had he refused to fill it. He also testified that he was the controlling member of the firm of Hugo and Company, licensed liquor dealers in Boston, the company being his wife, who was a partner in the license for the purpose of keeping it alive in case of his death; and that no charge was made for the delivery of intoxicating liquors, whether by the express or any other common carrier, but that the cost of delivery was included in the price charged for liquor and received by Hugo and Company before the goods were delivered to the carrier.

One Auboushon testified that he worked in a store in Hyde Park where Hugo's express had an order-box; that he gave the orders to the defendant Cody from the drawer in which they were placed; and that he wrote an order for goods for himself upon one of the blanks, and filled out the blank as follows: "To George Hugo & Co. Purchase for me as my agent, from George Hugo & Co., Boston, Mass. [naming articles], delivery of which you will accept for me, as my agent, from said George Hugo & Co., in said Boston, to be shipped by Hugo's express at my expense." He further testified that this order was given to Cody, with others; that he ordered beer or whiskey nine or ten times, and always received the liquor, which was delivered at his place; that he always enclosed the money with the order; that his orders were always given to one of the defendants Hauck or Cody; that they would call three times a week; that he would occasionally write an order, addressed to Hugo, saying, Please send me so and so, and put in the money; and that the orders for liquors were always given to either of the defendants Hauck or Cody.

The defendants asked the judge to rule that there was no evidence to submit to the jury, and to direct a verdict of not guilty as to each defendant. The judge refused so to rule; and the defendants excepted.

The defendants also asked the judge to rule that the defendants Hauck and Cody, being common carriers, had a right to receive orders for merchandise accompanied by the money in Hyde Park, to transmit the same to Boston, and return the articles purchased to the vendee in Hyde Park; that this would not constitute a sale of the article in Hyde Park, and that it made no difference whether the article so purchased was intoxicating liquor or not. The judge refused so to instruct the jury, but gave full instructions as to what would constitute a sale and delivery, and further instructed the jury that the defendant Hugo, or Hugo and Company, had, by virtue of the license, a right to sell and deliver liquors at his place so licensed in Boston, and if the sale was there consummated so that the title to the liquors passed to the vendee, he then, as a common carrier or otherwise, with or without compensation, had the right to transport said liquor to such place as the owner

might direct; that the defendants Hauck and Cody, as common carriers or otherwise, had the right to receive money in Hyde Park from any person with an order therewith to purchase intoxicating liquor for such person in Boston or elsewhere, and deliver the liquor so purchased to him in Hyde Park, but not as the agents of the express company to so purchase and deliver from Hugo and Company.

After verdict and before judgment the defendants Hauck and Cody filed a motion in arrest of judgment. The judge overruled said motion, and also a motion to quash made before the impanelling of the jury; and the defendants excepted.

The jury returned a verdict of guilty against each of the defendants; and they alleged exceptions.

H. H. Pratt, for the defendants.

R. O. Harris, District Attorney, for the Commonwealth.

MORTON, J. The motions to quash and in arrest of judgment have been waived, and therefore need not be considered.

Notwithstanding the form of the orders, there was evidence on which the jury properly could find that the liquors were not delivered until they reached in Hyde Park the hands of those ordering them, and that until then they were at the risk of the defendant Hugo. The jury might have found that the express was owned by the defendant Hugo, and used and run by him as a means of delivering the liquors that were ordered of him; and that the defendants Hauck and Cody were his servants, and were paid by him to deliver the liquors. The jury might have found also that a delivery to the express was no more a delivery to a common carrier in the ordinary course, than would be a delivery to the parcel wagon run by a merchant in Boston to accommodate his customers in Boston and its suburbs. The case is settled by former decisions. *Suit* v. *Woodhall*, 113 Mass. 391. *Commonwealth* v. *Greenfield*, 121 Mass. 40. *Commonwealth* v. *Burgett*, 136 Mass. 450.

Exceptions overruled.

COMMONWEALTH *vs.* ALEXANDER McCANCE.

Suffolk. November 26, 1894. — June 24, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP & BARKER, JJ.

Indictment not specifying the Parts of a Book relied on as Obscene.

An indictment under St. 1890, c. 70, charging the defendant with selling a book containing, among other things, obscene language, must be quashed if it does not specify with reasonable certainty the parts of the book relied on as obscene.

FIELD, C. J. This is an indictment under St. 1890, c. 70. The defendant is charged with "knowingly, unlawfully, feloniously, wickedly, and scandalously" selling "to one Jefferson H. Parker a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say, 'The Decameron; or Ten Days' Entertainment of Boccaccio. A revised translation by W. K. Kelly, with portrait and ten illustrations, drawn and engraved by Leopold Flameng. Published for the Trade,' — and which said book then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment," etc. The defendant moved to quash the indictment for this among other reasons, that "the indictment sets forth in no legal and sufficient terms wherein said book is amenable to the penalties denounced by the statute; no specifications of any offending passage is [*sic*] exhibited." This motion was overruled, and the defendant excepted.

The exceptions also recite as follows: "The government introduced in evidence the book described in the indictment, and caused to be read the following passages from the said book: Novel 1, Third Day; Novel 2, Fourth Day; Novel 4, Fifth Day; Novel 7, Sixth Day; Novel 8, Eighth Day; Novel

6, Ninth Day. No evidence of the character of the book was adduced by the Commonwealth other than the book itself."

The book introduced in evidence is a volume of 710 printed pages, most of which are in the English language, but a few pages are in the original Italian language, with a translation of these into the French language appended. There is a short preface, and at the end of some of the novels are short historical notes by the translator, and each day's entertainment is preceded by an introduction. The Decameron of Boccaccio is a book well known to students of literature, and contains ten novels or stories for each of ten days' entertainment. Of these one hundred novels six only were introduced in evidence by the Commonwealth. We cannot know what parts of the book the grand jury found to be obscene, indecent, and impure, and we know of no way whereby from the indictment the defendant could know before the trial what parts of the book would be put in evidence by the Commonwealth.

The first precedent, so far as we know, for an indictment in this form, is the second count of the indictment in *Commonwealth* v. *Holmes*, 17 Mass. 336. In that case the court say: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court; which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it." This decision has been followed by many of the courts in this country. See *People* v. *Girardin*, 1 Mich. 90; *State* v. *Pennington*, 5 Lea, (Tenn.) 506; *McNair* v. *People*, 89 Ill. 441; *Fuller* v. *People*, 92 Ill. 182; *State* v. *Brown*, 27 Vt. 619; *State* v. *Griffin*, 43 Tex. 538; *State* v. *Smith*, 17 R. I. 371; *United States* v. *Bennett*, 16 Blatchf. C. C. 338. No authorities are cited in *Commonwealth* v. *Holmes*, and the opinion in *Commonwealth* v. *Wright*, 1 Cush. 46, shows that the decision in *Commonwealth* v. *Holmes* must be regarded as an exception to the general rule of pleading relating to libellous publications.

Commonwealth v. *Tarbox*, 1 Cush. 66, decides that in an indictment for publishing an obscene paper, if the indictment purports to set out the alleged obscene publication, it must do it

in the very words of the paper, and the court say: "The excepted cases occur, whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and, then, the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment, by proper averments." See *Commonwealth* v. *Dejardin*, 126 Mass. 46. *Commonwealth* v. *Wright*, 139 Mass. 382, where the indictment was quashed, decides that the indictment "must, at least by some general description, identify the paper" which is alleged to contain obscene matter, and which the defendant is charged with publishing. This question of the mode of pleading in cases of this kind was considered in England by the Court of Appeal in *Bradlaugh* v. *The Queen*, 3 Q. B. D. 607, and it was unanimously decided that the words alleged to be obscene must be set out according to their tenor. The two principal Massachusetts cases were considered, and the decision in *Commonwealth* v. *Holmes* was not approved. Ibid. 621, 638, 641.

But the weight of authority in this country is in favor of the decision in *Commonwealth* v. *Holmes*, and the principle of that decision has been several times recognized by this court as correct, and we think that it must be regarded as an established rule of law in this Commonwealth.

It remains to be considered whether the present indictment contains a reasonably specific description of the obscene, indecent, and impure language which it is alleged that the book, among other things, contains. The Decameron of Boccaccio was probably not written for the purpose of corrupting the morals of youth. It was written long before the invention of printing, when the number of persons who could read were few, and it is supposed to represent the taste of many cultivated people of the world in Italy at the time. It was read for the entertainment of men and women. Parts of it are coarse, and according to the standards of modern times are obscene, indecent, and impure, and other parts of it are decent and pure enough to be read by the present generation. Because it is not a book which is wholly obscene, indecent, and impure, the book is described in the indictment as containing, "among other things, certain obscene, indecent, and impure language." If books of

this character are to be regarded as within the provisions of St. 1890, c. 70, upon which we express no opinion, we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure, should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to other parts. A picture or print has no tenor, and must of necessity be set out by description, but printed words always can be set out according to their tenor. If this is not done because it is alleged that the language is too indecent to be placed on the records of the court, we think that, in the absence of any statute regulating the procedure, the law requires that the language complained of should be identified by such a description or reference that it may be known that the indictment was found upon the language which is put in evidence and relied on at the trial. If the obscene language complained of appears only in some passages in a book, the rest of which is free from obscenity, the book as a whole should not be presented, but only the book as containing these obscene passages.

The records of the Court of Common Pleas and of the Supreme Judicial Court for the County of Worcester contain no copy of the book entitled "Memoirs of a Woman of Pleasure," referred to in the indictment in *Commonwealth* v. *Holmes*, but apparently the whole book was presented and the indictment was at common law. The statutes on the subject were first enacted here in Rev. Sts. c. 130, § 10. It may be suggested that, on a motion to quash the indictment, the court cannot take judicial notice of the contents of the book referred to in the indictment. But it appears by the indictment that the book referred to contains other things than the obscene language complained of, and no attempt has been made in the indictment to distinguish between these other things and the obscene language, and no excuse has been given in the indictment for not designating the parts of the book complained of, and the evidence shows that the indictment might easily have described or referred to the novels put in evidence, so that the defendant could

have known to what he was called upon to answer at the trial. We are of opinion that the indictment is not reasonably specific, and that it should have been quashed. The exceptions taken at the trial need not be considered.

Exceptions sustained.

P. H. Hutchinson, for the defendant.

F. E. Hurd, First Assistant District Attorney, for the Commonwealth.

GUSTENE KENERSON *vs.* MARGARET COLGAN.

Suffolk. April 2, 1895. — June 24, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Consideration of Contract — Agreed Facts — Action.

Where the consideration of the defendant's promise to make papers giving property to the plaintiff's wife after the defendant's death is that the plaintiff will move from E. to A. and take care of the defendant, the moving of his buildings by the plaintiff from E. to A. is no part of the consideration and therefore, conversely, the defendant's promise is not the consideration, or conventional inducement for moving the buildings, and a repudiation of the express promise does not let in a recovery for the buildings on a *quantum valebat*.

Where, judgment having been entered for the defendant, it seemed very possible that the agreed facts did not present the plaintiff's case adequately upon the point in question, the court said that the judgment was without prejudice to a motion to discharge the facts in the Superior Court, if the counsel for the plaintiff thought that he could show just cause.

CONTRACT, for the value of the materials and labor employed in taking down certain stables and sheds, and in erecting the same. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, upon agreed facts, in substance as follows.

The plaintiff, who had married a daughter of the defendant, was in the year 1889 engaged in the business of teaming, his place of business being Chambers Street, Boston, and was residing in East Cambridge; he used in his business from twelve to fifteen horses; in the month of June, 1890, the defendant was very sick at her home in Allston, and the plaintiff moved her

to his house in East Cambridge, and when removed to the plaintiff's house she was unable to sit up, and was wrapped in blankets; and after she had been at the plaintiff's house some weeks she became convalescent, and after a period of about seven weeks was able to go down stairs and be about the house. She then desired to go back to her home in Allston, and said to the plaintiff that, if he would move from his residence in East Cambridge to her house in Allston, and take care of her, she would not charge him any rent, and would as soon as she was able make papers giving the property to Mary, the wife of the plaintiff, after her death; that she had done all she ever should do for the boys, and all she had should be Mary's. She urged the plaintiff's wife to try to influence her husband to move to the defendant's house in Allston; and in pursuance of the defendant's request and promises, the plaintiff moved from his residence in East Cambridge to the defendant's house in Allston, and he also moved his buildings and stables he had erected in East Cambridge. He did so relying upon the statements of the defendant that she would make papers to convey the property to the plaintiff's wife Mary, so that she would own the property at her decease; and the plaintiff incurred expenses in moving the buildings from East Cambridge and erecting the same upon the defendant's premises at Allston, and in fitting up an extra tenement upon the defendant's premises, to the full amount stated in the plaintiff's declaration, to wit, $514.74; the plaintiff had lived at the defendant's house several months after he had moved the buildings to Allston, and had performed his part of the agreement, when the defendant executed a lease of the premises to one Charles H. Colgan, who immediately notified the plaintiff to vacate the premises, as he was then entitled to possession of them under said lease. The plaintiff in a few days vacated the same, and attempted to remove the sheds and buildings so moved and erected by him as aforesaid, but was prevented by the defendant and the said Colgan from so doing. The defendant died soon after the action was brought, without ever having made any conveyance to the wife of the plaintiff.

If the plaintiff was entitled to recover, judgment was to be entered for him in the sum of $514.74, and interest thereon from the date of the writ; otherwise, judgment was to be entered for the defendant.

J. M. Browne, for the plaintiff.

F. Burke, for the defendant.

HOLMES, J. According to the agreed statement of facts, the consideration of the defendant's promise to "make papers giving the property to Mary, the wife of the plaintiff, after her death," was that the plaintiff "would move from his residence in East Cambridge to her [defendant's] house in Allston, and take care of her." Moving his buildings was no part of the consideration, and therefore, conversely, the defendant's promise was not the consideration or conventional inducement for moving the buildings, and a repudiation of the express promise does not let in a recovery for the buildings on a *quantum valebat*, as in *Parker* v. *Tainter*, 123 Mass. 185. Moving the buildings was either a gratuitous act, or at most a means by which the plaintiff enabled himself to do his stipulated part. It was not within the defendant's request. *Bacon* v. *Parker*, 137 Mass. 309, 311.

As the facts stand, judgment must be for the defendant; but as it seems very possible that the agreed statement does not present the plaintiff's case adequately upon this point, we think it best to mention that our judgment is without prejudice to a motion to discharge the facts in the Superior Court if the counsel for the plaintiff thinks he can show just cause. *Platt* v. *Justices of the Superior Court*, 124 Mass. 353, 355.

Judgment for the defendant.

WILLIAM CASSADY *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Suffolk. March 27, 1895. — June 25, 1895.

Present: FIELD, C. J., MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Negligence — Obvious Defect — Assumption of Risk — Employers' Liability Act.

An employee cannot maintain an action against a railroad company for injuries occasioned while he was at work in a freight car, by the falling upon him of a grain door, which had been swung up against the roof of the car and there fastened by a hook by the plaintiff and a fellow servant a short time before, if

the defect in the door, if any, which caused it to fall, was an obvious one, of which the plaintiff took the risk; and on the question whether the plaintiff took the risk, there is no difference whether the action is brought at common law or under the employers' liability act, St. 1887, c. 270.

TORT, for personal injuries occasioned to the plaintiff by the falling upon him of a door while he was at work in a freight car in the defendant's employ. The declaration contained two counts, one at common law, and the other under the employers' liability act, St. 1887, c. 270, § 1, cl. 1.

Trial in the Superior Court, before *Hammond*, J., who ruled that the evidence was insufficient to warrant a verdict for the plaintiff, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

S. L. Whipple, for the plaintiff.

W. Hudson, for the defendant.

LATHROP, J. The plaintiff was injured, while at work in a freight car, by the falling upon him of a grain door, which had been swung up against the roof of the car, and there fastened by a hook, a short time before, the work of swinging up and fastening being done by the plaintiff and a fellow servant.

If there was any evidence in the case which would warrant a finding that there was any defect in the door or its fastening, notwithstanding the testimony of the plaintiff and his witnesses that the hook was all right, it is to be found in the testimony of one Agnew, "that the end of the hook was a little more or less blunt from wear; that the top of the grain door, which would come directly under the jaw over the hook, was a little worn, too, — he could n't say positively how much, — it may have been an eighth or a quarter of an inch; and that there was no iron over that part of the car door to prevent the wood wearing against the jaw above." It is to be noticed, however, that none of the witnesses testified that this condition of things caused the door to fall. Nor is there any evidence that the hook used in this case was not a proper and usual hook to use, although another kind of hook was put in evidence.

The condition of things was known to the plaintiff. He had been in the employ of the defendant for three years, and was an experienced freight handler. It was a part of his duty to put up and hook the grain door; he did it in this instance, and

looked to see whether it was all right, just as he had previously looked to see whether other grain doors which he had put up were all right. If, then, any defect existed in the door which would cause it to fall when the car vibrated, as all cars must vibrate when a heavy load is dumped into them, this defect was an obvious one, of which the plaintiff took the risk. *Russell* v. *Tillotson*, 140 Mass. 201. *Anderson* v. *Clark*, 155 Mass. 368. *Carey* v. *Boston & Maine Railroad*, 158 Mass. 228. *Conroy* v. *Clinton*, 158 Mass. 318. *Murphy* v. *American Rubber Co.* 159 Mass. 266. *Goldthwait* v. *Haverhill & Groveland Street Railway*, 160 Mass. 554. *Allen* v. *Smith Iron Co.* 160 Mass. 557. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153. *Kohn v. McNulta*, 147 U. S. 238.

On the question whether the plaintiff took the risk, there is no difference whether the action is brought at common law, or under the St. of 1887, c. 270. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135. *Fisk* v. *Fitchburg Railroad*, 158 Mass. 238. *Gleason* v. *New York & New England Railroad*, 159 Mass. 68. *Daigle* v. *Lawrence Manuf. Co.* 159 Mass. 378. *Kleinest* v. *Kunhardt*, 160 Mass. 230. *Exceptions overruled.*

CARRIE I. KEENE, administratrix, *vs.* NEW ENGLAND MUTUAL ACCIDENT ASSOCIATION.

Suffolk. March 20, 1895. — June 28, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Accident Insurance — Walking on Railroad Track.

Where the assured, having left the cars on the side nearest a station, passes in front of the engine attached to the train to a platform, and as he steps therefrom upon another railroad track to cross it to go to a street, is struck by a moving freight car and killed, he is within that clause of a policy of insurance which provides that for injuries received while "walking or being on the roadbed or bridge of any railway," the beneficiary shall be entitled to a certain limited indemnity only.

CONTRACT, by the administratrix of the estate of Fred L. Keene, upon a policy of insurance against accident, issued by the

defendant to the intestate, who was killed while crossing the tracks of the Old Colony Railroad Company at Brockton, on June 4, 1891. At the trial in the Superior Court, before *Hopkins*, J., it appeared that, by the policy which insured the plaintiff's intestate against bodily injuries from "external, violent, and accidental means," the defendant agreed to pay $5,000 to the beneficiary, who was the insured's wife, and is the plaintiff, if death should result to the insured from injuries alone; that it provided that no claim should be valid when the death or injury may have happened in consequence "of any voluntary exposure to unnecessary danger, hazard, or perilous adventure"; and that it contained a condition that for injuries received while "walking or being on the road-bed or bridge of any railway, the certificate holder or his beneficiary shall be entitled only to the indemnity or death loss provided in the classification of this association for railway employees insured to cover such risks." The policy also contained the following provision: "In the event of a certificate holder being either fatally or otherwise disabled, in consequence of his engaging temporarily or otherwise in any act or occupation of a more hazardous classification than is indicated by the occupation stated in his application, according to the manual in use by this association at the time of injury, or if not specially mentioned in said manual, approximating thereunto, this certificate shall not be wholly forfeited or voided, but the beneficiary or certificate-holder shall be entitled only to the benefit or indemnity provided in said manual for such more hazardous occupation."

There was evidence tending to show that the intestate was employed in Boston as a salesman in a leather house, and on the morning of June 4, 1891, went to Brockton by cars, arriving about 9 A. M.; that he left the cars on the side nearest the station, and, as it was raining, opened his umbrella, passed in front of the engine attached to the train, to the platform No. 2 on the plan which was in evidence; and that, as he stepped from the platform upon the railroad track to the east, in order to cross the track to the street known as Railroad Avenue, upon the east of the railroad tracks, he was struck by the first of two freight cars which had been kicked from the rear of a train consisting of an engine and several freight cars, which had pulled out to the south from

the station at the time of the arrival of the passenger train, and which, at the time the plaintiff was struck by the detached cars, was standing still upon the track, at some distance south. The detached cars were in charge of a brakeman who was on the top of the car which struck the plaintiff's intestate, and this brakeman called out to the plaintiff's intestate just before he was struck, but not in time to prevent the accident. One of the plaintiff's witnesses testified "that, when he first saw Mr. Keene, he was just stepping from platform No. 2 into the middle of the track next east, and that he was walking northeast obliquely across the track so that the freight car hit his right shoulder first." At the time of the accident the wind was southeast; the passenger engine was blowing off steam, and the plaintiff's intestate was about five feet back from the forward trucks of the passenger engine when struck first by the freight cars. He was thrown to the ground, and both cars passed over his body. It appeared in evidence that it was the custom of the railroad company to switch freight cars by passenger trains while standing at the station delivering and receiving passengers. It also appeared that it was customary for persons wishing to cross to Railroad Avenue to cross the tracks of the railroad in front of the station; that many hundred persons passed there daily; and that this custom had prevailed for many years. The plaintiff called many witnesses, who testified to their knowledge that the railroad company had never forbidden, prevented, or obstructed the public from so crossing to Railroad Avenue at this point.

When the plaintiff's intestate was struck by the cars, he was holding his umbrella over his head in the direction from which the rain was coming, which was nearly the same as the direction in which the freight cars were coming.

The secretary and general manager of the defendant corporation since its organization in 1884 produced the manual in use by the corporation at the date of the policy declared upon, and testified that the amount of death loss provided in the classification for railway employees insured to cover risks for walking or being on road-beds of railroads was under classification D, Inspector of Roadways, or Supervisor, and was in amount $1,500 for death benefit upon a $5,000 policy, and that $1,500 was the highest sum.

The defendant asked fourteen requests for rulings, not material to be considered, all of which the judge declined to give except two. The fourteenth request was as follows: "Mr. Keene was 'walking or being' upon the road-bed when he met his death, within the terms and conditions of the policy."

The judge, among other instructions to the jury, gave the following: "There does not seem to be much dispute as to the way and manner in which he came to his death. The place where he received his injury was upon the road-bed of the railway at that point. It is of importance for you to determine, with reference to the place, whether or not he was rightfully there, or whether or not he was there as a trespasser, because, if you should find that he had no right where he was killed, certain consequences would flow which are important to the parties to this suit. His line of travel, as indicated by the evidence, was from the platform diagonally across the tracks of the railroad to a place or street called Railroad avenue, upon the other side. The question is, whether or not he had a right to pass over the railroad at that point. If he had the right to pass over it, then the consequences that flow from the finding of that fact are two at least. In the first place he would not then be walking on or being on the road-bed of any railway within the meaning of the policy, and the right of recovery, if any exists in this case, would be $5,000 and interest. If he was a trespasser in crossing as he did, he would be walking or being on the road-bed of a railway within the meaning of the policy, and the right of recovery, if it exists in this case, would be $1,500 and interest. Then, too, if he had a right to cross where he did cross, that would be a circumstance which you would take into consideration in determining whether or not, under the instructions I shall give you, he at that time wilfully exposed himself to unnecessary danger; and perhaps the inference which you would draw, in case you found he had a right to be where he was, would be other and different from what you would find and draw in case you should find he had no lawful right to be where he was at the time he received the injury. . . . For injuries received while walking or being on the road-bed or bridge of any railway, the certificate holder or his beneficiary shall be entitled only to the indemnity or death loss

provided in the classification of this association for railway employees insured to cover such risks. Under that condition of the policy, evidence has been offered that the amount that would be paid for a death loss for railway employees, insured to cover such risks in this case, would be not more than $1,500. The claim on the part of the defendant is that the deceased was killed while walking or being on the road-bed of a railway, and they invoke that condition of the policy in order to diminish the amount which shall be paid, if, under the rules of law, anything is to be paid on account of his death. He may be said to have been rightfully upon the road-bed, and would not be a trespasser, provided the railway company had expressly granted permission to him, or to the public generally, to cross at that point."

The judge also instructed the jury that, if there had been such a universal, uniform, and long continued use by the general public for a crossing of the land where the deceased was killed as to give it the character of a line of travel, and such that it might fairly be inferred to be known to the railroad company, the deceased would be presumed to have known of the fact, and to be where he was rightfully, and not as a trespasser.

The judge, in instructing the jury as to what constituted voluntary exposure to unnecessary danger, followed the former decision, reported 161 Mass. 149.

The jury returned a verdict for the plaintiff for the full amount of the policy, $5,000, and interest thereon from October 10, 1891; and the defendant alleged exceptions.

I. R. Clark, for the defendant.

E. M. Johnson, (*J. W. Keith* with him,) for the plaintiff.

HOLMES, J. The rulings asked are disposed of by the former decision in this case. *Keene* v. *New England Mutual Accident Association*, 161 Mass. 149. So also are most of the matters excepted to in the charge. The jury were instructed that, if there had been such a universal, uniform, and long continued use by the general public for a crossing of the land where Keene, the deceased, was killed, as to give it the character of a line of travel, and such that it fairly might be inferred to be known to the railroad company, the deceased would be presumed to have known of the fact, and to be where he was rightfully, and not as a tres-

passer. If this were an action against the railroad company, and Keene had been upon the track simply as a member of the public, these instructions would be open to the criticism made in *Chenery* v. *Fitchburg Railroad*, 160 Mass. 211, 212. See also *Wright* v. *Boston & Albany Railroad*, 142 Mass. 296. But the question is with regard to the rights of a passenger to get off the location of the railroad within which he finds himself by right. With regard to that, it already has been decided to be a question for the jury. It is not necessary to consider whether the mode of statement which was adopted was right in its way of reaching the result. The result was right as applied to this case. See also *Wheelock* v. *Boston & Albany Railroad*, 105 Mass. 203, 208.

The instructions as to what constituted voluntary exposure to unnecessary danger followed the former decision. Cases as to what would be negligence as between the deceased and the railroad are not in point.

The only question left open by the former decision is whether Keene was "walking or being on the road-bed" of a railway, within the meaning of the policy. If he had been walking along the track longitudinally, he clearly would have been within the clause. *Piper* v. *Mercantile Mutual Accident Association*, 161 Mass. 589. Perhaps, if he had been crossing where there was a public way, he would not have been within it. This case is nearer to the line. The words of the policy contain no exception, and in view of the plain purpose of the provision, which is to exclude liability for a well known danger, we are of opinion that the implied exception, if any, does not extend to this case. On this point the exceptions must be sustained, unless the plaintiff consents to a reduction of the judgment to fifteen hundred dollars.

Exceptions sustained.

WILLIAM ROBERTS *vs.* CITY OF CAMBRIDGE.

Middlesex. March 21, 1895. — June 28, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Contract by a City by its Water Board — Specific Performance.

A lawful contract made by a city by its water board to supply a person whose land and water it has taken by the right of eminent domain with a quantity of water from its reservoir "sufficient for washing and steam purposes" at his mill, "to take the place of the water heretofore furnished to him by us for such purposes," may be specifically enforced in equity according to its legal import.

BILL IN EQUITY, filed May 12, 1894, for the specific performance of an agreement to open a four-inch gate at the gate-house at the defendant's dam at Stony Brook, and allow thereafter a quantity of water to pass through from its reservoir above the dam to the plaintiff's mill sufficient for washing and steam purposes. Hearing before *Lathrop*, J., who, at the request of the parties, reported the case for the consideration of the full court, in substance as follows.

The plaintiff was, on February 27, 1885, the owner of certain real estate situated partly in Waltham and partly in Weston, and delineated upon a plan used at the hearing, and also of a certain estate south of River or South Street, described upon the plan as the dam, paper-mill, and Stony Brook, together with the lots upon which the paper-mill was situated. The estate consisted of land above the dam bordering upon a basin of water created by the dam, which basin was upon said date of about thirty-five acres in extent, and the property in the water and the right and privilege to dam and hold up the same was in the plaintiff. Below the street the plaintiff owned and used the premises as and for a paper-mill, and had the right and estate to use the water for power, for washing, and for other manufacturing purposes.

Upon the same date, the city of Cambridge, acting under the authority of St. 1884, c. 256, authorizing it to take the waters of Stony Brook as set forth in § 1 in said chapter, did take, by

a paper taking, all the waters of Stony Brook and its tributaries, and all the property comprised within certain white exterior lines set forth in the plan above mentioned, for the purpose of laying, constructing, and maintaining aqueducts, water-courses, reservoirs, storage basins, dams, and other works necessary and proper for collecting, storing, and retaining the waters of Stony Brook and the tributaries thereto, and the discharging, taking, and distributing the same to and among the inhabitants of the city of Cambridge.

Subsequently, the city actually took from the plaintiff, among other property, the water of the basin, and by means of a high dam, hereinafter mentioned, which it proceeded to erect across the basin at a point a short distance above the dam belonging to Roberts, has since stored and held the water so as to greatly diminish the water rights of Roberts in the premises. The erection of the dam by the city increased the size of the basin above the dam, and the city since the erection of the dam has held the water as against the rights, privileges, and estate of the plaintiff, other than as hereinafter set forth.

Within three years from the time that the water was actually withdrawn by the city, the plaintiff applied to the Superior Court for the assessment of damages, as provided by St. 1884, c. 256, § 5, and the Superior Court appointed three disinterested persons as commissioners.

During the hearing before the commissioners, it appeared that the petitioner not only suffered a loss to his mill and property because of a great diminution of the water for power, but that he would be put, by the loss of this water, to great expense on account of his need for water for washing and manufacturing purposes at his mill. He had no other means, and could not without great expense acquire other means to provide water for these purposes, and so would be compelled to close his mill, unless some method could be employed to provide for him a quantity of water for that purpose. The method that he had employed up to that time had furnished him not only a large supply of water for these and for purposes of power during the wet season, but also a sufficient amount for the dry season. And it appeared that the taking by the city would, unless some remedy could be afforded, compel him to abandon his mill.

The defendant while it was erecting its dam had, so that the plaintiff could have proper water for washing and purposes other than for power, supplied the plaintiff with water from another source than Stony Brook. Upon December 19, 1887, its water board passed the following votes, which were transmitted to the plaintiff as therein provided:

"Voted, That, on December 19, 1887, we will open the four-inch gate at the gate-house of our dam at Stony Brook and allow thereafter a quantity of water to pass through from the reservoir above the dam to Roberts Mills, sufficient for washing and steam purposes, to take the place of the water heretofore furnished to him by us for such purposes.

"Voted, That the president be instructed to write to Mr. William Roberts informing him of the action of the board, and furnish him an attested copy of the foregoing votes."

This action of the defendant was put in evidence before the commissioners, with the assent of all the parties concerned, and such votes were deemed and treated by the commissioners as an agreement and act done by the city that would insure to the plaintiff the use of the water for the future for said purposes. In the assessment of damages in the premises the commissioners entirely eliminated the claim that the plaintiff had made concerning the water on account of washing and for steam purposes, and about August 1, 1888, made a report assessing damages to the plaintiff, which were lessened by this elimination.

This report, which recited that "the petitioner is entitled to recover of the city of Cambridge, as damages sustained by the petitioner in his property by the taking of his water and water rights and injury to his real estate, water, and water rights, . . . the sum of twenty-two thousand four hundred and twenty dollars, including in said sum interest from the time of the actual taking . . . to the date of this award, to wit, August 1, 1888," was accepted by the Superior Court, and the damages were subsequently paid by the defendant.

Shortly after said votes were passed, with the knowledge of the commissioners and with the agreement of the plaintiff and the defendant, the defendant opened the four-inch gate at the gate-house of its dam, and allowed sufficient water for washing and steam purposes at the plaintiff's mill, in accordance with said

votes. Everything necessary to be done in order that the water could be communicated from the defendant's dam to the plaintiff's mill to be used for the purposes designated was done, and the city, through its water board, since the date of the award and up to on or about July 1, 1893, supplied the water, in accordance with the agreement.

The plaintiff assented to this arrangement upon the part of the city to supply him with such water, and the award of the commissioners lessening the amount of his damages in the premises upon the promise, as aforesaid, of the defendant to supply him with such water after December 19, 1887.

On or about July 1, 1893, the defendant neglected to supply the plaintiff with water through said gate, although often requested so to do, and in consequence thereof the plaintiff was put to great expense and inconvenience. The defendant refused to fulfil the contract so to supply water to the plaintiff.

In his argument before the commissioners, the counsel for the city said: "We have passed a vote whereby we will open those gates every day when the water does not run over the dam, and supply to him a million gallons of water, which he may use for wash and condensing water, if he can do so, every day." His argument, however in part at least, presented the vote rather as affecting the probabilities of all the water being used than as conferring a right.

Chapter 39, § 3, of the city ordinances of 1880, in relation to the "Water Works," provided: "The board, so constituted and organized, shall have and exercise all the powers vested in the city council by an act of the Legislature of Massachusetts, approved on the twenty-fifth day of April, A. D. 1865, entitled 'An Act for supplying the city of Cambridge with pure water,' and by an act of the said Legislature, approved on the first day of May, A. D. 1875, entitled 'An Act to provide a further supply of water for the city of Cambridge,' and by any acts in addition to either of said acts, so far as the same can be legally delegated." An act of the Legislature was approved on the twenty-first day of May, A. D. 1884, entitled "An Act to provide a further supply of water for the city of Cambridge."

No vote or order of the city council of Cambridge was passed having any relation to the votes of December 19, 1887.

If in any aspect of the case the plaintiff was entitled to relief in equity, such order and decree was to be made as to the court might seem just and proper; otherwise, the bill was to be dismissed.

G. A. A. Pevey, for the defendant.

E. C. Bumpus, for the plaintiff.

HOLMES, J. This is a bill for the specific performance of an alleged contract. The material facts are as follows. The defendant had taken the water of Stony Brook, under St. 1884, c. 256, subject to prior rights given to other towns. See St. 1884, c. 257. Before the damages were assessed, the defendant's water board passed the following votes, which were communicated to the plaintiff and assented to by him.*

At the hearing before the commissioners on the amount of damages to be paid to the plaintiff by the defendant, these votes were put in evidence, were relied on by the counsel for the defendant, were treated by the commissioners as an agreement by the city, and led the commissioners to eliminate the plaintiff's claim for damages in respect of water for washing or steam purposes, with the result of lessening the amount of the commissioners' award. The city paid the award, and for a time supplied the plaintiff with water as agreed. Since then, however, it has neglected and refused to fulfil the contract, to the great inconvenience and expense of the plaintiff.

The defendant objected to evidence of the foregoing facts; but as it does not appear how they were proved, it is to be assumed that they were proved by proper evidence, if the facts, however proved, were competent. There is no question before us of inquiries addressed to a commissioner as to the ground of his decision.

It is objected that no evidence was admissible of the facts because the commissioners were to assess all the damages suffered by the plaintiff, but if there was a binding contract to give the plaintiff a part of the water embraced in the taking, such a contract would have the same effect as a valid exception of the same amount of water from the original taking, and would cut down the damages accordingly. See *Morse, petitioner*, 18 Pick. 443, 447; *Old Colony Railroad* v. *Miller*, 125 Mass. 1, 5; *Bicknell* v.

* The votes are set forth upon page 178.

New York & New England Railroad, 161 Mass. 428; *Huston* v. *Cincinnati & Zanesville Railroad*, 21 Ohio St. 235; Mills, Em. Dom. (2d ed.) §§ 112, 113.

It is found as a fact in the report that the transaction amounted to a contract, a finding warranted by the evidence. The accepted vote purported to be a contract. By the statute and the city ordinance the water board had all the powers of the city under the act. St. 1884, c. 256, § 10. Cambridge Ordinances, 1880, c. 39, § 3. If it should be doubted whether, supposing the city to have had power to make the contract, the power was one of those conferred on the water board, there was evidence of ratification. The city acted in pursuance of the vote by opening the four-inch gate and allowing the plaintiff sufficient water for washing and steam purposes, it argued from it to the commissioners and it paid the award as diminished in consideration of the vote, although no doubt the argument for the city to the commissioners, in part at least, seemed to present the vote rather as affecting the probabilities of all the water being used than as conferring a right. At that time *Howe* v. *Weymouth*, 148 Mass. 605, had not been decided.

It is urged that the city had no power to make the contract, and that it could not sell water for any purposes except those public ones mentioned in § 1 of the act, of which this was not one. But we see nothing beyond the power of the city in the vote, and still less anything unlawful. The power to make such a contract with a stranger might be limited to the surplus naturally incident to the taking of water for public use. But this contract was made with one from whom more water was taken at the same time, and therefore in its practical effect merely cut down the amount taken from the plaintiff and to be paid for by the defendant, — a perfectly lawful object.

The city having made a lawful contract to the effect set forth in the vote, there seems to be no reason why the contract should not be specifically enforced according to its legal import. *Raphael* v. *Thames Valley Railway*, L. R. 2 Ch. 147. No objection to the jurisdiction is taken in the answer. *Massachusetts General Hospital* v. *State Assurance Co.* 4 Gray, 227. The damages, if any, suffered by the plaintiff may be assessed, in order to give him full relief.

Decree accordingly.

SHERMAN L. WHIPPLE, assignee, *vs.* JOSEPH T. BOND.

Suffolk. March 25, 26, 1895. — June 28, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Insolvent Debtor — Fraudulent Preference — Mortgage as Security for Pre-existing Liability — Instructions.

In an action by an assignee in insolvency to recover certain property, or the value thereof, mortgaged by the plaintiff's insolvent to the defendant, in fraud of the insolvent law, it is enough, under the Pub. Sts. c. 157, § 96, to show that the debtor was insolvent; that the conveyance was made within six months before the filing of the petition, and was with a view to give a preference; and that the person to whom the conveyance was made had reasonable cause to believe the person making the conveyance to be insolvent, and that it was made in fraud of the laws relating to insolvency; and the fact that the defendant assumed a new liability by taking the mortgage cannot avail him, if the mortgage was also given as security for a pre-existing liability.

In an action by an assignee in insolvency to recover certain property, or the value thereof, mortgaged by the plaintiff's insolvent to the defendant, in fraud of the insolvent law, the defendant has no ground of exception to the refusal to instruct the jury that, if they "find that the conveyance was made in good faith by the debtor, with the intent solely to obtain means for the continued prosecution of his business, and with the intention and expectation that he would be able to do so, the same is valid, and will not be invalidated by the fact that the person to whom such conveyance is made is a person having a claim against the debtor, or is under liability for him to the amount of a part of the price, which claim or liability is discharged as a part of the consideration for the conveyance, and the plaintiff cannot recover."

TORT, by the assignee in insolvency of the estate of John E. McDougall, to recover certain property, or the value thereof, alleged to have been mortgaged by the plaintiff's insolvent to the defendant, in fraud of the insolvent law. Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions in substance as follows.

There was evidence tending to show that the mortgage, which covered the entire stock in trade of the insolvent and was stated therein to be for the consideration of $890, was given to the defendant to secure him for a payment made to the firm of Israel W. Munroe and Company, to which the insolvent was indebted to the amount of five hundred dollars; that two hundred dollars was paid by the defendant to a bank to take up a note before matu-

rity upon which the defendant was an indorser, and that the balance of the $890, viz. $190, the defendant contended was paid by check or in cash by him to the insolvent after the date of the mortgage, while the insolvent, who was a witness, testified that this balance had been paid to him by the defendant some time before the date of the mortgage. It appeared that the defendant had entered into a written contract with the firm to which he had made the payment of five hundred dollars, as follows:

"Boston, Mass., November 4, 1892. In consideration of one dollar and other good and valuable considerations, the receipt of which is hereby acknowledged, from Israel W. Munroe & Co., of Boston, I guarantee the payment of stock, sold and delivered to John E. McDougall, to the amount of five hundred (500) dollars, from time to time delivered by the said I. W. Munroe & Co., it being understood that this guarantee is not to be called for while the said McDougall is in business and buying of the said I. W. Munroe & Co. J. T. Bond."

The mortgage was made about six weeks prior to the filing of the petition in insolvency, and at the time of the making thereof and the payment by the defendant to the firm the insolvent was still doing business and buying goods of the firm, and no demand had been made by the firm upon the defendant.

There was evidence tending to show that the defendant, in making the payment, and in advancing the money to the insolvent, did so in the belief that the insolvent would be thereby enabled to discharge all the debts which he owed except to the defendant, and would be able to continue his business; but there was evidence tending to show the contrary. There was no evidence of actual intent on the part of the insolvent to take the benefit of the insolvent laws save the fact of his insolvency at the time of the making of the mortgage, and there was evidence that the defendant did not know of that fact. But the evidence of the insolvent McDougall and his wife tended to show that at the date of the mortgage, and for some time prior thereto, McDougall was insolvent, and that the defendant requested on different occasions that the mortgage be given, and gave as a reason therefor that McDougall was likely to go under, and that he, the defendant, would thereby lose his money, and that he ought to be secured in preference to other creditors; but these facts the defendant contradicted in his testimony.

There was also evidence tending to show that, at the time of the making of the mortgage, the defendant Bond agreed with the insolvent, as a part of the consideration for said mortgage, that he would pay to said firm its claim against the insolvent to the amount of five hundred dollars, which he afterwards paid, and that he agreed that he would take up the note at the bank, which he did before maturity. There was other evidence in the case material to the issues involved, but not material to any requests for rulings made by the defendant, which were denied.

The defendant requested the judge to rule:

"1. The conveyance in question was not made in fraud of the laws relating to insolvency, unless it was made with the intent to contravene the insolvent laws, and such intent cannot be inferred from the fact, if it be found, of the actual insolvency of the debtor at the time the conveyance was made, though he knew that he was then insolvent. To be made in fraud of the laws relating to insolvency, the conveyance must have been made with the intent to take the benefit of the insolvency laws. 2. The plaintiff is not entitled to recover in this action unless the jury find that at the time the conveyance was made McDougall intended to go into insolvency, and that the defendant Bond knew of such intent. 3. If the jury find that the defendant Bond, at the time of the making of the mortgage, assumed a new liability to the plaintiff's insolvent or third persons, or paid money represented as the consideration of the mortgage, the mortgage is valid and the plaintiff cannot recover. 4. If the jury find that McDougall, the mortgagor, was in fact insolvent at the time of the making of the mortgage, such mortgage would nevertheless be a valid mortgage, unless the jury find that it was made with an intent to deplete the mortgagor's estate, or give to one creditor an advantage over others; in other words, to create a preference. It is not sufficient to entitle the plaintiff to recover, that he should prove that the debtor was in fact insolvent, and known to be so by the defendant, but he must prove that the defendant knew or had reason to believe that the debtor intended to take the benefit of the insolvent laws. 5. If the jury find that the conveyance was made in good faith by the debtor, with the intent solely to obtain means for the continued

prosecution of his business, and with the intention and expectation that he would be able to do so, the same is valid, and will not be invalidated by the fact that the person to whom such conveyance is made is a person having a claim against the debtor, or is under liability for him to the amount of a part of the price, which claim or liability is discharged as a part of the consideration for the conveyance, and the plaintiff cannot recover. 6. If the jury find that the defendant, pursuant to an agreement with McDougall, paid to Munroe & Co. the indebtedness of McDougall to the amount of five hundred dollars, and received the mortgage as security for such payment, or gave to Munroe & Co. security therefor, and to McDougall cash representing the remainder of the mortgage debt, then the mortgage is valid and the defendant is entitled to a verdict."

The judge declined to give the instructions in the form requested, and instructed the jury upon the other issues involved in the case, in terms not objected to, and upon the matters embraced in the plaintiff's requests for instructions, as follows:

"A person gives a creditor a preference when he turns out something to him which he does not to other creditors; that is, when he singles out and does something in the way of securing him which he does not to his other creditors. Of course a person may give a preference to one of his creditors, and if he is perfectly solvent no one has any right to complain; it is only when he gives a preference and is insolvent that any one has a right to complain. The question is, Did he give a preference? That depends upon the circumstances. If this man was insolvent, and if the defendant was a creditor or was under any obligation for him, bound for him in any way, indorser upon his note or guarantor on some claim, and if he turned out property to secure him on account of that liability or debt, that would be making a preference. . . . If he made a preference, if he was insolvent, was it with a view to give a preference to a creditor? It is a principle of law that a man is presumed to intend whatever is the natural consequence of his act, whatever that act may be. A man is presumed to intend the natural and ordinary consequences which are the result of an act. If he intended to do an act, that is, to convey his property, and the natural and ordinary result of that was to make a preference, you have a right to say

that he intended to make a preference, — that it was with a view to make a preference. You have a right to say that the person receiving such payment, assignment, etc., if he had reasonable cause to believe such person insolvent or in contemplation of insolvency, received the same in violation of the insolvency laws. If you shall find that McDougall was insolvent or in contemplation of insolvency, and the property was conveyed to the defendant with a view to give him a preference on account of any liability, or any money that he had loaned, or to save him, or to protect him from any liability he was under, then the question is, Had the defendant reasonable cause to know that McDougall was insolvent or in contemplation of insolvency? It does not make any difference whether he knew it. Of course if he knew it, he had reasonable cause to believe it; but if he did n't know it, had he reasonable cause to know it from what he knew about the party, or from what he ought to have known from the circumstances, — from what was said, or from what he could see was the condition of the party? If you say the defendant had reasonable cause to know this man was insolvent or in contemplation of insolvency, or that he had reasonable cause to know that the mortgage was given to him so that the property could not be distributed among all the creditors, so that it was a fraud on the insolvent law, — because the insolvent law means that all property shall be distributed alike, unless some man has a legal preference, — and that this was done by the parties for the purpose of preventing the property from being evenly distributed, then this conveyance is void, and the assignee is entitled to recover.

"There was some evidence that five hundred dollars was taken and was paid to wipe out the debt. If that was the case, if five hundred dollars of this money was paid on this mortgage, was used and understood to be used for the purpose of wiping out this debt which the defendant had guaranteed, that would be a preference, just as much as if it paid the debt. It does n't make any difference whether it was paid to secure him for a debt owed by him, if it was done in that way, directly or indirectly, for the purpose of relieving him from that guaranty which he had signed to Munroe & Co., or if it was done partly for the purpose of raising money to pay off the note which he had indorsed for him, — the note which was given to him, and

which he had indorsed and put into the bank, — it would be just the same as if it was to pay off a debt actually due.

"There was some evidence, and perhaps conclusive, — I don't know about that, — that one hundred and ninety dollars or some sum was paid to the insolvent in checks afterwards, as part of this eight hundred and ninety dollars. If you shall find that any part of this money was used in the way I have said, to pay off the debt or relieve him from obligation, the fact that some of the money was given for a proper consideration would not save the whole transaction from being void, because if a part of this transaction was in order to give preference, the whole thing falls, although part of the money may have been actually paid at the time."

The jury returned a verdict for the plaintiff for $871.07; and the defendant alleged exceptions.

W. Howland, (*C. H. Innes* with him,) for the defendant.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiff.

LATHROP, J. The first, second, and fourth requests for instructions were properly refused. The plaintiff relies upon the case of *Gorham* v. *Stearns*, 1 Met. 366. That case was decided under the St. of 1838, c. 163, § 10, where these words occur: "in contemplation of his becoming insolvent, and of obtaining a discharge under the provisions of this act." It was held that it must be shown that the debtor contemplated going into insolvency and obtaining a discharge. This was changed by the St. of 1841, c. 124, § 3, so as to read, "being insolvent, or in contemplation of insolvency." See *Ex parte Jordan*, 9 Met. 292. As the law stands to-day, Pub. Sts. c. 157, § 96, it is enough to show that the debtor was insolvent; that the conveyance was made within six months before the filing of the petition, and was with a view to give a preference, and that the person to whom the conveyance was made had reasonable cause to believe the person making the conveyance to be insolvent; and that it was made in fraud of the laws relating to insolvency. As is said by Chief Justice Shaw in *Denny* v. *Dana*, 2 Cush. 160, 171: "Contemplation of insolvency is one of the cases in which a preference shall be avoided, but it is not the only one; the other is the being in fact insolvent, under the circumstances, and with the incidents mentioned. Actual insolvency of the debtor, and reason-

able belief, on the part of the creditor, that he is so, without contemplation of insolvency, constitute a fraudulent preference."

And it is generally the rule, that, if the jury find that the person making the conveyance was insolvent at the time that it was made, and that it was made with a view to give a preference over other creditors, and that the person to whom the conveyance was made had reasonable cause to believe that his grantor was then insolvent, they will be authorized in finding that the conveyance was in fraud of the insolvent law. *Abbott* v. *Shepard*, 142 Mass. 17.

The third and sixth requests were properly refused. The fact that the defendant assumed a new liability by taking the mortgage cannot avail him, if the mortgage was also given as security for a pre-existing liability. *Denny* v. *Dana*, 2 Cush. 160, 172. *Forbes* v. *Howe*, 102 Mass. 427, 436. *Peabody* v. *Knapp*, 153 Mass. 242.

The fifth request for instructions was properly refused. It is taken from *Smith* v. *Merrill*, 9 Gray, 144, though it omits all reference to the question whether the conveyance was made with a view to a preference or not, which appears in the instruction in *Smith* v. *Merrill*. In view of the evidence, we are of opinion that the judge gave all the instructions necessary upon this point. *Exceptions overruled.*

WARDENS AND VESTRY OF ST. PAUL'S CHURCH *vs.* ATTORNEY GENERAL & others.

Suffolk. March 21, 22, 1894. — July 16, 1895.

Present: HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trust Deed — Perpetuity — Gift to Trust Fund — Valid Public Charity — Right of Reverter in Founder of Trust — Effect of Deed on Trust created by previous Deed — Express Trust — "Nearest Heir" and "Eldest Lineal Male Descendant" — Accumulation for Benefit of a Charity — Bill in Equity.

Where a grantor, by the terms of a trust deed, confers upon the grantees discretion to apply one half of the income either to the accumulation of the fund, one half of the income of which is intended for the benefit of the grantor or his descendants, or to apply it to charitable or pious uses, there is as to one half of the fund

a valid charitable trust, subject to an illegal discretion as to accumulation for the benefit of the grantor or his descendants which will be rejected; and as to the other half of the fund, an invalid trust being created, the beneficial interest results to the donor; and other trust deeds not delivered to the grantees until after the delivery to and acceptance by them of the first deed cannot affect the interpretation of the first deed, or make the invalid trust valid.

If a grantor makes a gift of a certain sum of money, to be appropriated for the foundation of a trust fund established by him by deed nearly two years previous thereto for charitable uses, and the gift is formally accepted by the grantees as a "donation . . . towards a fund for charitable uses," the gift becomes a part of the fund, and is subject with it to the legal interpretation of this court.

A gift to a library, which first mentions a limited and definite class of beneficiaries, but finally provides that the library is to be used by the public generally, creates a valid charitable trust.

A deed does not convey or purport to convey any right of reverter remaining in the founder of a trust, if such appears to be the intention from the construction of the language of the deed as a whole.

While the effect of a deed cannot alter a charitable trust created by the grantor by another deed executed more than thirty years before, yet if the intention is clear it may operate as a release as to matters of account prior to its date, and from the obligation voluntarily entered into by the trustees, in their discretion, by a former deed, to expend a certain part of the income of the original fund for the purchase of books for a library; and, released from such obligation, the trustees are free to apply the income to objects of charity, in their discretion, according to the original deed of trust.

Where the possession of property is held by a trustee, not by virtue of any personal right or personally asserted right on his part, but is colored by a trust and confidence in virtue of which he received it, the identity of the *cestui que trust* is of very little importance, but the relationship is all important; and, so long as the relation of trust exists, it is a case of express trust, no matter who the *cestui que trust* may prove to be.

S. provided by will that the beneficiary income of a trust fund established by him many years before by deed, which income was to be paid over to "S. or his nearest heir by the name of S. for the time being who shall demand it," should be, when demanded, "the sole property of my heirs having the right to receive the same successively, as described in said trusts." By a later article he gave the residue of his estate in trust, and by another article provided that in the will and wherever else he had used the like terms, "nearest heir" and "eldest lineal male descendant" should mean first his son S., Jr., and his male issue successively, in order of seniority, *in infinitum*. *Held*, that the deed could not be construed to mean that S., Jr. took an estate for life with remainder over, and that the question was unimportant, as he had received the income during life with the acquiescence of all parties; that his eldest son, who was living, was not entitled to a life estate before the beneficial interest under the trust failed and became vested in those entitled to it, and that this interest, the trust being void for remoteness, vested in the trustees under the residuary clause, notwithstanding that the testator in this clause excepted from the residue "any of the trust funds by me created during my life, or the incomes thereof, which are to be disposed of according to the trusts declared concerning the same, without reference to this item."

The limits of an accumulation for the benefit of a charity are subject to the order of a court of equity, and to justify such equitable interference the accumulation should be unreasonable, unnecessary, and to the public injury.

On a bill in equity for instructions as to the interpretation of a deed of trust, questions will not be considered if enough does not appear in the bill to enable the court to pass upon them.

LATHROP, J. This is a bill in equity, filed on August 7, 1891, to obtain the instructions of the court in relation to certain trusts created by David Sears. The defendants are the Attorney General of the Commonwealth, the Proprietors of St. Paul's Church in Boston, the surviving executor of the will of David Sears, the trustees under his will, his eldest grandson, his heirs at law, and Trinity Church.

On March 1, 1821, David Sears conveyed, by six separate deeds, six pews in St. Paul's Church in Boston to the Wardens and Vestry of said church, and their successors in office, in trust to lease the pews and invest the rents thereof to form a permanent fund. The deeds then provided as follows: "And the said Wardens and Vestry and their successors in office shall make a statement of said fund, and of the income thereof, and shall pay over to said Sears, or his nearest heir by the name of Sears for the time being who shall demand it, the one half of said income for his or her use and benefit, that is to say, any heir of said Sears, of his name, who may demand the said one half of said income, shall be entitled to receive it, but his or her right to it shall be superseded and annulled whenever a nearer heir of the same name shall make a similar demand. And provided neither said Sears nor any of his heirs as above, nor any person authorized by him or them, shall demand said income, within six months after it shall have been due and paid over to said Wardens and Vestry, then the said Wardens and Vestry shall invest said income in stocks, etc., as above, to increase and accumulate the fund aforesaid. And the remaining half of said income arising from said fund as aforesaid, the said Wardens and Vestry shall either invest in stock, etc., as above, to increase and accumulate the fund aforesaid, or shall and may expend from time to time on any charitable or benevolent object or objects, in such manner and under such regulations as to their wisdom may seem advisable. It being the intention of said Sears to give to said Wardens and Vestry and their successors in office the uncontrolled liberty of appropriating from time to time the remaining half part of said income from said fund."

On March 5, 1821, this gift was formally accepted by the plaintiffs as a gift "in trust for charitable uses." At some time previously to November 12, 1822, Mr. Sears delivered to the plaintiffs a deed (known as the "deed in the parchment envelope"), bearing date March 1, 1821. By this deed he assigned to the plaintiffs for the term of nineteen years, (or for his life should he not live so long,) all his right, title, and interest to his half part of the income arising from the fund by this deed, and by the deeds of the pews, to be expended for sacred music. The previous deeds were referred to as deeds "in trust to form a fund for charitable and other uses." It was further declared that this deed and the previous deeds were to be operative only on the condition that the plaintiffs should be governed by the definition of the phrase "nearest heir" set out in this deed. This definition was, in general, to the effect that the eldest of male descendants should be preferred. This deed was formally accepted by the plaintiffs on January 13, 1823.

On November 9, 1822, Mr. Sears made a gift of one hundred dollars, to be appropriated for the foundation of the trust fund established on March 1, 1821, by the deed just referred to. This was formally accepted on November 18, 1822, by the plaintiffs, as a "donation . . . towards a fund for charitable uses."

Up to January 1, 1824, one half of the income of the trust fund was expended in sacred music, and the other half expended for charitable objects, or accumulated.

On January 1, 1824, Mr. Sears conveyed a parcel of land adjoining the church to the plaintiffs as actuaries of the Sears fund, "subject to its conditions, limitations, and restrictions," namely, that one half of the income of the fund should be paid "over to the parties being issue of said Sears," as before designated, "and provided, if at any time hereafter it should so happen, from any cause whatever, that said income cannot be so paid over, or that any of said parties should in any way be prevented, excluded, or prohibited, or should in any manner be debarred, from their several successive rights, or if any of said parties, as they may become successively entitled to said income from said fund and said account of said fund, should not receive the same within one year after demand thereof," then the whole fund should "be immediately forfeited to, revert to,

and be reinvested in" David Sears and his heirs. Power was given to the Wardens and Vestry to exchange or sell the lot of land, if it should be found advantageous or expedient, "provided always that the proceeds of such exchange or sale shall be reinvested in real estate for the use and benefit of said fund." The deed further stated that the Wardens and Vestry by their acceptance declared "that the above are the terms, conditions, limitations, and restrictions and tenure" of the said fund as understood by them in addition to and in explanation of the previous deeds; and that the Wardens and Vestry by their acceptance promised that half of the "remainder of said income" should be invested in buying books for a library to be open to the proprietors of the church, to all clergymen, men of letters, and members of government, and to be used by the public generally under such rules as might be deemed expedient, "the said Wardens and Vestry reserving the other half part of said remainder of said income to be appropriated" as expressed and authorized in the former deeds.

From January 1, 1824, to February 27, 1854, the plaintiffs received the rents from the pews, and invested the same as part of the trust fund. One half of the income thereof was, in accordance with the provisions of the deed of March 1, 1821, expended for sacred music until 1840, and thereafter it was added, by the direction of David Sears, as an accumulation to the trust fund. One quarter part of said income was expended in the purchase of books for the library, in accordance with the provisions of the deed of January 1, 1824; the remaining quarter part of said income was expended by the plaintiffs for charitable objects, or added by them as an accumulation to the fund.

On May 1, 1843, David Sears executed and delivered a deed, witnessed and recorded, by which he, for himself and his heirs, "having a right of forfeiture," purported to assign to Trinity Church in Boston, or in certain contingencies to the Protestant Episcopal churches in Boston, "the contingent and conditional interest" in the fund and the real estate. The provisions of this deed will be more fully stated later.

On May 10, 1847, David Sears, by a letter to the Wardens and Vestry of St. Paul's Church, released them from any obligation to appropriate one quarter part of the income to the purchase of books for the "public library," and authorized them to

appropriate to such purpose so much only of the income as they might deem judicious, and to apply the remainder of such part of the income in their judgment to any honorable purpose. This letter also contained a reiteration of the trust, and approved the accounts of the plaintiffs. It does not appear that this letter was acted on by the plaintiffs, except to request a deed of confirmation.

On February 25, 1854, David Sears executed, and on February 27 acknowledged and delivered, a deed to the Wardens and Vestry in confirmation of this letter. After reciting the letter, the trusts, etc., the grantor gave certain directions as to the management of the fund, and authorized the Wardens and Vestry to expend the one half part of the income of the fund, in "their discretion, in such objects of utility, benevolence, or expediency as they in their judgment may from time to time see fit for the benefit of the church"; discharging them from the obligation of investing one quarter part of the income in books, and from all responsibility as to errors, omissions, etc. as to past acts and appropriations, with the proviso that the grantees were entitled to one half part of the income on the condition that they paid over the other half of said income to David Sears and his heirs who may demand the same, according to the provisions of the deed dated March 1, 1821, and delivered at some time before November 12, 1822; if not demanded to be accumulated according to the terms of the trust. The deed further authorized "the use of the hall originally intended for the library in the vestry building" for any purpose the Wardens and Vestry should see fit. The deed closed by declaring that it was to be regarded as affirmative only, and that nothing therein contained was to be so construed as to alter or diminish in any degree the rights reserved to the donor and his heirs by the original deeds, nor the tenure of the trust, nor the claims of the parties to his benefits hereafter.

From February 27, 1854, to the present time, the plaintiffs have continued to receive and invest the pew rents as a part of the trust fund. No income has ever been received from the real estate. Up to April, 1860, one half the income of the fund was accumulated, as no demand was made for it by David Sears. On that date, a demand having been made by him, and thereafter

until his death on January 14, 1871, the said one half part of the income was paid to him. In 1871 and 1872 that half of the income was paid over to David Sears, Jr., the eldest son of David Sears, the founder of the fund. Since the death of David Sears, Jr., early in the year 1873, this half of the income has been accumulated as a separate fund due the Sears family, at the request, oral and written, of one Cotting, acting for the Sears family. On June 9, 1893, a formal demand was made on the plaintiffs by said Cotting, in behalf of the trustees under the will of David Sears, and of the heirs and next of kin of said Sears, or any of them entitled, for the payment of all said one half of the income of the trust fund heretofore received by the plaintiffs, or hereafter to be received by them.

The other one half part of the income of said trust fund has been expended by the plaintiffs, from said February 27, 1854, to the present time, for objects of utility, benevolence, or expediency, for the benefit of St. Paul's Church. No part of the income during said period, except a payment in March, 1854, has been expended for the purchase of books.

David Sears by his will devised his residuary real and personal estate to trustees upon certain trusts therein declared. The testator also by his will defined the terms "nearest heir" and "eldest lineal male descendant" in his will, and wherever else he may have used these terms, to mean, first, his son David Sears, and his male issue successively, etc. The provisions of the will will be more fully stated hereafter.

1. The first question which arises in the case is as to the validity of the trust created by the six deeds executed by David Sears in 1821. The grantees in these deeds are the Wardens and Vestry of St. Paul's Church in Boston, and their successors in office. The church itself was incorporated in 1820, as a Protestant Episcopal society and body politic. St. 1819, c. 77. Since the Prov. St. of 1754–55, c. 12, the church wardens of Protestant Episcopal churches are bodies corporate, authorized to take in succession "all grants and donations, whether real or personal, made either to their several churches, the poor of their churches, or to them and their successors"; and when the vestry is joined with them in the grant or donation, the church wardens and vestry together constitute the corporation. 3 Prov. Laws, (State

ed.) 778; Anc. Chart. 605. St. 1785, c. 51. Rev. Sts. c. 20, §§ 39 *et seq.* Gen. Sts. c. 31. Pub. Sts. c. 39.

In *Sohier* v. *Wardens & Vestry of St. Paul's Church*, 12 Met. 250, a bequest to the Wardens and Vestry of St. Paul's Church "to be received and held by the legatees, as the formation of a fund" for the support of a city missionary of the Protestant Episcopal Church, was held to be a valid charitable gift. See also *Saltonstall* v. *Sanders*, 11 Allen, 446; *Weber* v. *Bryant*, 161 Mass. 400.

It is clear that the grantor could not create a trust for the benefit of his descendants forever. *Kent* v. *Dunham*, 142 Mass. 216. Nor could he create a trust for one of a series of his descendants, successively, unless such a one could be ascertained within a life in being and twenty-one years afterwards. *Dungannon* v. *Smith*, 12 Cl. & Fin. 546. It cannot be certain that there would be an heir by the name of Sears within the legal period, or that a demand would be made in that period for any income due. This demand clearly appears to have been a condition precedent. *Ibbetson* v. *Ibbetson*, 10 Sim. 495; *S. C.* 5 Myl. & Cr. 26. *Thomson* v. *Shakespeare*, H. R. V. Johns. 612. *Wainman* v. *Field*, Kay, 507. See *Lovering* v. *Lovering*, 129 Mass. 97. This is not a case of definite successive limitations. The limitation is general for the benefit of all the descendants of David Sears answering to a particular description.

It is contended that, as the grantees were given discretion to apply one half of the income either to the accumulation of the fund, one half of the income of which was intended for the benefit of the grantor or his descendants, or to apply it to charitable or pious uses, the entire trust is invalid.

There is undoubtedly a class of cases where a fund is given for purposes which are charitable, or for other purposes in the discretion of the trustees which are legal, but are not charitable. In these cases the whole gift is held void for uncertainty. *Morice* v. *Bishop of Durham*, 10 Ves. 521. *In re Hewitt's estate*, 53 L. J. (N. S.) Ch. 132. *Chamberlain* v. *Stearns*, 111 Mass. 267. *Nichols* v. *Allen*, 130 Mass. 211.

But it is settled by a long line of decisions in England, that, where trustees are given discretion to apply a fund either to a legal or an illegal object, the law forbids them to apply the fund

to the illegal object, and the trust is valid for the legal object. The leading case on this subject is *Sorresby* v. *Hollins*, 9 Mod. 221, where a discretion was given to executors to settle by purchase of lands, or otherwise as they should be advised, an annuity of £50 to be distributed in charity. The discretion to purchase lands was illegal, as violating the mortmain act. Lord Hardwicke said: "Can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for, if one bequest is lawful, that shall be pursued and take effect." To the same effect are the following cases. *Attorney General* v. *Parsons*, 8 Ves. 186. *Curtis* v. *Hutton*, 14 Ves. 537. *Salusbury* v. *Denton*, 3 Kay & Johns. 529. *Carter* v. *Green*, 3 Kay & Johns. 591. *Attorney General* v. *Goddard*, Turn. & Russ. 348. *Ingleby* v. *Dobson*, 4 Russ. 342. *Faversham* v. *Ryder*, 5 DeG., M. & G. 350. *University of London* v. *Yarrow*, 1 DeG. & J. 72. *Lewis* v. *Allenby*, L. R. 10 Eq. 668. *In re Hedgman*, 8 Ch. D. 156. See also *Williams* v. *Williams*, 4 Seld. 525. And in *Jackson* v. *Phillips*, 14 Allen, 539, 556, it is said by Mr. Justice Gray: "When a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law."

This is not a case where the charitable trust is of a surplus remaining after an invalid gift has been satisfied. In such cases the validity of the gift to charitable purposes will depend on whether the amount required for the prior gift can be ascertained in order to fix the amount of the surplus, or on whether the prior gift is merely "honorary," as it is termed, and not a legal charge on the fund. *Chapman* v. *Brown*, 6 Ves. 404. *Fisk* v. *Attorney General*, L. R. 4 Eq. 521. *Hunter* v. *Bullock*, L. R. 14 Eq. 45. *Dawson* v. *Small*, L. R. 18 Eq. 114. *In re Williams*, 5 Ch. D. 735. *In re Birkett*, 9 Ch. D. 576.

There is, therefore, as to one half of the fund, a valid charitable trust, subject to an illegal discretion as to accumulation for the benefit of the grantor or his descendants, which will be rejected. This trust could not be altered in its terms by the trustees or by the creator of the trust. *Sewall* v. *Roberts*, 115 Mass. 262.

As to the other half of the fund, an invalid trust being created, the beneficial interest resulted to the donor. *Nichols* v. *Allen*, 130 Mass. 211, 212. *Olliffe* v. *Wells*, 130 Mass. 221, 223. *Lassence* v. *Tierney*, 1 MacN. & G. 551, 564, 565.

It is contended, however, that, as the whole fund was given to a charitable corporation, the corporation would retain the beneficial interest if any part of the trust could not be carried out. See *Attorney General* v. *Trinity College*, 24 Beav. 383, 399. While it is true that a gift to a church *eo nomine* is a gift to a charity, (*Baker* v. *Fales*, 16 Mass. 488, 495, *Jackson* v. *Phillips*, 14 Allen, 539, 553,) yet it does not follow that it may not be given for a purpose that is invalid, and in such case the church cannot take, (*Old South Society* v. *Crocker*, 119 Mass. 1,) although it might well take the beneficial interest as well as the legal title if no particular trust or use had been designated. *Sohier* v. *Wardens & Vestry of St. Paul's Church*, 12 Met. 250, 259.

2. The deed dated March 1, 1821, which was not delivered until some time before November 12, 1822, cannot affect the interpretation of the deeds relating to the pews, nor can it make the invalid trust valid.

3. The gift of $100 made on November 9, 1822, became a part of the fund, and is subject with it to the legal interpretation before mentioned.

4. The terms of the deed of January 1, 1824, cannot affect the disposition of the fund before created, or impose new conditions, or alter the terms of the former deeds, so far as the valid charitable trust is concerned. The Wardens and Vestry had by the former deeds discretion in the selection of charitable objects. By the deed now under consideration they agreed with Mr. Sears to devote one quarter of the income of the fund to a library. If such a library as is described in the deed is a charitable object, we can see no objection to their action. If it is not, then the agreement, so far as the prior deeds are concerned, is a nullity. We have no doubt that the deed in this respect created a valid charitable trust. While a limited and definite class of beneficiaries is first mentioned, the final provision is that it is to be used by the public generally. There is, therefore, not a gift for the benefit of a definite class, or of shareholders only, as in the cases of *Carne* v. *Long*, 2 DeG., F. & J. 75, and *In re Dutton*,

4 Ex. D. 54, but for the public, and such a gift is unquestionably valid. *Drury* v. *Natick*, 10 Allen, 169. *Fairbanks* v. *Lamson*, 99 Mass. 533. *Cary Library* v. *Bliss*, 151 Mass. 364, 373, 374. See also *Brown* v. *Pancoast*, 7 Stew. (N. J.) 321.

The question of difficulty arising under this deed, so far as the land is concerned, is whether the limitation to the grantor and his heirs created a condition giving a right to terminate by re-entry the estate previously granted, or whether a trust was created in favor of the grantor and his heirs. This question, for reasons hereinafter stated, we find it unnecessary to decide.

5. The deed to Trinity Church may be briefly disposed of. What Mr. Sears attempted to do was to make Trinity Church a trustee in the event of the plaintiffs not fulfilling their trusts. He conveyed to the grantee no right of his own, but "the contingent and conditional interest in said property and fund which the above named Wardens and Vestry of St. Paul's Church now hold and enjoy." The subsequent language of the deed amounts merely to an agreement on his part to waive a breach of any conditions on the part of the Wardens and Vestry of St. Paul's Church existing at the time the title to the fund should vest in Trinity Church. The language is as follows: "It being the intention of this deed, and the meaning of the grant herein made, that the right of forfeiture which may accrue to said Sears and his heirs from any act or omission on the part of said Wardens and Vestry of said St. Paul's Church will not be exercised or exacted, provided said Trinity Church . . . accept said trust and undertake to perform and do perform all the duties and obligations of said trust according to the true meaning and object of its founder, and not otherwise."

Other language in the deed shows that the new trustee was to take upon the same terms, conditions, and forfeitures as in the original deeds.

If this conveyance had been simply of the premises conveyed in the preceding deeds, it might operate to destroy the right of forfeiture, if any existed, in David Sears. *Rice* v. *Boston & Worcester Railroad*, 12 Allen, 141. See also *Guild* v. *Richards*, 16 Gray, 309, 317; *Van Rensselaer* v. *Ball*, 19 N. Y. 100, 103; *Schulenberg* v. *Harriman*, 21 Wall. 44. Construing the language of the deed as a whole, we are of opinion that the deed does not

convey, or purport to convey, any right of reverter then remaining in Mr. Sears.

As to the other questions in the case, we do not see that the deed is of any importance. Mr. Sears had reserved no right to nominate or appoint a new trustee; nor does it appear that Trinity Church has ever accepted the trust, or attempted to act under it.

6. The deed of February 27, 1854, could not alter the charitable trust already declared. The other half of the fund was again made subject to an express trust void for remoteness, and the beneficial interest again resulted to the grantor. The condition, if any, was void as creating a perpetuity. *Brattle Square Church* v. *Grant*, 3 Gray, 142, 158. *Otis* v. *Prince*, 10 Gray, 581. *Cartwright* v. *Cartwright*, 3 DeG., M. & G. 982. *Poor* v. *Mial*, 6 Madd. 32. *Egerton* v. *Brownlow*, 4 H. L. Cas. 1.

The deed, however, would operate as a release as to matters of account prior to its date. It also may operate as a release from the obligation voluntarily entered into by the Wardens and Vestry, in their discretion, by the deed of January 1, 1824, to expend one quarter of the income of the original fund for the purchase of books for the library. Released from such obligation, the Wardens and Vestry were free to apply the income to objects of charity, in their discretion, according to the original deeds of trust. If the language used in the deed now under consideration, stating the purposes for which the income was to be applied, indicate purposes not charitable, such language is of no effect to vary the trust declared in the deeds of March 1, 1821.

7. On the facts stated, it appears that the Wardens and Vestry have continuously admitted that they held the one half of the income of the fund, which by the terms of the deeds was for the benefit of Mr. Sears and his heirs, and consequently one half of the income bearing fund itself, as trustees, and not adversely, under any claim of right in themselves inconsistent with a fiduciary relation. We leave out of consideration for the moment the land, as this did not produce any income.

It is well settled that, in the case of an express trust, the statute of limitations does not run in favor of the trustee against the *cestui que trust*, unless the user of the former has been open and notorious against the claim of the latter. In the case of implied

or constructive trusts, however, unless there has been a fraudulent concealment of the cause of action, the law is otherwise. *Boxford Religious Society* v. *Harriman*, 125 Mass. 321, 329. *Davis* v. *Coburn*, 128 Mass. 377, 380. *Dickinson* v. *Leominster Savings Bank*, 152 Mass. 49, 54. *Currier* v. *Studley*, 159 Mass. 17. But, independently of the statute of limitations, courts of equity will not assist a person who has slept upon his rights, and has acquiesced for a great length of time. *Speidel* v. *Henrici*, 120 U. S. 377. *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1, 175; *S. C.* 4 Bligh, 1.

The trust in the case at bar is an express trust, and there has been no such open and adverse user as is necessary to set the statute in motion. The claim of David Sears to one half of the income has always been recognized by the plaintiffs; and they have also since his death recognized that in some way the Sears family had a claim under the trust.

The resulting trust in the case at bar is not a constructive trust. It was not forced upon the plaintiffs by operation of law against their will, but was assumed by them. They have never contended that they were not trustees. The trust deeds showed that the declared trusts were invalid, and they therefore held for other *cestuis que trust* than those declared. This fact distinguishes the case from that of *Churcher* v. *Martin*, 42 Ch. D. 312, 318, where the invalidity of the trust was due, not to the terms of the deed, but to the fact that the deed was rendered void because it was not enrolled according to statute; and therefore any holding under the terms of the deed was, of necessity, adverse from the start. It was not a question between trustee and *cestuis que trust*. Where the possession of property is held by a trustee not by virtue of any personal right or personally asserted right on his part, but is colored by a trust and confidence in virtue of which he received it, the identity of the *cestui que trust* is of very little importance, but the relationship is all important; and, so long as the relation of trust exists, it is a case of express trust, no matter who the *cestui que trust* may prove to be. *Salter* v. *Cavanagh*, 1 Dr. & Wal. 668. *Lister* v. *Pickford*, 34 Beav. 576, 582. *Patrick* v. *Simpson*, 24 Q. B. D. 128. *Soar* v. *Ashwell*, [1893] 2 Q. B. 390. *Warner* v. *Morse*, 149 Mass. 400.

In the case at bar, it is true that the only duty of the plaintiffs from the start was to pay over one half of the trust fund to David Sears; yet by their continued acknowledgment of an existing trust relation, and by making no assertion of any adverse claim, they induced a reliance on the existence of the fiduciary relation by virtue of which they expressly held the property.

As to the land conveyed to the plaintiffs by the deed of January 1, 1824, we do not think that sufficient appears to enable us to determine what should be done with it. It is stated in the agreed facts, that up to the date of the filing of the bill it has yielded no income, and has not been taxed. What has been done with it is left uncertain. We might infer from the language of the deed of February 25, 1854, that it had been used for church purposes, but even this is uncertain. No demand appears ever to have been made for it, and it may be that the use has been such as to amount to an adverse use, or that the defendants' rights, if any, have been lost by laches. We intend to express no opinion on these points. All that we can determine now is that enough does not appear to enable us to pass upon the question of title.

8. David Sears in his will provided, in article 17, that the beneficiary incomes of trust funds established by him should be, when demanded, "the sole property of my heirs having the right to receive the same successively, as therein described." By articles 20 and 21, all the residue of his real and personal estate is given to trustees, upon certain trusts therein set forth.

The provisions of article 17 are open to the same objections as the original trust to the same effect. It is impossible to determine that they must take effect within the lawful period.

The resulting trust in favor of David Sears must therefore pass to those entitled under the residuary clause. *Thayer* v. *Wellington*, 9 Allen, 283. *Lovering* v. *Lovering*, 129 Mass. 97.

It is contended, however, that the language of article 5 of the will leads to a different result. This is: "It is to be understood in this will, and wherever else I may have used the like terms, that by the terms 'nearest heir' and 'eldest lineal male descendant,' I intend first my son David, and his male issue successively, in order of seniority, *in infinitum*" (with the same definition as to his other sons and his daughters successively in default of

issue of each). "Said issue so receiving property to assume the name of such one of my sons deceased as he may at the time elect." It is argued that, as this term "nearest heir" was used in the deeds of March 1, 1821, and in the deed of February 25, 1854, this provision of the will supplied an interpretation clause to these deeds, so that they should read as if they contained a limitation of one half of the fund and its income to David Sears for life, remainder to his son David for life, remainder to his male issue successively, in order of seniority; and that therefore, under the decisions in *Lovering* v. *Worthington*, 106 Mass. 86, and *Tollemache* v. *Coventry*, 2 Cl. & Fin. 611, David Sears, Jr. took an estate for life, with remainder over. So far as any interest of David Sears, Jr. is concerned, it is of no importance whether he took a life estate or not, inasmuch as he received one half of the income during his life, with the acquiescence of all parties, and it is now too late to raise the question of the legality of these payments. *Attorney General* v. *Old South Society*, 13 Allen, 474, 495. It is a question of importance whether his eldest son, the defendant David Sears, 3d, is entitled to a life estate before the beneficial interest under the trust fails and becomes finally vested in those entitled under the residuary clause of the will of David Sears. We are not able to adopt the view that he is so entitled. The so called interpretation clause of the will is in no sense a devise or bequest of the interest of the testator in the fund. It would be highly dangerous to allow a man who had created an invalid trust, the beneficial interest in which had resulted in him, to explain fifty years later in his will that his real meaning was something different from what his words implied, and, without any words of devise, to allow the creation of a new trust by a new interpretation of the old deed. The deeds were complete, and not incomplete, as in *Bizzey* v. *Flight*, 3 Ch. D. 269.

It is clear, therefore, that all rights under the resulting trust are now vested in the trustees under the residuary clause of the will of David Sears, unless the fact that the testator in this clause excepted from the residue "any of the trust funds by me created during my life, or the incomes thereof, which are to be disposed of according to the trusts declared concerning the same, without reference to this item," leads to a different result. But

we are of opinion that it does not. The reason for this provision is that the testator supposed that the trusts he had created were valid, and could be carried out. If so, they would not fall within the residuary clause. The resulting trust to the testator is not provided for except by the general words of the residuary clause, and it falls within them.

9. The plaintiffs state that, in their opinion, further accumulation of income, if not compulsory, would be injurious and undesirable. They give, however, no reasons for such a conclusion. The founder of the trust, David Sears, provided that the income from the pews should be added annually to the trust fund to accumulate forever.

As to one half of the fund no question arises, as the plaintiffs must convey and transfer it to those entitled thereto. There will, consequently, be no further income to accumulate. All income accumulated by special deposit with the trust company will not be added to the fund, as it belongs under this decision to the trustees under the will of David Sears.

As to the other half of the fund, the question directly arises how far a provision to accumulate for a charitable purpose is valid. In England the period within which accumulations are valid is defined by the St. of 39 and 40 Geo. III. c. 98, commonly called the Thellusson Act, and the provisions relating thereto apply to accumulations for charities. *Martin* v. *Margham*, 14 Sim. 230. In the absence of statute there is no definite limit to accumulations for charities, so far as the decisions are concerned. The few cases bearing at all on the subject afford little assistance. *Hawes Place Society* v. *Hawes Fund*, 5 Cush. 454. *Odell* v. *Odell*, 10 Allen, 1. *Harbin* v. *Masterman*, L. R. 12 Eq. 559. 1 Perry on Trusts, § 399. Scott on Trusts for Accumulation, §§ 74–84. In regard to this matter, one of three rules must be true: the accumulation must be valid forever; or it may be controlled by the court within reasonable and desirable bounds; or it must be subject to the same rules as an accumulation for private purposes. There is good reason to suppose that the rule last named should not apply, for, if the object is not subject to the rule against perpetuities, there is no good reason why an accumulation for that object should be. It certainly would be as much the policy of the law to favor an

accumulation for charitable objects as to favor charitable objects. It often happens that the charitable purpose cannot be carried out without accumulation of a fund, sometimes for a long period of time.

There are also good objections to a compulsory perpetual accumulation even for a charitable purpose. Much would depend on the terms under which the accumulation was to be made. There would be great public danger in allowing an accumulation indefinitely for a charitable purpose that was not to be carried out within some definite time. Such a purpose would be practically no charitable purpose at all. On the other hand, however, there are cases where the income from property might be directed to be accumulated to form a fund, the income of which fund was to be annually applied to charitable purposes, as in the case at bar. Such an accumulation, it is evident, is less objectionable, as the income from the accumulating fund is constantly being applied to the charity year by year in larger amount. There seems to be no more objection to such an accumulation than to the holding of property constantly increasing in value for the benefit of the charity.

We are of opinion, however, that the proper course is to hold that the limits of an accumulation for the benefit of a charity are subject to the order of a court of equity. By this method of solving the difficulty, on the one hand an unreasonable and unnecessary trust for accumulation can be restrained, and on the other hand a reasonable accumulation can be allowed to carry out the intention of the benefactor and to secure the accomplishment of the trust in the best manner. In *Woodruff* v. *Marsh*, 63 Conn. 125, 137, an accumulation of a reasonable part of the income was allowed for a hundred years.

To apply this principle to the case at bar. It seems that to authorize equitable interference with the accumulation directed by the testator, the accumulation should be unreasonable, unnecessary, and to the public injury. It is not enough that the trustees are not desirous to continue it, or that any one in behalf of the charity asks that it be not continued. The court must be satisfied that there is good cause why the testator's directions should not be carried out.

Mr. Sears directed that the income from the pews should

accumulate to form a fund, the income of which should be paid over annually. There is consequently no locking up of the trust property altogether; the income from it first passes into a fund, and then the income of that fund is paid out for charitable purposes. If the accumulation were stopped, the practical result would be to combine the trust property and the trust fund, and allow the whole income to be applied annually for charitable purposes. Such a proceeding would increase the annual income on one hand, and at the same time put an end to a constantly increasing income from the present "fund," so called. As this accumulation was to serve apparently no definite or special object, there seems to be no objection to putting an end to it, if there is good reason therefor. No reason, however, is given by the plaintiffs as to why such a course should be taken, and we are of opinion that the court should not act as requested under such circumstances.

It must be borne in mind that hereafter the trust property and the trust fund held by the plaintiffs for charitable purposes will be one half part only of the present fund.

We do not intend to preclude the plaintiffs from presenting this question hereafter to the court, if they should see fit to do so; but merely to decide that, as the case is presented, enough does not appear to warrant the court in determining the question.

10. In regard to the continuance of the library, it is alleged in the bill that it is practically of no value, and is not used by any one; that the expense of employing attendants to keep it open, and of lighting and heating, and other incidental outlays necessary to maintain it, greatly outweigh any possible advantage that can accrue from its use, and would be an unjustifiable employment of the plaintiffs' funds. As the case has been heard on the bill as amended and the answers thereto, and certain agreed facts, and as the answers and the agreed facts do not controvert these statements of fact, we must take these allegations to be true; and we are of opinion that it is no longer the duty of the plaintiffs to expend the income of the fund in the purchase of books for the library.

It follows from these considerations:

1. That one half of the trust fund consisting of personal prop-

erty other than the library is held by the plaintiffs in trust for the trustees under the residuary clause of the will of David Sears.

2. That the remaining half of the trust fund is to be held by the plaintiffs in trust for charitable uses, the income to be appropriated according to their discretion.

3. That there need be no further appropriation of income for the support of the library.

4. That enough does not appear to enable us to determine whether the income from the pews should be further accumulated.

5. That the income specially deposited by the plaintiffs is to be paid over to the trustees under the residuary clause of the will of David Sears.

6. That enough does not appear to enable us to pass upon the title to the land conveyed by the deed of January 1, 1824.

Decree accordingly.

John C. Gray, for the plaintiffs.

R. Olney, for Frederick R. Sears and others.

J. L. Thorndike, for David Sears, eldest grandson of the testator.

PATRICK COAN *vs.* CITY OF MARLBOROUGH.

Middlesex. March 27, 1895. — July 23, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Assumption of Risk — Due Care — Liability of Municipality for Negligence in Building Sewer.

If, in an action for personal injuries occasioned to the plaintiff by the negligence of the defendant city in failing properly to brace the sides of a trench in which it had employed the plaintiff to work in the construction of a sewer in one of its streets, there is evidence in favor of the defendant's contention that the plaintiff knew and appreciated the danger, and assumed the risk, but not conclusive, as there is also evidence of other facts proper for the consideration of the jury, the question is one of fact for their determination.

A municipality is liable to a private action for negligence in building or maintaining sewers.

TORT, for personal injuries occasioned to the plaintiff by the negligence of the defendant in failing properly to brace the sides

of a trench in which it had employed the plaintiff to work in the construction of a sewer in one of its streets. The declaration contained one count under the employers' liability act, St. 1887, c. 270, § 1, cl. 1. At the trial in the Superior Court, before *Bishop*, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions, the nature of which appears in the opinion.

S. H. Smith, (*J. Lowell, Jr.*, with him,) for the defendant.

G. L. Mayberry, for the plaintiff.

BARKER, J. 1. The defendant now concedes that there was evidence that the sides of the trench were not sufficiently shored.

2. Whether the plaintiff knew and appreciated the danger from the lack of proper shoring was a question of fact. He knew that the trench was not close-sheathed, and saw what portions of its sides were not covered, knew the nature of the soil and the depth of the trench, and that blasting was done to remove rock at the bottom, and that small quantities of earth frequently fell from the sides, and he had worked much in such trenches. These things make in favor of the contention that he knew and appreciated the danger, and assumed the risk of injury. But they are not conclusive, as there was evidence of other facts proper for the consideration of the jury. The plaintiff was a common laborer, working where he was told to work, and having no discretion as to where he should stand. He had a right to rely upon the inspection of the shoring and of the condition of the sides of the trench made by his superiors after each blast before allowing the workmen again to enter the trench, and he was not charged with the decision of the question whether there was danger. Neither the fact that inconsiderable quantities of earth were frequently falling, nor his experience in trenches, can be said to show, as matter of law, that he appreciated the danger. See *Breen* v. *Field*, 157 Mass. 277, 278, and 159 Mass. 582; *Lynch* v. *Allyn*, 160 Mass. 248, 254; *Hennessy* v. *Boston*, 161 Mass. 502.

3. The defendant also contends that a verdict should have been ordered in its favor, because the construction of the sewer was a public duty undertaken for the public good and not for any pecuniary reward; and argues that the duty of maintaining

a public sewer is of far more serious importance to the general public than the maintenance of a fire department, a workhouse or a public hospital, in respect to each of which undertakings the doctrine for which it contends has been held to prevent a recovery, and in the case of the fire department even as to a laborer, to whom the city by contracting to hire him had a duty, springing from an implied term of the contract of hiring, to use due care to furnish a safe place in which to do his work. See *Benton* v. *City Hospital*, 140 Mass. 13; *Curran* v. *Boston*, 151 Mass. 505; *Pettingell* v. *Chelsea*, 161 Mass. 368.

It has long been settled by our decisions that, because sewers are built and maintained partly for the private benefit and advantage of the abutters, who pay in part for such advantages, and because the charge of sewers is not an obligation imposed by law without the assent of the municipality, but voluntarily assumed, a municipality is liable to a private action for negligence in building or maintaining them. *Child* v. *Boston*, 4 Allen, 41, 52. *Emery* v. *Lowell*, 104 Mass. 13, 15. *Hill* v. *Boston*, 122 Mass. 344, 359. *Murphy* v. *Lowell*, 124 Mass. 564. *Tindley* v. *Salem*, 137 Mass. 171, 172. *Curran* v. *Boston*, 151 Mass. 505, 508. *Breen* v. *Field*, 157 Mass. 277, 278. In *Hennessy* v. *Boston*, 161 Mass. 502, an action like the present, the point was not raised. The sewer in building which the present plaintiff was hurt was one which the defendant had voluntarily assumed to construct, and in respect of which the owners of estates whose particular drains enter it are bound to pay annual rentals. The case is governed by the doctrine of *Child* v. *Boston* and *Murphy* v. *Lowell*.

Exceptions overruled.

FRANK LEWIS *vs.* MARY E. NORTON.

Suffolk. January 8, 1895. — September 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Writ of Entry — Statute — Levy of an Execution by Sale of Land — Constable — Jurisdiction.

A constable cannot make a levy of an execution by sale of land where he has no jurisdiction in the towns where Pub. Sts. c. 172, § 29, require notifications to be posted up.

WRIT OF ENTRY, to obtain possession of a parcel of land in the city of Boston. The case was submitted to the Superior Court, and, after judgment for the tenant, to this court, on appeal, upon agreed facts, the nature of which appears in the opinion and in the opinion in the former case, reported 159 Mass. 432.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

L. M. Child, for the demandant.

C. H. Sprague, for the tenant.

KNOWLTON, J. The principal question argued before us was considered and decided in *Lewis* v. *Norton*, 159 Mass. 432, and a majority of the court are of opinion that there is no good reason for changing the decision then announced.

For more than two hundred years constables have been elected by the towns of this Commonwealth, and have been regarded as town or city officers. Prov. St. 1692–93, c. 28, § 4; 1 Prov. Laws, (State ed.) 65. *Leavitt* v. *Leavitt*, 135 Mass. 191. Except in a few cases, for which special provisions are made by the statutes, they can do nothing officially outside of the cities or towns in which they are elected. Pub. Sts. c. 27, §§ 113, 114, 122. *Leavitt* v. *Leavitt*, *ubi supra*. The special provisions of the statutes do not include authority to act in making a sale of land upon an execution. Pub. Sts. c. 27, §§ 121, 122; c. 154, § 31; c. 155, § 44; c. 161, § 41; c. 170, §§ 12, 22. St. 1885, c. 289.

An attempt of a constable to do anything without express authority from a statute in the service of a writ or execution, outside of the city or town for which he is elected, is like a

similar attempt of a deputy sheriff to serve a writ outside of the county for which he has a commission; it is wholly void. See *Lee* v. *Wells*, 15 Gray, 459.

The constable who made the levy in the present case had no jurisdiction, in any city or town adjoining Boston, to post or cause to be posted notifications of the sale under his levy, as required by the statute, and his levy and sale were ineffectual to pass a title to the real estate. A constable can serve civil process under the Pub. Sts. c. 27, § 114, in personal actions where the damages are laid at a sum not exceeding three hundred dollars, provided that the particular service which he attempts can be completed "within his town"; but if an indivisible official act of service requires action outside of the city or town for which he is elected, it must be done by an officer of more extensive jurisdiction. *Judgment for the tenant.*

JOSEPH FOWLE *vs.* LINUS M. CHILD & another.

Suffolk. January 23, 1895. — September 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Record of Former Judgment — Set-off — Evidence of a Series of Frauds to establish a Scheme of Fraud — Former Acquittal — Res inter alios.

On the issue whether, if the defendant took the plaintiff's money from a safety vault to which both had access, he was entitled to retain it as collateral security for a note given to him by the plaintiff, the note is admissible in evidence for the defence; and the record of a pending action between the same parties, wherein the same note had been pleaded in set-off and allowed, is inadmissible in behalf of the plaintiff.

Until a promissory note is extinguished by a judgment rendered in an action thereon, the right to retain collateral pledged as security for its payment remains with the holder.

Where there is evidence that a borrower of money, who secured the loan by pledges of other money of his own intrusted to the keeping of the lender, afterward, with a design to cheat the latter, secretly removed the money from his possession by sleight of hand, and substituted therefor something of no value, evidence is admissible of other similar frauds of the borrower in other transactions between the same parties during the same period.

If, in a civil action, various acts of fraud are proved for the purpose of showing that they are parts of one general plan of fraud, evidence is inadmissible in rebuttal that the perpetrator thereof was acquitted on a criminal charge based upon one of such fraudulent acts.

CONTRACT, for money had and received. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

In the years 1884, 1885, and 1886 the plaintiff had been in the habit of borrowing money of the defendants and giving his notes therefor, secured by cash in excess of the face of the notes, deposited in boxes in safety vaults in Boston which were taken in the names of the plaintiff and the defendants. In May, 1886, the parties adjusted the accounts between them, and the plaintiff gave a note to each of the defendants, secured by a pledge of the money so deposited in the vaults, which was the money sought to be recovered in this action. In November, 1888, the plaintiff being under arrest on a criminal charge, the defendants procured from him a power of attorney authorizing them to go to the safety vaults without him, and upon so doing the defendants, as the plaintiff contended, took therefrom a large sum of money; but, as the defendants contended, they found there nothing but scraps of paper and other worthless stuff. There was evidence tending to show that the plaintiff never went to the vaults, or examined their contents, except in company with one of the defendants or their agent. For the purpose of showing that, if any money was taken by them from the vaults, they were entitled to take and to retain it as collateral security, the defendants introduced in evidence the notes given in May, 1886, to the admission of which the plaintiff excepted, on the ground that in another action pending between him and the defendant Child the notes had been pleaded in set-off to the plaintiff's claim, and that in the report of the referee to whom the case had been referred the notes had been allowed. Final judgment had not been entered in that action, and the record thereof, which was offered in evidence by the plaintiff, was excluded, subject to his exception.

For the purpose of showing that the plaintiff was attempting to and had defrauded him, the defendant Child, subject to the exception of the plaintiff, introduced evidence tending to show

that during the time covered by the transactions described above the plaintiff had borrowed money of him secured by a pledge of tin boxes alleged to contain money, but which, when opened, were found to contain nothing of value; that the plaintiff had borrowed other money of him upon the security of a ticket issued by the Collateral Loan Company, which recited that the company held as security one hundred dollars in bank bills; that upon presentation of the ticket for redemption it was found that the only bill deposited by the plaintiff was a ten dollar bill so folded as to resemble a one hundred dollar bill, upon which the company had loaned him fifty-two dollars.

The defendants also offered evidence, subject to the exception of the plaintiff, tending to show that during the same period of time the plaintiff had borrowed money of the defendant Mrs. Sunbury upon tumblers which appeared to contain gold pieces, but which contained only pasteboard or gilt pieces made to represent gold.

The plaintiff, in rebuttal, offered in evidence the record of a criminal case wherein he was charged with obtaining money from the Collateral Loan Company under false pretences, for the purpose of showing that, upon the trial of that charge, he was acquitted. The evidence was excluded, and the plaintiff excepted.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

W. H. Baker, (*C. H. Welch* with him,) for the plaintiff.

R. M. Morse, for the defendants.

BARKER, J. 1. The first and second exceptions may be disposed of together. The notes given by the plaintiff to the defendants upon the adjustment of the accounts between them in May, 1886, were secured by pledge of the money which the plaintiff sought to recover in this action, and were admissible in evidence for the defence, upon the issue whether, if they took that money, they were entitled to retain it as collateral security for the notes. The record of the former suit, in which the notes had been pleaded in set-off against the plaintiff, showed that the suit was still pending; as it had not gone to judgment, the

notes were not extinguished, and the record offered by the plaintiff was immaterial, and was rightly excluded. Until the notes were extinguished, the right to retain the collateral pledged as security for their payment remained in the defendants.

2. The next class of exceptions is to the admission of evidence that during the period covered by the transactions upon which the plaintiff's suit is founded, he committed other frauds upon the defendants in other transactions in which they lent him money. This evidence was introduced in support of the defendants' contentions that they took no money from the safety vaults, and that they found in the vaults nothing but worthless bundles secretly substituted by the plaintiff for the money which he had himself fraudulently removed.

Acts which are part of one general scheme or plan of fraud, designed and put in execution by the same person, are admissible to prove that an act which has been done by some one was in fact done by the person who designed and pursued the plan, if the act in question is a necessary part of the plan. *Commonwealth* v. *Robinson*, 146 Mass. 571, 577. See also *Wiggin* v. *Day*, 9 Gray, 97; *Lynde* v. *McGregor*, 13 Allen, 172; *Jordan* v. *Osgood*, 109 Mass. 457; *Haskins* v. *Warren*, 115 Mass. 514; *Horton* v. *Weiner*, 124 Mass. 92; *Commonwealth* v. *White*, 145 Mass. 392. And the plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence. *Commonwealth* v. *Robinson*, *ubi supra*. The transactions shown in the evidence in the present case were very strange and peculiar. One reasonable explanation of them is that they disclose a plan by which the plaintiff designed to cheat the defendants, after first obtaining their confidence, by showing them that he had money in large amounts, by intrusting his money to their keeping, borrowing from them upon their belief that they had it in their keeping, and, when his borrowing had reached a sufficient extent, by secretly removing his money from their possession by sleight of hand, and substituting in its stead something of no value. All the transactions put in evidence were between the same parties, during the same period of time, and were of the general character of confidence games, carried through by deception and jugglery. They may well have been parts of a single plan, the chief end of which was the abstraction by the

plaintiff of the money from the safety boxes; and if so, any acts done by him in pursuance of that plan were competent to show that it was he who did the act which was its necessary culmination if successfully carried through.

3. The remaining exception is to the exclusion of evidence that the plaintiff had been acquitted in a criminal prosecution for one of the frauds, evidence of which was admitted against him. But that acquittal was *res inter alios*, like the withdrawal of suits by other parties in *Haskins* v. *Warren*, 115 Mass. 514, 538. Because the defendants were strangers to the judgment offered, it could not affect them. *Commonwealth* v. *Waters*, 11 Gray, 81. *Cluff* v. *Mutual Benefit Ins. Co.* 99 Mass. 317, 325. *Parker* v. *Kenyon*, 112 Mass. 264. *Exceptions overruled.*

PETER BJBJIAN *vs.* WOONSOCKET RUBBER COMPANY.

Suffolk. March 26, 1895. — September 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Due Care — Negligence — Dangerous Machinery — Instructions to Employee — Fellow Servant.

An employer is not liable for the negligence of an employee whose daily duty it is to oil machinery, and who, on a single occasion, after oiling it, leaves it in a dangerous condition, whereby another employee is injured.

The plaintiff, an adult foreigner, understanding English imperfectly and unfamiliar with machinery, was put at work on a compounding machine in the defendant's rubber factory in charge of a fellow workman, who instructed him as to his duty. The machine consisted of two heated steel cylinders, closely set, and revolving in opposite directions, between which pieces of rubber and chemicals to be combined were slowly ground. It was the duty of the plaintiff to feed the machine with material, which he guided either with his hands or with a hoe. During the noon hour of the second day on which the plaintiff was so employed, and in his absence, a fellow workman, who had further separated the cylinders for the purpose of oiling them, failed to readjust them. The increased distance between them was not obvious, and the plaintiff, unaware that their position had been or could be altered, on returning to his work, placed a piece of rubber between them, and guided it with his hands as he had been taught. The rubber fell through the cylinders suddenly, and the plaintiff, perplexed, turned for advice to his instructor, who merely laughed, and the plaintiff, interpreting the laugh as a direction to do as before, again attempted to guide the rubber with his

hands, which were drawn into the machine and injured. *Held*, that the questions whether the defendant was at fault in not giving the plaintiff instruction or warning, and whether the plaintiff was in the exercise of due care, were for the jury.

TORT, for personal injuries sustained by the plaintiff while in the employ of the defendant. At the trial in the Superior Court, before *Sherman*, J., there was evidence tending to show that at the time of the accident the plaintiff was engaged in compounding rubber at the defendant's factory on a machine which consisted of two smooth heated steel cylinders, each about four feet long and fifteen inches in diameter, set in an iron frame horizontally with the floor, heated, and revolving in opposite directions, one at about three times the speed of the other. At each end of the frame, on the side of the machine where the operator worked, and in plain sight, was an iron screw about three inches in diameter, standing out about fifteen inches from the machine, which was used to push the cylinders nearer together, or separate them, as required.

The process of compounding rubber consists of placing a quantity of pure rubber on the cylinders, and, as it is caught between them and ground through, of throwing on it chemicals which are to be combined therewith. The rubber is ordinarily placed endwise in the machine, and is steadied with the hand for a moment until it catches, but small pieces are usually thrown in, and the rubber is frequently given a quick irregular motion as the machine grips it, and sometimes is thrown entirely out. When, for any reason, it does not readily catch in the cylinders, an appliance called a "hoe" is used for pressing it into the cylinders. When compounding rubber the cylinders are not over one eighth of an inch apart, but when used for grinding it they are sometimes separated a little more, and when the grinding is finished they are restored to their original position, but any change in their adjustment is discretionary with the operator. As the operator stands in front of the machine, he cannot by looking at the cylinders see how far apart they are, and it is dangerous for him to bend over and look down between them. When the machine is in operation, conversation in an ordinary tone is impossible, unless the voice is exceptionally clear.

The plaintiff was an Armenian, of ordinary intelligence, who

came to this country in 1889. At the time of the accident, which occurred on June 13, 1893, he was forty-two years old. At that time he understood English very imperfectly, and was unfamiliar with machinery. On Monday, the day before the accident, he was put to work on a compound mill, and an experienced workman, one Healy, was instructed by the foreman to look out for him. For a few days previous to the accident, the plaintiff had been employed in wheeling material from the compound room to the compound mills, during which time he had constantly passed by the compound mills, but he had paid no attention to them, nor to the manner in which they were operated.

The plaintiff testified that, on the day before the accident, the foreman took him to the machine where he was injured, and said something to the man in charge of the next machine which the plaintiff did not understand; that this man, Healy, showed him once with his hands and by signs and motions how to work, after which he, the plaintiff, did it once; that Healy stood by him five or ten minutes going through the operation, and that then he did it himself under the direction of Healy, and the latter went back to his own machine near by, and that he worked on the machine the rest of the day, Healy occasionally showing by signs and sometimes saying, "Hurry up," as well as some other things which the plaintiff did not understand; that sometimes he could not get the rubber off the cylinders, and Healy would come over and cut it off for him; that during the time he worked on the machine he saw Healy do nothing to his own machine, and no one showed him the screw on the machine for adjusting the cylinders, nor did he see the screws or know their use; that he did not know how far apart the cylinders were or that their position could be changed; and that he worked on his machine the same way all the time until he was injured. The plaintiff further testified, that on the day of the accident he came back from his dinner four or five minutes late, and Healy, with an oath, told him to "hurry up"; that he hurried, took off his coat, and hastened to his work; that he took two pieces of rubber, put them between the cylinders, and they fell down; that he turned and looked toward Healy, who laughed; that theretofore he had used other pieces of rubber of the same size, which had never fallen through or gone through so quickly;

that these pieces of rubber did not cling to the cylinders as others had done in the morning, but went through quickly and fell into the tray under the cylinders; that Healy said nothing, and made no motion for him to stop; that he put them in again side by side, and tried to hold them pressed together with his hands, but did not press down on them; that he did just the same as he had done before, and as he had seen Healy do; and that as he put the pieces on the cylinders the second time they again fell through quickly, and his hands and arms were drawn into the machine and injured. On cross-examination he admitted that when he went to work upon the machine he knew that, if he put his fingers between the cylinders, they would be cut or broken; and that he did not understand why the rubber fell through the first time, but that he looked to Healy, who laughed.

The defendant's evidence tended to show that on Monday the plaintiff worked on the same machine with Healy, and under his supervision; that he was instructed fully as to the management of the machine, including the use of the screws, not only by language and motions, but by the guiding of his hands; and that he was frequently warned by Healy and others, by words and motions, such as pulling away his hands from near the centre of the machine when they were carried there in his efforts to cut the rubber off the cylinder, and there was evidence that he understood the language used. Another Armenian employed in the factory testified, without contradiction, that he told the plaintiff that the machine was dangerous, and that he must be very careful. The defendant's evidence further tended to show that, after the first few trials, the plaintiff, on Monday and up to the time of the accident on Tuesday, did his work well, and without difficulty, although at times he was reckless, and, when warned, he thought he ought not to be spoken to; that when he began grinding at half past eleven on Tuesday, he opened the cylinders slightly, but soon restored them to their original position, where they remained when he left them at noon; and that during the noon hour one Boland, in the regular performance of his duty, opened the cylinders for the purpose of oiling the threads of the screw, after which he readjusted them.

Boland testified that he oiled the plaintiff's machine at about one o'clock, and that he told the plaintiff, who did not appear to

understand what he said, to keep his hands off the machine, and that he then pulled the plaintiff away from it by the shoulder about two minutes before he was injured, and when the plaintiff was putting two medium-sized pieces of rubber into the machine, and that he then went away, and did not see the accident. On cross-examination he testified that the plaintiff did not speak to him, and that Healy, who was working on the next machine, did not look when the witness pulled the plaintiff away from the machine; that, as he left, he said to Healy, "It makes me nervous to see a man act like that," to which Healy made no reply; and that he saw that the plaintiff needed instruction which the witness tried to give him, and that he knew that the plaintiff was under Healy's charge and direction.

Healy testified that he saw the plaintiff from the time he came in at noon on Tuesday until he was injured; that the plaintiff threw a big lump on, which bit a little and jumped out into the alley; that the plaintiff threw it in again carelessly, and it jumped out again; that the plaintiff then took a small piece in his hand and made a dart, as if he were vexed "and wanted to shove it in with terrible force"; that the piece jumped up on the box over the small gears, the plaintiff's left hand went down and he put his right hand after it, and both were caught; that when the piece jumped out the second time the witness put his hand up to the plaintiff to prevent him from going near it until the witness got to him; that as he jumped for the screw to open the cylinders after the plaintiff was caught he noticed that the screw was about three threads out of adjustment, and he testified that the effect of leaving the cylinders thus wider apart than usual would be that the rubber would go through very quickly, and would indicate to his mind that the cylinders were too far apart; and that he, or any experienced man, or one who had been taught, would at once screw them up.

The plaintiff, in rebuttal, testified that he had never seen the "hoe" used for the purpose of pressing the rubber into the cylinders, or been instructed so to use it, and that, in showing him how to do the work, his teacher had held the rubber with his hands in position to catch between the cylinders. He further testified that neither Boland nor any one else had pulled him away from the machine, and that he did not remember hav-

ing seen Boland previous to the trial. There was no evidence that the plaintiff's machine was touched by any one during the dinner hour except Boland.

At the close of the evidence, the defendant requested the judge to rule that there was no evidence to warrant a verdict for the plaintiff; but the judge declined so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff, and the judge reserved the case and reported it for the consideration of this court. If the ruling was right, judgment, by consent of the parties, was to be entered on the verdict; otherwise, judgment was to be entered for the defendant.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

C. K. Cobb, for the defendant.

S. L. Whipple, (*W. R. Sears* with him,) for the plaintiff.

BARKER, J. Upon the report, the question is whether the jury could find that some breach of the defendant's duty to the plaintiff caused his hurt, and that he was himself using due care.

1. The fault of the workman who after oiling the machine neglected to readjust its cylinders cannot be imputed to the defendant. The oiling of the machine was one of the daily matters, regularly incident to its ordinary use, which must be intrusted to servants; and in such cases, if a competent servant is selected, his negligence on a single occasion cannot be imputed to the master. *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209. *McGee* v. *Boston Cordage Co.* 139 Mass. 445. *Moynihan* v. *Hills Co.* 146 Mass. 586. *Ryalls* v. *Mechanics' Mills*, 150 Mass. 190, 195.

2. A majority of the court are of opinion that there was evidence of a breach of the defendant's duty to give instruction and warning. The jury may have found that the plaintiff's state of pupilage as to his work had not ended, and that Healy was yet charged with the duty of instructing him how to use the machine safely and properly; that the plaintiff's experience with the machine had been so very brief that he was chargeable with no more knowledge of it than he actually had; that he did not know that the cylinders were or could be out of adjustment; that he knew of no way of feeding the material but by the use of his hands; that the sudden falling through of the two pieces of rubber gave him no actual knowledge that the machine was

not in a condition for use; and that when the pieces so fell he turned for advice to Healy, and that Healy's laugh was in effect a direction to go on as before. If, as the jury might find, the quick falling through of the rubber would at once show an experienced workman that the cylinders were too far apart, it was the duty of Healy, if he still had the plaintiff in charge, and if he understood when the pieces first fell through that he was applied to by the plaintiff for instructions, to warn him against attempting to feed the pieces again until the cylinders had been readjusted; and an omission so to do would be imputable to the defendant, on whom rested whatever duty there was to give the plaintiff warning. For this purpose, Healy represented the defendant; and if the defendant was found, through Healy, to have known that a need of warning had arisen, there was a duty to give it, although the danger came from the fault of a fellow servant, and although, as held in *Siddall* v. *Pacific Mills*, 162 Mass. 378, 382, the employer is not ordinarily called upon to warn against dangers which can only result from the fault of fellow servants. The plaintiff was an adult; and, as stated in *Stuart* v. *West End Street Railway*, 163 Mass. 391, the doctrine that it is the duty of an employer to give instructions to one about to work on dangerous machinery when there are dangers which the employer knows or ought to know and which he has reason to believe his employee does not know, and will not discover in time to protect himself from injury, is to be applied in favor of adults with great caution; and the employer is not required to give warning where the elements of the danger are so obvious to a careful person of average intelligence that ordinary prudence should make him avoid them without warning. While in the present instance many of the elements of the danger were obvious, the circumstance that the cylinders were much too far apart was not, owing to their position, obvious; and it was this circumstance which very much increased the danger to the plaintiff in feeding his machine in the usual manner. If the plaintiff by looking at Healy when the pieces of rubber fell through asked for instruction, he should have been warned not to repeat the operation of feeding them with his hands until the cylinders had been readjusted.

3. A majority of the court are also of opinion that the question whether the plaintiff was guilty of negligence, in attempting

again to feed with his hands the pieces which had just fallen through, was for the jury. Of course, no man of ordinary intelligence, with a day's experience in operating the machine, could contend that he did not know that if his hands were so placed between the upper portions of the revolving cylinders as to come in contact with their surfaces, there was obvious danger that his arms would be drawn in. The plaintiff admitted that he knew that, if he put his fingers between the cylinders, they would be cut or broken, and there was uncontradicted evidence that he had been told that the machine was dangerous, and that he must be very careful. And besides this, the sudden falling through of the pieces of rubber when first fed was enough to make it his duty to inquire of himself or of his instructor whether he ought to feed them in the same way again. But the machine as then out of adjustment was very much more dangerous than usual. The jury may have found that the plaintiff was then for the first time confronted with this increased danger, and that he did not know to what the unusual course of things was due, nor what he ought under such circumstances to do. If, without asking for advice, he had again placed the pieces of rubber in the machine with his hands, he might have been said to be at fault, although that was the usual way of feeding, and the only way in which he had been instructed. If he was yet a pupil, ordinary care required that he should not repeat such an operation without asking for instructions. The plaintiff's testimony, however, justified a finding that, upon the first indication of the increased danger, he did in fact by a look appeal to Healy for advice, and got merely a laugh in reply, and the jury may have found that in this way the plaintiff did in effect inquire of Healy what he ought to do, and was in effect instructed to go on as before. If so, we think it cannot be said, as matter of law, that he was negligent in again attempting to feed the machine in the usual manner. His want of personal experience tended to justify him in following the directions of the man who had him in charge, and his imperfect knowledge of English must be taken into account in determining whether he was at fault in asking advice by a look, and interpreting the answering laugh as a direction to do as before.

Judgment for the plaintiff on the verdict.

NASHUA AND LOWELL RAILROAD CORPORATION *vs.* BOSTON AND LOWELL RAILROAD CORPORATION.

Suffolk. March 8, 1895. — September 5, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Railroad — Corporation — Contract — Ultra Vires — Action — Equity Practice — Decree — Estoppel.

The decision in *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157 Mass. 268, as to the amount recoverable, is affirmed.

If, two railroad corporations having entered into a contract for the joint operation of their roads, one corporation without right receives the benefit of funds belonging to the other through the unauthorized act of the joint manager, an action may be maintained to recover for the same, even though the contract was *ultra vires*.

After issue is joined in a suit in equity, if the plaintiff moves for leave to amend his bill by striking out one of several claims included therein, which motion is denied, and thereupon, without leave of court, he files a discontinuance of his bill as to such claim, upon which no order of court is made, the plaintiff's action is nugatory, and the defendant is entitled to treat the claim as a part of the matter to be heard and determined in the suit.

Where, in a suit in equity, the plaintiff obtained a decree in his favor for one only of two distinct claims which were the subject of that suit, and the record is silent on the question whether the other claim was passed upon by the court, such record is not conclusive evidence in favor of the defendant in a subsequent suit between the same parties to recover upon the other claim, and the plaintiff is not estopped by the decree in the former suit, if in fact such other claim was not adjudicated upon in that suit. HOLMES, KNOWLTON, & LATHROP, JJ., dissenting.

BILL IN EQUITY, filed in the Superior Court, for an account under a contract entered into by the parties for the joint operation of their railroads. Hearing before *Dewey*, J., who reported the case for the determination of this court. The facts material to the points decided appear in the opinion.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

J. H. Benton, Jr., for the defendant.

F. A. Brooks, for the plaintiff.

ALLEN, J. 1. The iron of the Boston and Lowell Railroad being at the outset in worse relative condition than that of the Nashua and Lowell Railroad and branches, it was agreed that in

the final settlement of the contract the iron of the Boston and Lowell road should be left in the same relative worse condition, or otherwise its improved relative condition should be paid for by the Boston and Lowell Railroad Corporation on its separate account. The existing difference at the outset was appraised as equivalent to the cost of replacing three hundred tons of old rails with new. The report finds that, at the termination of the contract, the rails of the Boston and Lowell road were not in a relatively worse condition than those of the Nashua and Lowell road, and that the cost of replacing three hundred tons of old rails with new was agreed by the parties to be $9,711.88. The report further finds, that whatever was expended upon the road-bed of the Boston and Lowell road during the existence of the contract was from the joint fund. It thus appears that, instead of the Boston and Lowell Railroad Company's paying for the improvement on its separate account, the improvement was paid for out of the joint fund, in which the plaintiff was interested to the extent of thirty-one per cent. The amount, therefore, which the plaintiff could recover for this item is thirty-one per cent of $9,711.88, or $3,010.68. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157 Mass. 268.

2. The defendant, however, contends that the traffic contract was *ultra vires*, and that neither corporation had power under its charter to agree with the other to operate their railroads as one road. No authority has been cited in favor of this view, but it would seem to be supported by decisions in New Hampshire. *Burke* v. *Concord Railroad*, 61 N. H. 160. See also *Boston, Concord, & Montreal Railroad* v. *Boston & Lowell Railroad*, 65 N. H. 393.

We do not, however, need to enter upon this question, because the plaintiff's suit, to the extent above mentioned, may be maintained on an independent ground. The joint manager, without authority either under the contract or otherwise, used the joint fund belonging to the two railroad companies for the improvement of the relative condition of the defendant's road. In this way the defendant has, without right, received the benefit of funds belonging to the plaintiff, and an action may be maintained to recover for the same, even though the traffic contract was *ultra vires*. *Slater Woollen Co.* v. *Lamb*, 143 Mass. 420. *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177. *L'Her-*

bette v. *Pittsfield National Bank*, 162 Mass. 137. *Central Transportation Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 60. *Logan County National Bank* v. *Townsend*, 139 U. S. 67, 74–76. *Manchester & Lawrence Railroad* v. *Concord Railroad*, 20 Atl. Rep. 383. *Central Trust Co.* v. *Ohio Central Railroad*, 23 Fed. Rep. 306.

3. The defendant further contends that the plaintiff is estopped to maintain this suit by the judgment or decree entered in favor of the plaintiff against the defendant in the Circuit Court of the United States. No authority is cited in support of this view. It appears that the plaintiff brought a bill in equity in that court against the defendant upon the claim now in suit here, and upon other distinct claims; that, after issue was joined therein, the plaintiff moved for leave to amend its bill by striking out the present claim; that after a hearing this motion was denied by the court; that thereupon the plaintiff filed in the Circuit Court a paper disclaiming and discontinuing its bill as to said claim; that this paper was filed without leave of court, and there was never any order of court upon it; that after various intermediate proceedings a final decree was entered in the Circuit Court for the plaintiff for one of the claims set forth in its bill, no mention being made therein of the claim now in suit; and that afterwards said decree was performed, and satisfied of record.

The defendant has not in its answer averred, nor by its evidence proved, that the present claim was in fact argued, considered, or determined in the Circuit Court. The report is silent upon this point. If this had been done in point of fact, of course the present suit could not be maintained. What we have to consider is, whether, upon the case as it is presented to us, we should assume that it was so determined, and whether, looking merely at the record, the legal effect of the former decree is to estop the plaintiff now.

In the first place, it is clear that the plaintiff's attempt to withdraw the present claim from that suit, in spite of the refusal of the court to permit such withdrawal, was nugatory. The case stood thereafter just as if no such attempt had been made. No doubt, as a general, though not universal proposition, at any time before a hearing the court on application made will allow a plaintiff in equity to dismiss his whole bill as of course, upon payment of costs. *Kempton* v. *Burgess*, 136 Mass. 192. Such

dismissal, however, is not made without an order of court; and there may be facts which would lead the court to refuse to allow it. *Chicago & Alton Railroad* v. *Union Rolling Mill*, 109 U. S. 702, 713. *Electrical Accumulator Co.* v. *Brush Electric Co.* 44 Fed. Rep. 602. *Hat-Sweat Manuf. Co.* v. *Waring*, 46 Fed. Rep. 87, 106. *Hershberger* v. *Blewett*, 55 Fed. Rep. 170. *Detroit* v. *Detroit City Railway*, 55 Fed. Rep. 569. *Stevens* v. *Railroads*, 4 Fed. Rep. 97. *Badger* v. *Badger*, 1 Cliff. 237. *Folger* v. *The Robert G. Shaw*, 2 Woodb. & M. 531. *Wilkinson* v. *Wilkinson*, 2 R. I. 414. *Cozzens* v. *Sisson*, 5 R. I. 489. Where a plaintiff wishes to dismiss his bill as to a part of the relief prayed for, the proper way is to apply for leave to amend, by striking out. *Camden & Amboy Railroad* v. *Stewart*, 4 C. E. Green, 69. This the plaintiff did, and his motion was denied. The defendant was therefore entitled to treat the claim now in suit as still a part of the matter to be heard and determined in that suit.

It does not necessarily follow, however, that the judgment in that case is a bar to the present suit. It has been held elsewhere, that, if a plaintiff sues in one action for several distinct demands, and obtains a general verdict and judgment, the record of such judgment is not conclusive evidence that all of the demands were included therein, and will not bar a subsequent action for such as in fact were not adjudicated upon. *Seddon* v. *Tutop*, 6 T. R. 607. *Paine* v. *Schenectady Ins. Co.* 12 R. I. 440. *Hungerford's appeal*, 41 Conn. 322. *Supples* v. *Cannon*, 44 Conn. 424. *Allebaugh* v. *Coakley*, 75 Va. 628. *Wheeler* v. *Van Houten*, 12 Johns. 311, *dictum*. This question was discussed, but not decided, in *Goodrich* v. *Yale*, 8 Allen, 454, where it was said that the doctrine of *Seddon* v. *Tutop* "is not entirely free from objection, inasmuch as it allows a party unnecessarily to subject the other party to a second suit, after the plaintiff has elected to unite two causes of action in one suit, and when he has had full opportunity to obtain judgment for his entire damages." The court, however, was not ready to deny the doctrine of that decision, and, upon consideration, we think it better not to extend the estoppel of a former judgment so far as to assume conclusively that such a distinct demand was determined in favor of the defendant, when the record does not so state, but merely shows that the other demands were deter-

mined in favor of the plaintiff. Such estoppel includes whatever was actually determined, and whatever was necessarily involved in the actual determination; but where the former action included several distinct claims or demands, which were distinct causes of action, a demand or cause of action which in point of fact was not passed upon may be the subject of a subsequent suit. The defendant might have brought such demand to the attention of the court, and might have asked for and obtained an adjudication upon it. But if this was not done, and if there was no such adjudication, then there is no estoppel in respect to it. This limitation of the doctrine of estoppel by former judgment is in accordance with the general tendency of the decisions. *Foye* v. *Patch*, 132 Mass. 105. *Hooker* v. *Hubbard*, 102 Mass. 239, 245. *Burlen* v. *Shannon*, 99 Mass. 200. *Russell* v. *Place*, 94 U. S. 606. *De Sollar* v. *Hanscome*, 158 U. S. 216, 221. *Dunlap* v. *Glidden*, 34 Maine, 517. *Pray* v. *Hegeman*, 98 N. Y. 351. *Doe* v. *Oliver*, 2 Smith's Lead. Cas. (7th Am. ed.) 699, and cases cited.

The demand now in suit, therefore, is not barred by the former judgment, unless it was in fact adjudicated upon therein; and the record laid before us is not conclusive evidence that it was so adjudicated upon. If there is any question as to the fact, it will be determined in the Superior Court.

Unless in point of fact it was so adjudicated, the plaintiff should have a decree for $3,010.68, and interest.

Ordered accordingly.

HOLMES, J. In my opinion, when the pleadings present three issues, and the final decree is for the plaintiff upon two of them and is silent as to the third, it has the same effect, with regard to that issue, as if it had been expressly for the defendant. *Thompson* v. *McKay*, 41 Cal. 221, 227. In either form, it is a bar to a subsequent suit for the same cause of action. *Schmidt* v. *Zahensdorf*, 30 Iowa, 498. Decisions as to the effect of the decree as an estoppel in collateral proceedings have no application. See *Foye* v. *Patch*, 132 Mass. 105, 110; *Bassett* v. *Connecticut River Railroad*, 150 Mass. 178; *Bradley* v. *Bradley*, 160 Mass. 258; *Watts* v. *Watts*, 160 Mass. 464, 465; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Pray* v. *Hegeman*, 98 N. Y. 351.

Justices KNOWLTON and LATHROP concur in this view.

PROPRIETORS OF MILLS ON MONATIQUOT RIVER & others *vs.* COMMONWEALTH.

Norfolk. January 24, 25, 1895. — September 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Taking of Land and Rights therein by Metropolitan Park Commission — Rights of State as Owner — Effect of Taking on Water Rights — Corporation — Eminent Domain — Statute.

The Commonwealth, as owner in fee, after the taking by the Metropolitan Park Commission, under St. 1893, c. 407, § 4, of land and rights in land, including ponds and streams of water within the limits of such land, has the rights which belong to a private owner of land and of ponds and streams on the land.

The taking by the Metropolitan Park Commission, under St. 1893, c. 407, § 4, of land and rights in land, including streams of water within the limits of such land, does not take or impair the water rights of those persons who own land not taken, but to or through which the streams of water flow from the land so taken, and such persons have no foundation for a petition for an assessment of damages under § 7.

The St. 1818, c. 35, incorporating the proprietors of mills on a river, and authorizing them to make reserves of water in certain great ponds, to erect suitable dams for the purpose of raising the water in the ponds, to lower the outlets of the ponds, and to draw off the waters from the ponds, did not confer upon the corporation the right of eminent domain.

A statute incorporated the proprietors of mills on a river, and authorized them to make reserves of water in certain great ponds, to erect suitable dams for the purpose of raising the water in the ponds, to lower the outlets of the ponds, and to draw off the waters from the ponds. Before the corporation had exercised the powers given by the statute as to one of the ponds, the land at the outlet and around the pond, which was never owned by the corporation, was taken by the Metropolitan Park Commission under St. 1893, c. 407, § 4. *Held*, that the corporation, by the statute creating it, acquired no rights of property in the pond, and could not maintain a petition for an assessment of damages under St. 1893, c. 407, § 7.

PETITION to the Superior Court, under St. 1893, c. 407, § 7, for an assessment of damages for the taking by the Metropolitan Park Commission, under § 4, of certain land and rights therein. The respondent demurred to the petition, and moved that the same be dismissed. *Mason*, C. J. sustained the demurrer, and dismissed the petition, and the petitioners appealed to this court. The facts appear in the opinion.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

E. C. Bumpus, (*R. F. Simes* with him,) for the petitioners.

F. Rackemann, (*F. V. Balch & J. D. Colt* with him,) for the Commonwealth.

FIELD, C. J. By St. 1893, c. 407, § 4, the board of Metropolitan Park Commissioners is authorized "to take, in fee or otherwise, in the name and for the benefit of the Commonwealth, by purchase, gift, devise, or eminent domain, lands and rights in land for public open spaces within said district, or to take bonds for the conveyance thereof; and to preserve and care for such public reservations," etc. By § 7, "said board shall estimate and determine as near as may be all damages sustained by any person or corporation by the taking of land, or any right therein, under this act; but any one aggrieved by such determination of the board may have such damages assessed by a jury of the Superior Court, in the same manner as is provided by law with respect to damages sustained by reason of the laying out of ways." See St. 1894, c. 288. The petition in the present case alleges that on January 5, 1894, the board, acting under the statute, duly took certain parcels of land and rights in land, which are situated in the town of Milton and in the city of Quincy, and are definitely described in the taking, and which included Houghton's Pond and the brook which is the outlet of the pond, and which empties into Blue Hill River, one of the tributaries of Monatiquot River. Houghton's Pond is a great pond of the area of about twenty-five acres, and Blue Hill River empties into Monatiquot River above the mill sites of those of the petitioners, who own or occupy mill sites on Monatiquot River. The petitioners are the corporation of the Proprietors of Mills on Monatiquot River, which does not maintain mills on the river, and certain persons and corporations which own or occupy mills on the river; and it is alleged that these last and their predecessors in title "for more than twenty years prior to December 29, 1893, have had the use and enjoyment of Houghton's Pond at said privileges, as it has flowed from said pond down into the said river, and to and past their respective privileges." All of these owners or occupants of mills but one are members of the corporation of the Proprietors of Mills on Monati-

quot River. The lands taken by the board at the time of the taking were not owned, and never had been owned, by any of the petitioners, and there has been no actual diversion of the waters of Houghton's Pond, or of its outlet from Monatiquot River.

The Commonwealth, waiving "all objection on the ground of the joinder of several petitioners in the single petition," demurred, on the ground that the petition does not state a case which entitles the petitioners, or any of them, to damages.

The claims of the owners or occupants of mill privileges are made, we think, upon a mistaken view of the effect of the taking by the board. Land and rights in land have been taken, and this includes ponds and streams of water within the limits of the land taken, but no right is given to divert running water from the channels in which it naturally flows. The Commonwealth, as owner in fee after the taking, has, we think, the rights which belong to a private owner of land and of ponds and streams on the land. The Commonwealth was the owner of the great pond before the taking, and its rights to control the waters of this pond are either the same as they were before the taking, or have been made somewhat less by the taking. The land has been taken for and the pond has been taken for or dedicated to the purposes of the statute, which are "to acquire, maintain, and make available to the inhabitants of said district open spaces for exercise and recreation." These are called in the act "public open spaces," and "public reservations." There is nothing in the act which indicates that the board may take or impair the water rights of those persons who own land not taken, but to or through which streams of water flow from the land taken. The Commonwealth, succeeding to the title of private owners, acting through the board of commissioners, may make such reasonable use of the waters on the land taken as the private owners before the taking lawfully could have made without liability to the owners of land not taken, but to or through whose land these waters flow. Whether the Commonwealth, as owner, has greater rights in the waters of the great pond before they issue from the pond need not now be considered. Whatever rights the owners of mill sites had, before the taking, to have the waters of Houghton's Pond and of its

outlet flow into Blue Hill River, and thence into Monatiquot River past their mills, they have now. The board has not attempted to take any of these rights.

The claim of the Proprietors of Mills on Monatiquot River is a peculiar one. They were incorporated by an act approved June 12, 1818, being St. 1818, c. 85. This act was considered in *Proprietors of Mills* v. *Randolph*, 157 Mass. 345. That case was a petition for the assessment of damages for the taking of all the waters of Great Pond, so called, under St. 1885, c. 217, for the purpose of supplying the inhabitants of Braintree, Randolph, and Holbrook with water. There it appeared that the corporation of the Proprietors of Mills on Monatiquot River "owned a dam which held up and regulated the waters of Great Pond, and certain land and flowage rights in connection therewith, at or near the border of said pond, which dam and land and flowage rights, acquired by and belonging to the said corporation, were taken by the respondents under said act of 1885," etc., and it was held that, under St. 1885, c. 217, the corporation "was entitled to recover the market value of its dam, land, and flowage rights which were taken, as property distinct from the right to use the water of the river, which belonged to the mill-owners on the stream, and that the mill-owners could also recover for the injury to their estates in being deprived of the use of a part of the water of the stream by the taking of the respondents."

By the act of incorporation the Proprietors of Mills on Monatiquot River were given authority to make reserves of water in Houghton's Pond, Cranberry Pond, Little Pond, and Great Pond, and to erect suitable dams at proper places for the purpose of raising the water in said ponds "as high as its original bounds," and "to lower the outlets of said ponds, and to draw off such portions of said waters from any of said ponds, in such quantities, and at such times," as the proprietors or a major part of them should judge best. It appears by the petition that the corporation, before the year 1890, had exercised its powers, so far as concerned Great and Little Ponds, so called, being both great ponds, and had used the waters of these ponds as reserved waters, but that about the year 1890 all of the waters of these ponds were taken under the right of eminent domain for the

purposes of supplying the inhabitants of certain towns with water. The corporation had not exercised its rights under its charter with reference to Houghton's Pond because, as is alleged, until the waters of Great and Little Ponds had been taken, it did not need to make a reserve of the waters of Houghton's Pond. These waters flowed, as they had always flowed, through the natural outlet of the pond, and formed a part of the waters which flowed through the channel of Monatiquot River, past the mills of the other petitioners.

After the diversion of the waters of Great and Little Ponds from the Monatiquot River, there was need of new reserves of water, and the petition alleges as follows: "The outlet of Houghton's Pond could be deepened at small expense, and a dam put there which would reserve a certain amount of water in this pond that could be used during the dry season at the said mills, and which would be of value to take the place, to some extent, of the reserved waters diverted from Great and Little Ponds. After said diversion of Great and Little Ponds, the Proprietors' Corporation had considered the question of such storing and using of the waters in Houghton's Pond, and intended to take definite proceedings relative thereto, although at the date of the action of the respondent, hereinafter set forth, no such definite proceedings had actually been taken." The claim of this petitioner then is, that it has been prevented, by the taking of land and of rights in land by the board of Metropolitan Park Commissioners, from erecting a dam and making a reserve of the waters of Houghton's Pond, and that therefore the right which the corporation had to do this has been taken from the corporation. It is, as we understand, conceded by the counsel for the Commonwealth, that since the taking the corporation of the Proprietors of Mills on Monatiquot River cannot, without the consent of the Commonwealth, lawfully erect dams, and change the outlet of Houghton's Pond, upon the land taken by the commissioners.

The act of incorporation, St. 1818, c. 35, was passed before the passage of St. 1830, c. 81, which provided that acts of incorporation thereafter passed should be liable to be amended, altered, or repealed at the pleasure of the Legislature, and there is no power expressly reserved to the Legislature in St. 1818,

c. 35, to alter, amend, or repeal the statute. Whether it is subject to the provisions of St. 1808, c. 65, § 7, we have not found it necessary to consider.

It is contended, in behalf of the Commonwealth, that the act of incorporation did not confer upon the corporation the right of eminent domain, and we think that this contention is true. There are no words that purport to grant the right to take private property, and no provision for compensation. The ponds described in the act are all great ponds. If it were necessary to take private property to exercise any of the rights and powers to make reserves of water, we think that the property must be acquired by purchase from the owners. The act in this respect is like that construed in *Thacher* v. *Dartmouth Bridge*, 18 Pick. 501.

It is suggested that the taking by the park commissioners impairs the franchise powers of the corporation. It does this, if it does it at all, by taking property of the corporation. If the corporation have no rights of property in the waters of Houghton's Pond, the taking of these waters has not taken anything from the corporation, although there may be less property left upon which, without the further consent of the Commonwealth, the powers of the corporation might be exercised. If a corporation were empowered to erect and maintain dwelling-houses anywhere within the city of Boston, a taking of land in Boston which was not the property of the corporation for the purpose of making a public park upon which dwelling-houses could not be built, would not be a taking of any franchises or property of the corporation, although the quantity of land on which the corporation might erect dwelling-houses would be less after the taking than before. See *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360, 395.

The question then is whether the Commonwealth by the act of incorporation granted to the corporation any rights of property with reference to the waters of Houghton's Pond which have been taken by the park commissioners. In *Proprietors of Mills* v. *Braintree Water Supply Co.* 149 Mass. 478, the plaintiff had built and maintained a dam at the outlet of Little Pond, so called, and had raised the water of the pond to high-water mark, making a valuable reserve of water in the pond of

about one hundred and ten million gallons. It was contended by the defendant that the plaintiff had at most only a revocable license to use and enjoy the waters of the pond, which the Commonwealth might terminate at its pleasure. The court in that case found it unnecessary to decide the question.

In the present case, there never has been any exercise by the corporation of its powers with reference to the waters of Houghton's Pond, and the corporation never has had any possession or control of them before they became a part of the waters of Monatiquot River. The argument is, that the Commonwealth owned the waters of Houghton's Pond, and by the act of incorporation granted to the corporation rights of property in them, which became vested, and which have not been lost by non-user, and which could not be taken away by the Commonwealth except for a public purpose, and then only by paying reasonable compensation. The act gives to the corporation "full power, liberty, and authority to make the reserves of water wished by them," etc., and this relates to the powers of the corporation; and the proprietors are "authorized and empowered" to erect suitable dams, lower the outlets of said ponds, and draw off the waters, etc., and this at least implies a permission to do these things, so far as the Commonwealth could give permission. This charter seems to a majority of the court to resemble, with respect to the grant of powers, that of the Watuppa Reservoir Company, which was considered in *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548, 559. A majority of the court there said: "By its charter, this company was granted the 'power to make reserves of water in the Watuppa Ponds, so called, by erecting a dam across the outlet of said ponds, in the town of Troy, in the county of Bristol, so as to raise the water in said ponds two feet higher than the dam already erected by the Troy Cotton and Woollen Manufactory in said town of Troy, and to draw off said reserved water in such quantities, at such times, and in such manner, as they shall judge to be most for the interest of all concerned.' St. 1826, c. 31. We do not think that this can be construed as granting any part of the pond, or any absolute and exclusive right to use and control the waters of the pond. It does not do this in terms or by necessary implication. It is a familiar rule, that

grants made by the government are to be construed in favor of the grantor, and this is especially true when they affect the interests of the people which are held in trust by the government. The State is not presumed to grant away such rights or franchises unless it is done in clear terms, or by an implication which is strictly necessary. *Commonwealth* v. *Roxbury*, 9 Gray, 451. *Martin* v. *Waddell*, 16 Pet. 367, 411. *Susquehanna Canal Co.* v. *Wright*, 9 Watts & Serg. 9." This was a question distinct from the principal one in that case, and upon this the justices who dissented from the opinion of the majority upon the principal question said, "There is great force in the argument, that, by the acts of the corporation under its charter, the contract of the Commonwealth has become executed, and that the rights of the corporation have become vested, so that they cannot be taken away without compensation, — at least so long as the charter remains unrepealed." But no opinion was expressed by them upon the effect of that charter if the powers given to the corporation had not been exercised. That charter was expressly made subject to St. 1808, c. 65.

In the present case it must be taken that no one of the plaintiffs ever owned the land at the outlet of Houghton's Pond, or ever had acquired any right to enter upon this land for the purpose of damming up the water, or deepening the channel, or for any other purpose. The St. of 1818, c. 35, conferred no such right. All that the corporation created by that statute acquired by it was the right to do certain things as a corporation, provided it should acquire from the owners the right to use the land on the borders of the pond. This at most was a possibility. Everything depended upon the corporation acquiring, by purchase or otherwise, the right to enter upon the land at the outlet. The only right, in actual possession, which any of the plaintiffs ever had, was to have the water flow *ut currere solebat*. The owners of the land at the outlet and around the pond might sell it or give it away to whomsoever they pleased. They might have sold or given it to the park commissioners; and in that case the park commissioners would have succeeded to the rights of the former owners. But the park commissioners, instead of purchasing, have taken this land at the outlet, and all around the pond. If this taking had been

made expressly subject to all the rights which the Proprietors of Mills on Monatiquot River had, under St. 1818, c. 35, still that corporation could do nothing until it should obtain leave from the Commonwealth, as owner of the land at the outlet, to build a dam there. As against the Commonwealth, in its capacity of owner of this land, the corporation of the Proprietors of Mills on Monatiquot River has no right whatever, and the taking of the land at the outlet did no legal harm to the corporation, any more than if the Commonwealth had bought it.

We have no occasion in the present case to express any opinion upon the rights in the waters of Houghton's Pond which might have been acquired by the Proprietors of Mills on Monatiquot River if the powers given by the charter had been executed by the purchase of land, and by building a dam and actually making reserves of waters in Houghton's Pond. The powers of the corporation not having been used with reference to Houghton's Pond, the corporation must stand, if at all, upon the effect of the charter in granting rights of property in the waters of the pond. The language of the charter seems to a majority of the court that of license and permission, rather than that of a gift, grant, or conveyance of property, and they are of opinion that by the charter it was not intended to grant to the corporation irrevocable rights of property in the waters of Houghton's Pond.

Demurrer sustained, and petition dismissed.

CALVIN S. CROWELL & another *vs.* CAPE COD SHIP CANAL COMPANY & another.

Barnstable. March 7, 1895. — September 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Cape Cod Ship Canal Co. — Fund for Benefit of Creditors — Parties to Bill in Equity.

The fund deposited by the Cape Cod Ship Canal Company with the Treasurer of the Commonwealth, agreeably to the provisions of St. 1883, c. 259, § 19, which provides that "the Supreme Judicial Court shall have jurisdiction in equity to

apply said deposit to the payment of any damages caused by the laying out, construction, and maintenance of said canal, and for all claims against said company for labor performed or furnished, and for land or materials taken or used in the construction of said canal," is for the benefit of all persons having claims within the terms of the statute, and, if it is insufficient to pay all in full, it should be divided ratably among them.

A bill in equity brought against the Cape Cod Ship Canal Company and the Treasurer of the Commonwealth to have a judgment recovered against the company paid out of the fund deposited with the company, as required by St. 1883, c. 259, § 19, should, as in the case of a creditors' bill or a suit for the administration of a trust fund, make all persons interested in the fund parties, and, if this is not done, the bill may be treated as brought in behalf of all parties in interest, and an opportunity given them to come in and present their claims.

LATHROP, J. The St. of 1883, c. 259, incorporating the Cape Cod Ship Canal Company, by § 19, provides for a deposit by the defendant of the sum of $200,000 with the Treasurer of the Commonwealth, and that "the Supreme Judicial Court shall have jurisdiction in equity to apply said deposit to the payment of any damages caused by the laying out, construction, and maintenance of said canal, and for all claims against said company for labor performed or furnished, and for land or materials taken or used in the construction of said canal."

The plaintiffs have recovered a judgment against the Cape Cod Ship Canal Company amounting to $2,260.53, for damages occasioned by the taking of their land for the construction of a canal, and seek by this bill in equity, which is brought against the canal corporation and the Treasurer of the Commonwealth, to have their judgment, with interest, paid out of the sum of $200,000 which was deposited as required by the statute. It appears from the answers of the defendants, which it is agreed are to be taken as true, that there are other claims pending against the defendant corporation by persons who contend that they are entitled to share in the fund, which, if allowed, will more than exhaust the fund; and the defendant corporation contends that, before the claim of the plaintiffs is ordered to be paid, an inquiry should be had to give all persons interested or claiming to be interested in the fund an opportunity to appear and present their claims, in order that the fund, if not sufficient to pay all claims that may be allowed, may be equitably distributed.

On the facts stated, we have no doubt that the contention of

the defendants should prevail. The fund in question is for the benefit of all persons having claims, within the terms of the statute. If it is insufficient to pay all in full, it should be divided ratably among them.

A bill in equity in such a case as this, as in the case of a creditors' bill, or a suit for the administration of a trust fund, should make all persons interested in the fund parties. *Smith* v. *Williams*, 116 Mass. 510. *Libby* v. *Norris*, 142 Mass. 246. See also *Richmond* v. *Irons*, 121 U. S. 27, 44. If this is not done, the bill may be treated as brought in behalf of all parties in interest, and an opportunity given them to come in and present their claims. *Hallett* v. *Hallett*, 2 Paige, 15, 19.

The case must therefore be remanded to the county court, that an order of notice may issue to all persons interested to present their claims by a certain time.

So ordered.

H. P. Harriman, for the plaintiffs.
G. Putnam, for the defendants.

J. R. PARKER *vs.* CHINA MUTUAL INSURANCE COMPANY.

Suffolk. March 15, 1895. — September 6, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Marine Insurance — "Excluding" and "Prohibiting" — Action.

If the words "excluding Gulf of C." were written in a policy of marine insurance, not for the purpose of qualifying the printed clause in which the vessel was prohibited from certain rivers, gulfs, straits, and seas, including the Gulf of C., but of calling particular attention to the Gulf of C., which was near the port where the vessel was when the insurance was effected, an action on the policy for a loss accruing after the vessel has been to and left the Gulf of C., and before the expiration of the policy, cannot be maintained.

CONTRACT, upon a policy of insurance on the schooner H. A. De Witt. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, upon agreed facts, in substance as follows.

The defendant issued to the plaintiff its policy, dated June 3,

1890, for "one thousand dollars on Schooner 'H. A. De Witt,' valued at six thousand dollars. At and from the 24th of June, 1890, at noon, until the 24th of June, 1891, at noon. Excluding Gulf of Campeachy." The words quoted were in writing. Just below appeared in print a prohibition from certain rivers, gulfs, straits, and seas, including the Gulf of Campeachy, the words used being "prohibited from . . . Gulf of Campeachy."

When the policy was issued, the schooner was at La Guayra, in Venezuela, South America. She sailed from there on June 24, 1890, and, after using various ports not prohibited, she proceeded to a port or ports in the Gulf of Campeachy, and sailed from Alvarado in the Gulf of Campeachy on May 30, 1891. On or about June 14, 1891, in latitude 24° 24′ N., longitude 86° 14′ W., outside of the Gulf of Campeachy, heavy weather was encountered with squalls, which continued until the 16th, when the vessel was abandoned, and became a total loss by perils of the sea. If the defendant was liable for anything under the policy, it was liable for the total amount thereof; otherwise, judgment was to be entered for the defendant.

E. P. Carver, for the plaintiff.

J. D. Bryant, for the defendant.

FIELD, C. J. In the present case we think that the words "excluding Gulf of Campeachy" were written in the policy, not for the purpose of qualifying the printed clause in which the vessel was prohibited from certain rivers, gulfs, straits, and seas, including the Gulf of Campeachy, but for the purpose of calling particular attention to the Gulf of Campeachy, which is near the port where the vessel was when the insurance was effected. If the intention had been materially to modify the effect of the printed clause, we think it would have been shown by the use of words more distinctly expressing that intention. So far as we are aware, there is no technical meaning given to the word "excluding" in marine insurance, and the customary meaning of the word does not differ greatly from that of the words "prohibiting" or "prohibited from." The plaintiff relies upon the decision in *Palmer* v. *Warren Ins. Co.* 1 Story C. C. 360; but Mr. Justice Story reached his conclusion in that case with some hesitation, relying upon the particular words of the policy, and not upon any technical signification of the word

"excluding," which had become established in marine insurance. We are unable to see any such contradiction between the written and the printed words concerning the Gulf of Campeachy in the present policy as to make it necessary to reject the printed words. It is in effect conceded by the plaintiff that the printed clause, if in force as to the Gulf of Campeachy, is equivalent to a warranty that the vessel should not go there during the time covered by the insurance. *Odiorne* v. *New England Ins. Co.* 101 Mass. 551. *Whiton* v. *Albany City Ins. Co.* 109 Mass. 24. *Burgess* v. *Equitable Ins. Co.* 126 Mass. 70. *Cobb* v. *Lime Rock Ins. Co.* 58 Maine, 326. *Birrell* v. *Dryer*, 9 App. Cas. 345.

Judgment for the defendant affirmed.

ARTHUR M. EVANS & another *vs.* CHARLES S. HAMLIN & another, assignees.

Suffolk. March 19, 1895. — September 6, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Writ of Error to reverse Decree in Equity.

A writ of error does not lie to reverse or revise a decree in equity.

A bill of review is the customary remedy to reverse a final decree in equity for errors of law apparent on the record, but it is suggested by the court, although not decided, that that remedy is not open where the final decree has been affirmed by the full court, and especially where it has been so affirmed by the consent of all the parties.

WRIT OF ERROR, to reverse a decree rendered by a single justice of this court in a suit in equity wherein the plaintiffs in error were the defendants. The defendants in error demurred generally to the writ and the assignment of errors, and the case was heard by *Lathrop*, J., who reserved it for the full court, upon the writ and the return thereof, the assignment of errors, and the pleadings. The facts sufficiently appear in the opinion.

A. Thompson, for the plaintiffs in error.

R. M. Morse, for the defendants in error.

FIELD, C. J. This is a writ of error from this court, sued out for the purpose of reversing a decree rendered in a suit in

equity by the court when held by a single justice within and for the County of Suffolk. A writ of error lies where the proceedings are according to the course of the common law, but it does not lie in proceedings in equity unless it is authorized by statute. The customary remedy in equity to reverse a final decree for errors of law apparent on the record is by a bill of review. *Elliott* v. *Balcom*, 11 Gray, 286. There is no statute of this Commonwealth which authorizes a writ of error in proceedings in equity.

After the decree in the equity suit which is complained of was entered by a single justice in the court sitting for the county, an appeal was taken to the full court, and exceptions were allowed by the single justice, and the appeal and exceptions were entered in the full court. While the exceptions and appeal were pending before the full court, the following agreement was filed in that court, viz.:

"Supreme Judicial Court for the Commonwealth.

"In Equity.

"George P. Deshon et al., Assignees, *vs.* Arthur M. Evans and Augustin Thompson.

"It is agreed in the above entitled action that the appeal taken by the defendants be waived, that the bill of exceptions taken by said defendants be overruled, and that the decree of Mr. Justice Charles Allen be affirmed.

"R. M. Morse, Jr., for complts.
J. B. Rich & , for deft. Evans.
J. A. Brackett, for deft. Thompson."

A rescript of the full court affirming the decree of the single justice was sent down in pursuance of this agreement. It deserves to be considered by the plaintiffs in error whether any proceedings in the nature of a bill of review will lie in this court to reverse a final decree in equity, which has been affirmed by the full court, although an application for a rehearing sometimes may be made, which is addressed exclusively to the discretion of the full court. It should also be considered whether, in any event, a bill of review will lie to reverse a final decree which has been affirmed by the full court by consent of all of the parties. See *Winchester* v. *Winchester*, 121 Mass. 127. The present writ of error must be dismissed. *So ordered.*

THEODORE E. DAVIS *vs.* COMMONWEALTH.

Suffolk. March 20, 1895. — September 6, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Constitutionality of Resolve — Validity of Contract — Employment by State of Agent to prosecute Claim against United States — Statute — Waiver — Obligation of State to perform.

It is within the constitutional power of the Legislature to pass a resolve authorizing the Governor and Council "to employ the agent of the Commonwealth for the prosecution of war claims against the United States to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress" of August 5, 1861, "also to fix his compensation, which shall be paid out of any amount received therefrom."

A contract made by the Commonwealth, under the authority of a legislative resolve to employ a person who is the agent of the Commonwealth for the prosecution of war claims against the United States to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under an act of Congress, and whose compensation is to be paid out of any amount so collected by him, cannot be declared void as against public policy.

The Commonwealth, under the authority of a legislative resolve, employed A., who was the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under an act of Congress, and fixed his compensation, which was to be paid out of any amount received therefrom. A. rendered services in procuring the passage of an act of Congress, which appropriated a sum for the refund of the tax, and provided, among other things, that no part of the money so appropriated should be paid out to any agent under any contract for services existing or previously made between any State and agent. A. also rendered further services in preparing the form of a resolve to be passed, in accordance with the requirements of the act, accepting the sum appropriated, and also the form for obtaining payment of the money. The Commonwealth, under a resolve duly passed, accepted the money, and also all trusts imposed by the act. *Held*, that A., in procuring the passage of the statute and in assenting to the Commonwealth's receiving the money under it, did not waive his claim for compensation; and that the Commonwealth was bound to pay the amount of the compensation agreed upon from any appropriation that might be made for the purpose.

FIELD, C. J. This is a petition against the Commonwealth under Pub. Sts. c. 195, as amended by St. 1887, c. 246. The Commonwealth demurred to the petition; the Superior Court overruled the demurrer and ordered judgment for the petitioner; and the Commonwealth appealed to this court. The order of

the Governor and Council, passed February 5, 1890, seems to us within the authority granted by the resolve of March 20, 1888, c. 39, and we have no doubt that the Legislature had the constitutional power to pass the resolve.* We cannot declare the contract made with the petitioner by the Governor and Council void as against public policy, because the Legislature has sanctioned it. Whether a similar contract between private individuals, in which the compensation to be paid is made contingent upon success, would be deemed at common law void as against good morals and public policy, we need not consider. The Legislature can determine for itself what public policy requires or permits to be done in the prosecution in any form of claims of the Commonwealth against the United States. It is not bound, in fixing the compensation of its agents, to conform to the rules of the common law as interpreted by the courts, or to pass a general law whereby individuals shall be put upon the same footing as the Commonwealth in the prosecution of similar claims.

The more difficult question in the case is whether the obligation of the Commonwealth to the petitioner is affected by the act of Congress of March 2, 1891, and by the acceptance of the money by the Commonwealth from the United States under the resolve of April 8, 1891, c. 46. By that resolve the Commonwealth accepted in full satisfaction of all claims against the

* The resolve was as follows: "Resolved, That the Governor and Council are hereby authorized to employ the agent of the Commonwealth for the prosecution of war claims against the United States to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress, approved August fifth in the year eighteen hundred and sixty-one, and of the interest paid upon war loans during the period from eighteen hundred and sixty-one to eighteen hundred and sixty-five, also to fix his compensation, which shall be paid out of any amount received therefrom."

The order was as follows: "Ordered, That Theodore E. Davis of Washington, D. C., agent of the Commonwealth for the prosecution of war claims against the United States, be and he is hereby authorized to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under acts of Congress, approved August fifth in the year eighteen hundred and sixty-one, and that his compensation be two (2) per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom and paid into the treasury of the Commonwealth, the same to be in full for compensation and expenses on account of said claim."

United States on account of the collection of the direct tax under the statute of the United States approved August 5, 1861, the money which had been credited to it by the Secretary of the Treasury of the United States, under the provisions of the statute of the United States approved March 2, 1891; and the Commonwealth further accepted all trusts imposed upon it by the provisions of the last named statute. The statute of the United States approved March 2, 1891, appropriated the money necessary to reimburse to each State and Territory the amount of the direct tax collected under the Statute of the United States approved August 5, 1861, and it provided in § 3, that "no money shall be paid to any State or Territory until the legislature thereof shall have accepted by resolution the sum herein appropriated and the trusts imposed in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the Governor to receive said money for the use and purposes aforesaid."

The trusts imposed by this statute are "that where the sums or any part thereof credited to any State, Territory, or the District of Columbia have been collected by the United States from the citizens or inhabitants thereof, or any other person, either directly or by sale of property, such sums shall be held in trust by such State, Territory, or the District of Columbia for the benefit of those persons or inhabitants from whom they were collected, or their legal representatives." In this Commonwealth the tax was not collected by a levy upon the inhabitants, but was paid by the Commonwealth out of its treasury, and therefore this Commonwealth did not receive the money upon the trust above mentioned. This statute of the United States also provided as follows: "That no part of the money hereby appropriated shall be paid out by the Governor of any State or Territory, or any other person, to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and any attorney or agent. All claims under the trust hereby created shall be filed with the Governor of such State or Territory and the Commissioners of the District of Columbia, respectively, within six years next after the passage of this act; and all claims not so filed shall be forever barred and the money attributable thereto shall belong to

such State, Territory, or the District of Columbia, respectively, as the case may be."

We consider the statute to mean that no part of the money received shall be paid out to any agent or attorney under any contract for services made before or existing at the time of the passage of the statute, but we doubt whether this provision can be regarded as a part of the trust created by the statute. We are inclined to think that the Commonwealth, after it received the money, held it as its own absolute property. It may be doubtful whether this provision of the statute last cited was intended to apply to States which had paid the tax out of their treasuries; but if it be construed as including all the States, then the reception of the money by the Commonwealth under the statute may be held to imply a promise on the part of the Commonwealth to the United States that it will not pay out of the money so received any compensation to any agent or attorney under any contract for services made before the passage of the statute. Assuming this to be so, what is the legal effect of such a promise upon the claim of the petitioner against the Commonwealth? If the petitioner has performed his contract with the Commonwealth, and according to the terms of the contract has become entitled to his compensation, we think that it would be no defence for the Commonwealth that it had promised the United States that it would not pay to him his compensation. It may be conceded that Congress, in appropriating money to be paid out of the treasury of the United States to the States, can impose upon it any trust which it sees fit, and that the States, if they accept the money, are bound to carry these trusts into effect.

The most formidable argument is that, as the original resolve provided that the compensation of the agent to be employed "shall be paid out of any amount received" from the United States, and as the order under which the petitioner was employed provided that "his compensation be two per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom and paid into the treasury of the Commonwealth, the same to be in full for compensation and expenses on account of said claim," the petitioner by assenting to the Commonwealth's receiving the money under the act of Congress

which in effect provided that no part of the money when received shall be paid to him, has waived his claim for compensation, or is estopped from asserting it.

The petitioner not only alleges that he helped to procure the passage of the act of Congress, but in the eighth paragraph of his petition alleges also the following: "Your petitioner says that very soon after the passage of the said act of Congress of March 2, 1891, to refund the direct tax, the Chief Clerk of the State Auditor's office, under the direction of the then State Auditor, Mr. W. D. T. Trefry, wrote to him at Washington and requested him to prepare the form of a resolve for the Legislature to pass, in accordance with the requirement of said act of Congress, accepting the sum therein appropriated, and also the proper form of a claim to be made upon the Treasury Department of the United States for obtaining the money; and that both of said forms were prepared by your petitioner and forwarded, and were used by the Commonwealth in obtaining said money," etc.

It is plain from these allegations that it must be considered that the petitioner assented to the Commonwealth's receiving the money on the terms provided in the statute of the United States of March 2, 1891. The promise implied, on the part of the Commonwealth, if one is to be implied from its acceptance of the money under such a statute, may certainly be regarded as importing at least a moral obligation, which it may be the duty of the Commonwealth to keep. Is it to be inferred that the petitioner, in procuring the passage of the statute and in assenting to the Commonwealth's receiving the money under it, intended to waive altogether his claim for compensation? We think not. Congress in the statute did not undertake to declare void any contracts theretofore made between the representative of any State and an agent or attorney. Congress only provided that the money appropriated should not be used to pay for the services of any such agent or attorney. If the money was to be held in trust by the State for the persons from whom the tax was collected, this was a necessary provision if these persons were to be paid in full out of it; but if the money was not held in trust by the State, but belonged to the State absolutely, it is largely a matter of form whether the obligations of the State

shall be discharged out of the money received from the United States, or out of other funds of the State. We think that due effect can be given to the conduct of the petitioner if we hold that at most it amounted to an assent on his part that he need not be paid out of the money received from the United States, and that the Commonwealth, so far as he is concerned, may keep its promise to the United States.

But the petitioner has in substance performed his part of the contract, and the Commonwealth has fully received the benefit contemplated by such performance, and whether the contract was a provident one or not, the Commonwealth ought in substance to perform its part of the contract, and we see no legal difficulty in its doing so. The principal thing promised is a certain amount of compensation, to be determined in a certain manner; it is a subordinate and separable part of the contract that the compensation shall be paid out of the proceeds, and this last may be waived or modified by the parties without a cancellation or avoidance of the whole contract. We are of opinion that the Commonwealth is bound to pay the amount of the compensation agreed upon from any appropriation that may be made for the purpose. See Pub. Sts. c. 195, § 4. It was agreed by the Attorney General at the argument, that, if the demurrer should be overruled, judgment should be entered against the Commonwealth.

Judgment accordingly.

H. M. Knowlton, Attorney General, & *J. M. Hallowell*, Second Assistant Attorney General, for the Commonwealth.

J. D. Long & *W. Schofield*, for the petitioner.

DWIGHT PRINTING COMPANY *vs.* CITY OF BOSTON.

Middlesex. March 28, 1895. — September 6, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Waterworks — Statute — Taking of Water Rights — Damages.

It seems, that the taking of a pond or a stream, with the water in it, is a taking of the land and of the water of the proprietors of the pond or stream where the taking is made, and is also a taking of the water rights of such other persons as have the right to use the water elsewhere, such as lower proprietors on a stream.

Under St. 1846, c. 167, authorizing the city of Boston to take water, water rights, and land for the purpose of supplying the city with water, when what is called land or water is taken, the petition for an assessment of damages for such taking must be filed within three years from the taking, and when what are called water rights are taken the petition must be filed within three years from the time the water is actually withdrawn or diverted; and this implies that what is called a taking of water rights is a taking for the purpose of ultimately withdrawing or diverting the water for the use of the city.

In the application of St. 1872, c. 177, to St. 1846, c. 167, (each statute authorizing the city of Boston to take certain water, water rights, and land for the purpose of supplying the city with water,) so far as remedies are concerned, it seems that for every taking of land or of water, or for injury to or interference with land or water or water rights not amounting to a taking of water rights, or for injury to or interference with the use and enjoyment of the water of Sudbury River, (so authorized to be taken,) the petition for an assessment of damages by any person injured in his property must be filed within three years from the taking, or from the act which causes the injury or interference, but when water rights are taken the petition cannot be filed until the water is actually withdrawn or diverted by the city.

The city of Boston, under St. 1872, c. 177, took "for the purpose of furnishing a supply of pure water for the city" all the waters of Sudbury River and its tributaries above a dam built by it below the premises of A., and at this dam the city connected its aqueducts with the river and withdrew and diverted water from the channel of the river to be conducted to the city. Subsequently, the city took substantially the same waters over again for the same purpose; and also took certain lands and waters, which were tributaries of the river above A.'s premises, and water rights "for building and maintaining thereon a dam and reservoir for storing water for the sole use and benefit of said city"; and also took and purchased certain mills and mill privileges on the river above A.'s premises "for the purpose of preserving and protecting the purity of the water for said city." The flow of the water in the river was not interfered with otherwise than by maintaining the storage reservoirs constructed by the city and the dam at the mills taken, and by operating the mills through a tenant in the same manner as they were operated before the city took and purchased them. No water was actually withdrawn or diverted from the channel of the river or its tribu-

taries above A.'s premises. *Held*, that there had not been such a taking of A.'s water rights in the river as entitled him to maintain a petition for damages against the city for a taking of water rights.

PETITION, filed June 2, 1892, for an assessment of damages caused to the petitioner's mills and mill privileges in Ashland by the taking of the waters of Sudbury River and its tributaries by the respondent city, under the provisions of St. 1872, c. 177. A plan showing the lands and waters in question is printed on the opposite page.

Trial in the Superior Court, without a jury, before *Bishop*, J., who refused to rule, as requested by the respondent, that the petition could not be maintained, and found and assessed damages for the petitioner in the sum of $133,700, as if all the water of the river subject to the restrictions of St. 1872, c. 177, had been actually withdrawn and diverted from the mills of the petitioner. The respondent alleged exceptions. The facts appear in the opinion.

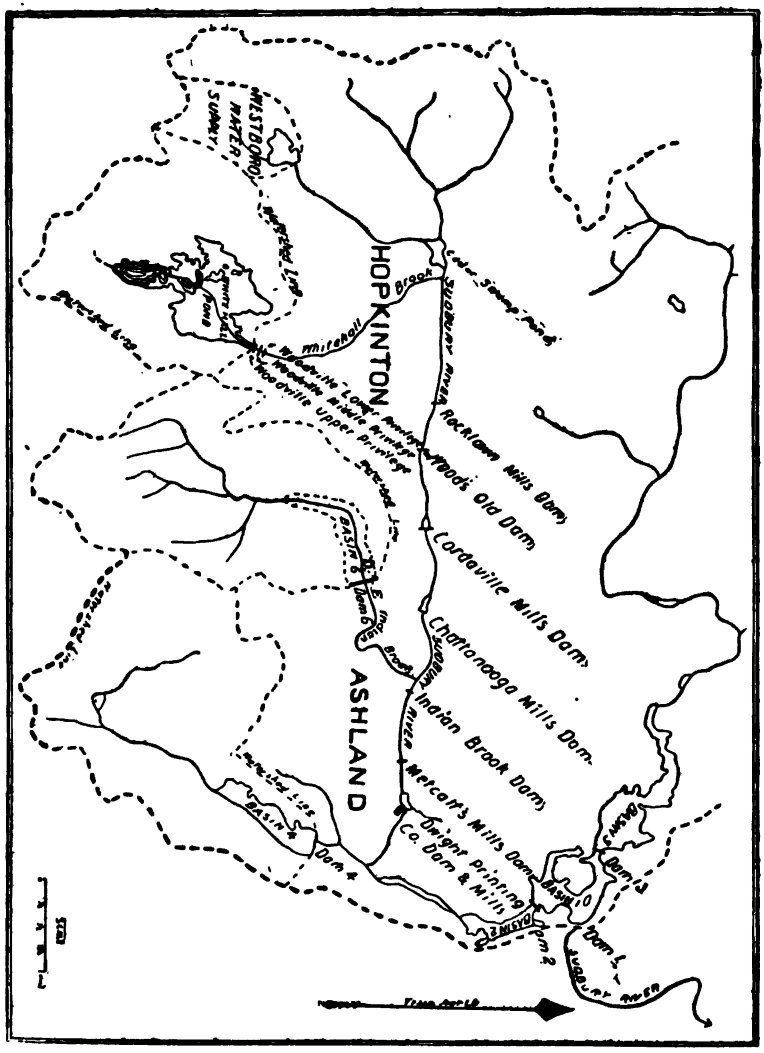
The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

A. J. Bailey, for the respondent.

F. P. Goulding & E. C. Bumpus, for the petitioner.

FIELD, C. J. By the St. of 1846, c. 167, the city of Boston was authorized to take the water of Long Pond, etc., and the water which may flow into and from it, and any other ponds or streams within the distance of four miles from said Long Pond, and any water rights connected therewith; and also to take land around the margin of Long Pond, and all land necessary for constructing reservoirs and laying aqueducts for the purpose of supplying the city of Boston with pure water. In the sixth section of this statute it was provided that the city should be liable to pay all damages that should be sustained by any persons in their property by the "taking of any land, water, or water rights," or by the constructing of any aqueducts, reservoirs, or other works, and that if the owner of any "land, water, or water rights" shall not agree with the city upon the damages, he may apply by petition for the assessment of his damages, at any time within three years from the "taking of the said land, water, or water rights."

By the eighth section of the statute it was provided as follows:



"No application shall be made to the court for the assessment of damages for the taking of any water rights, until the water shall be actually withdrawn or diverted by the said city under the authority of this act; and any person or corporation whose water rights may be thus taken and affected may make his application aforesaid at any time within three years from the time when the waters shall be first actually withdrawn or diverted as aforesaid."

It is not entirely clear what is meant by the distinction between the taking of water and the taking of water rights, but it may be suggested that, in general, the taking of a pond or a stream, with the water in it, is a taking of the land and of the water of the proprietors of the pond or stream where the taking is made; and is also a taking of the water rights of such other persons as have the right to use the water elsewhere, such as lower proprietors on a stream. It is plain, however, whatever the distinction may be, that, under the statute, when what is called land or water is taken, the petition must be filed within three years from the taking; and that, when what are called water rights are taken, the petition must be filed within three years from the time the water is actually withdrawn or diverted. This implies that what is called the taking of water rights is a taking for the purpose of ultimately withdrawing or diverting the water for the use of the city of Boston.

By the St. of 1872, c. 177, § 1, the city was authorized to take all "the water of Sudbury River, so called, said water to be taken at any point or points within the town of Framingham, or higher up on said river, and the water of Farm Pond, so called, in said town of Framingham, and the waters which may flow into and from said river and pond, and to take any water rights in or upon said river or pond, in or above the town of Framingham, or connected therewith." The city was also authorized by this section to take and hold, by purchase or otherwise, in connection with the said sources of supply, any lands and real estate necessary for increasing or preserving the purity of the water, or for the laying, building, and maintaining aqueducts, watercourses, reservoirs, dams, buildings, etc., for the purpose of conducting, elevating, purifying, storing, discharging, disposing of, and distributing water, etc. By the fifth section of this statute the city is made liable "to pay all damages that shall be sustained by any persons in their property, by the taking of or injury to any land, real estate, water, or water rights, or by the flowage of the lands of any persons, or by the interference with or injury to any use or enjoyment of the water of said river to which any person, at the time of such taking, is legally entitled, or by any other doings under this act; and in regard to such taking, injury, interference, and flowage, and the ascertain-

ment and payment of all such damages, the said city of Boston, and all persons claiming damages, shall have all the rights, immunities and remedies, and be subject to all the duties, liabilities, and regulations," provided in St. 1846, c. 167, and St. 1850, c. 316.

In the application of the St. of 1872 to that of 1846, so far as remedies are concerned, it seems that for every taking of land or of water, or for injury to or interference with land or water or water rights not amounting to a taking of water rights, or for injury to or interference with the use and enjoyment of the water of Sudbury River, the petition for damages by any person injured in his property must be filed within three years from the taking or from the act which causes the injury or interference; but when water rights are taken, the petition for damages cannot be filed until the water has been actually withdrawn or diverted by the city.

On January 21, 1875, the city took all the water of Sudbury River at and above the dam built by the city of Boston in 1872 in Framingham, and all the water in the said dam to the source or sources of said river, all the water in Farm Pond, all the water in the brook connecting Farm Pond with the water of Sudbury River, and all the water in all streams, brooks, rivulets, or watercourses of any kind, whether natural or artificial, that may flow into or from said Farm Pond or into or from said Sudbury River at any point above said dam, subject to the restriction set forth in St. 1872, c. 177, § 4. The dam referred to was built below the premises of the petitioner, and it is at this dam that the city of Boston has connected its aqueducts with Sudbury River, and has withdrawn and diverted water from the channel of the river to be conducted to the city of Boston. The effect of this taking upon the rights of the petitioner to damages was considered in a case between the same parties as the present, which is reported in 122 Mass. 583.

On July 29, 1890, the city in form took substantially the same waters over again, and also took for "building and maintaining thereon a dam and reservoir for storing water for the sole use and benefit of said city," certain parcels of land, including Whitehall Pond, so called, and the lands about it and under it, and the water rights in the pond and in the waters thereof, and

the streams and ponds forming a part thereof and tributary thereto.

On August 14, 1890, the city also took certain parcels of land near Indian Brook, so called, including the brook, the water and the water rights in it, and in all the streams and brooks tributary thereto, for the purpose of "building and maintaining thereon a dam and reservoir for storing water for the sole use and benefit of said city."

Indian Brook and Whitehall Brook, which is the outlet of Whitehall Pond, empty into the Sudbury River above the premises of the petitioner. All the damages for the taking of Whitehall Pond and of Indian Brook, and of the waters thereof and of the water rights therein, and of the lands under and about the same, we understand, have been agreed upon by the parties and paid by the city.

The city, on January 27, 1891, bought and took conveyances of the Chattanooga Mills and mill privileges, including the mill-dam and mill-pond which are on Sudbury River above the premises of the petitioner, having, on January 2, 1891, taken said mills and mill privileges, mill-dam, and mill-pond, under the statutes hereinbefore recited, "for the purpose of preserving and protecting the purity of the water for said city, for the sole use and benefit of said city," and the city maintains the dam and pond, and permits the water of Sudbury River to run over the dam without any other interference with the stream.

The city also, on October 29, 1891, bought and took a conveyance of the Rocklawn Mills and mill privileges, including the mill-dam and mill-pond on Sudbury River several miles above the Chattanooga Mills; and on the same 29th day of October took, under the statutes hereinbefore recited, the said mills, dam, pond, and privileges "for the purpose of preserving and protecting the purity of the water for said city, for the sole use and benefit of said city," and the city has taken possession of the mills, and has let them to a tenant who has continued to operate said mills by means of the said dam and pond, and has controlled the water of the river for that purpose. It does not appear that the tenant has controlled the water in any other manner than a proprietor of an upper mill privilege at common

law has a right to do. No water whatever, from any source, has been actually withdrawn or diverted from the channel of Sudbury River, or its tributaries, above the premises of the petitioner.

The only difference between the situation now and that at the time of the decision reported in 122 Mass. 583, is that Whitehall Pond and Indian Brook, and the lands under and about them, and the water in them, have since that decision been taken by the city, and reservoirs have been constructed there, and are used for the purpose of storing water for the benefit of the city; and the water from these reservoirs is controlled in its flow into that river above the premises of the petitioner more or less by the city of Boston, for its benefit; and that since that decision the Chattanooga mill privileges and the Rocklawn mill privileges have been purchased by the city and also taken by the city, with the mill-ponds and mill-dams connected therewith, for the purpose of preserving and protecting the purity of the water of the river for the benefit of the city. The flow of the water in Sudbury River has not been interfered with otherwise than by maintaining the storage reservoirs as aforesaid, and the dam at the Chattanooga Mills, and by operating the Rocklawn Mills in the same manner as they were operated before the city purchased and took them.

It is not contended by the petitioner that all the powers granted to the city by St. 1872, c. 177, were exhausted by the taking of the water of Sudbury River and of its tributaries on January 21, 1875. The petitioner in effect admits that under said statute there may be successive takings at different times by the city, and it files its petition under the special takings of Indian Brook, Whitehall Pond, Chattanooga Mills, and Rocklawn Mills, all of which were made long after the taking of January 21, 1875. The contention of the petitioner, as we understand it, is that by the taking of January 21, 1875, and by the taking of July 29, 1890, of substantially the same effect, the city took all of the water rights of the petitioner, at and above the dam of the petitioner, in all of the water of Sudbury River and of its tributaries above the dam, subject, of course, to the restrictions imposed by the St. of 1872; and that by the other subsequent acts of the city of Boston hereinbefore recited, some of the

water of the river or of its tributaries has been actually withdrawn or diverted from the river above the dam of the petitioner, within the meaning of St. 1846, and that therefore the petitioner is entitled to maintain its petition for damages sustained in the taking of all its water rights in said river and its tributaries. This contention is made on the theory that all of its water rights in the river have been taken, subject to the restrictions of the St. of 1872, and that the time of the filing of the petition for damages sustained by such taking was only postponed until there had been some withdrawal or diversion of the water, and that when this occurred, even though only a small part of the water was withdrawn or diverted, the right to file a petition for all the damages sustained by the taking accrues, and that the damages are the same as if all the water of the river subject to the restriction of the statute of 1872 had been actually withdrawn or diverted.

It is plain that there has been no actual withdrawal or diversion of any water from the channel of Sudbury River, in the ordinary sense of those words. We understand that the damages for the takings of Whitehall Pond and Indian Brook, and their tributaries, have been paid, although this is not entirely clear from the exceptions. The interference with the flow of the water in the river at Chattanooga Mills and Rocklawn Mills is no greater than existed before these mills were purchased and taken by the city, and it may deserve to be considered whether it is anything more than what the proprietor of lands on a running stream can rightfully cause in the exercise of his common law right to make a reasonable use of the water as it flows through his land. There is nothing in the takings of Chattanooga Mills and Rocklawn Mills and their tributaries which purports to be a taking for the purpose of diverting the water, or withdrawing it from the channel in which, before the taking, it was accustomed to run. As the St. of 1872 provides that damages may be recovered for an injury to or interference with water rights, or with the use and enjoyment of water, as well as for a taking of water rights, and an actual withdrawal or diversion of the water, it is entirely unnecessary to interpret the words "withdrawal or diversion" in an unusual or an unnatural sense. We see no evidence of any actual withdrawal or diver-

sion of the water of Sudbury River above the premises of the petitioner within the meaning of the statute.

The fundamental proposition of the petitioner is, that the water rights of the petitioner in the water of the Sudbury River and its tributaries were taken by the city by its taking of January 21, 1875. Why the city adopted the form of taking which it used we do not know. The water of Sudbury River was actually withdrawn and diverted from the river for the use of the city of Boston at or just above the dam which the city erected in Framingham, and the water was actually taken at that point by the city. Having taken the water at that point, under the authority of the law, the city had a right to have the sources of the water naturally flowing in the river at that point kept in their natural condition, subject to such reasonable uses as upper proprietors on the river and its tributaries might make of the water. The right to have the water of all the tributaries of the river and of the river itself flow to the dam erected by the city as it had been accustomed to flow, subject to such reasonable uses, is secured to the city by the common law, and it was not necessary that there should be a special taking of the water rights throughout the whole extent of the river and its tributaries above its dam in order to secure to the city the natural flow of water to the dam.

It is evident, we think, that the city never understood that by this taking of January 21, 1875, it acquired any property in the river above its dam and pond in addition to what the common law gave it, for, so far as appears, the city never exercised any rights over the river above its dam and pond, except under a purchase or a new taking, such as is shown in the present case. The theory of the petitioner is in effect that the city, having acquired all the water rights above its dam by the taking of 1875, could at any time, if it should purchase or take land necessary for the purpose, enter its aqueducts into the river at any point above the dam of the petitioner, and withdraw the water, without any new taking of the water or water rights. We are of opinion that this is not the legal effect of the taking of 1875, or of the similar taking of 1890, but that, notwithstanding the form of the takings, the legal effect was to take the water of Sudbury River at and just above the dam which the city con-

structed in Framingham, where its aqueduct was connected with the river and where the water was withdrawn.

On this construction of the effect of the takings, there has been no general taking of all the water rights of the petitioner in Sudbury River above its dam, subject to the restrictions of the St. of 1872. If any of its water rights in the river above its dam have been taken, it is by the takings of Indian Brook, Whitehall Pond, Chattanooga Mills, or Rocklawn Mills, and we do not construe these takings as authorizing a withdrawal or diversion of the water from the channel of the river above the premises of the petitioner. On the construction that we have given to the statutes, and the effect of the takings by the city, if the city is liable for any damages to the petitioner, it is for interference with the use and enjoyment of the water by the petitioner, so far as there has been any interference with this use, or so far as the takings authorize any interference with this use beyond the right of interference which at common law the city is entitled to exercise by virtue of its ownership of property. We infer that full damages have been paid to the petitioner for all injuries sustained by the takings of Indian Brook and Whitehall Pond and their tributaries; but if we are mistaken in this, then it may be that the petitioner is entitled to damages for such interference with the flow of the water in Sudbury River as the city may exercise under these takings. If by the taking of Chattanooga Mills or of the Rocklawn Mills for the purposes indicated by the taking the city can lawfully exercise rights of control over the water of the river beyond what belongs to it as proprietor of those mills, it may be that the petitioner is entitled to damages therefor, as for an injury to or interference with its water rights. We see no reason to doubt that the city could, under the statute of 1872, lawfully purchase those mill privileges, and hold them under the statutes, for the purpose of preserving the purity of the water, and it may deserve to be considered whether the city as such purchaser has not the rights which belong to the proprietors of land under and on a natural stream. If the operation of the Rocklawn Mills through a tenant is *ultra vires* of the city, this does not concern the petitioner if there is no invasion of its rights. There is nothing in the case indicating that the owner of the Chattanooga Mills, or of

the Rocklawn Mills, was under any obligation to the petitioner to use his mill-pond as a storage pond for the benefit of the petitioner.

On the view we have taken of the case, the exceptions must be sustained. Whether the petition should be dismissed, or should be retained for the assessment of damages for some interference, if there be any, with the use of the water by the petitioner, or for some right of interference with this use which the city has acquired by its takings, if it has acquired any, which yet does not amount to a withdrawal of the water or a right to withdraw it from the river, but which has caused or may cause injury to any rights which the petitioner has to have the water of Sudbury River flow past its premises as it was accustomed to flow, we need not now determine. *Exceptions sustained.*

BELLA ROSS *vs.* PEARSON CORDAGE COMPANY.

Suffolk. May 24, 1895. — September 6, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Breach of Duty.

Where a person is injured by the sudden starting of a machine which he is cleaning, if there is no defect in the machine, and it does not differ from similar machines in use elsewhere, and is in the same condition as it was when he entered upon his employment, the mere fact that certain contrivances, if on the machine, might have prevented its starting, is not sufficient to show a breach of duty on the part of his employer.

TORT, for personal injuries occasioned to the plaintiff while in the employ of the defendant. The declaration contained three counts, one at common law and the other two under the employers' liability act, St. 1887, c. 270. Trial in the Superior Court, before *Sherman*, J., who reported the case for the determination of this court, in substance as follows.

The plaintiff testified that in June, 1893, she was employed by the defendant to tend a machine known as a drawing frame, in its factory, used in preparing material for making cordage;

that she had been in the employ of the defendant five or six weeks at the time of her injury; that she had been directed by the foreman of the room in which she worked to clean the machine tended by her whenever the same was stopped; that she had never been instructed by the defendant, or any of its agents, that there was any danger in so doing, or that the machine might start without any notice to her while she was thus engaged in cleaning it; that she had no knowledge of any such danger until she was injured; that she had been employed at what is called the feed end of the machine, and that it was her business to see that hemp passed into and through the machine; that there was another girl named Kate Farrell, who was employed at what is called the delivery end of the machine, and her business was to receive the material as it passed through the machine and to coil it into cans and to start and stop the machine; that the machine was started and stopped by means of a lever, at the opposite end of the machine to that where the plaintiff was at work, which extended about eighteen inches from the machine; that by means of this lever the belt was moved to and from the loose pulley to the fixed pulley of the machine; that usually there was a rope which came from above on to the feed end of the machine, where the plaintiff was at work, by which a person employed at that end of the machine could stop it; that at the time the plaintiff was injured there was no such rope to the machine she was tending; that in the afternoon of July 1, 1893, the machine which the plaintiff was tending was stopped temporarily by Kate Farrell, who then left the room; that while the plaintiff was at work cleaning the same from dust and fibre, which continually accumulated in the gearing from the material used in making cordage, it suddenly started up, without any notice to her, and her left hand was caught in the machine, and she received the injuries complained of; that the plaintiff was facing and had a view of the machine, and she did not see any person approach or start it; and that she was not looking around, but was just cleaning up the machine.

On cross-examination, the plaintiff testified that, at the time of the injury, she was about nineteen years of age; that she saw Kate Farrell stop the machine and leave the room, and

supposed she would return in a few minutes; that she immediately began to clean it; and that she had her hands inside of the machine, that is, she was cleaning the pan down by the side of the machine right over the cogs. The plaintiff also testified as follows:

"*Q.* Now, did not Kate Farrell go out of the room and stop her machine? *A.* Yes, sir.

"*Q.* And did not she come back and start up her machine before you were hurt? *A.* Yes, sir.

"*Q.* Are you sure about that? *A.* Yes, sir.

"*Q.* Do you swear positively that Kate Farrell's machine was not running when you were hurt? *A.* Yes, sir, I am sure it was. I know it was started before I was hurt."

The plaintiff further testified that the machine was in the same condition at the time of her injury as when she entered the service of the defendant.

Isaac S. Craig, a witness in behalf of the plaintiff, testified that he had been a machinist for thirty-two years, and was acquainted with all kinds of machinery generally; that, in company with the plaintiff and her counsel, he visited the defendant's factory a few weeks after the time the plaintiff was injured, and examined the machine that was pointed out by her as the machine by which she was injured; that the machine was six or eight feet long, about three feet high in the back part and a little higher in the front, and about three feet wide; that the machine was started and stopped by what is called a belt shipper, which was an ordinary shipper, such as is used to throw a belt over from a tight to a loose pulley; that it was two feet long, with nothing to hold it in its place, except that it was pivoted in the centre; that the machine was stopped by simply moving the lever, by which the belt was thrown from the tight to the loose pulley, and the reverse movement to start the machine; that, in the proper construction of such a machine, such levers are not ordinarily locked, or clamped, unless the machine has some special danger; that a machine which required two persons to operate it, one at the end where the shipper is and one at the other end, would make it necessary that there should be something to secure it; that a simple latch would secure it from allowing the belt to run on; that machines

sometimes started by means of the belt getting a little twisted and spreading on one side, which makes it liable to run on the fixed pulley from the loose pulley; that this will be done if a shaft tips, or the belts are improperly adjusted for height; that this would be prevented by having the shifting bar latched or locked; and that it would also prevent the machine being started by any one striking against it.

On cross-examination, he testified that the shipper was like the ordinary shipper, such as is used on ordinary machines; that there was nothing unusual about it; that it was made in the ordinary way for the use of that class of machines; and that he did not see any defect in it.

Kate Farrell, a witness called by the defendant, testified that, shortly before the accident, she stopped her machine and went into the wash-room, after informing the plaintiff that she would return in a few minutes; that she returned to her machine in a few minutes and put it in motion; that it had been running continuously for several minutes just before and until shortly after the plaintiff was injured; and that she did not see the plaintiff cleaning her machine.

The defendant requested the judge to rule that, upon all the evidence, the action could not be maintained. The judge so ruled, and directed the jury to return a verdict for the defendant. If there was any sufficient evidence upon which the jury could have found for the plaintiff, a new trial was to be ordered; otherwise, judgment was to be entered upon the verdict.

H. P. Harriman & F. J. Daggett, for the plaintiff.

C. Reno, for the defendant.

LATHROP, J. The plaintiff, a girl nineteen years of age, was injured by having her hand caught in the cogs of a machine called a drawing frame, which she was cleaning. We assume in her favor that there was evidence for the jury that the machine started without its having been set in motion by a fellow servant.

The remaining question is, therefore, whether there was any evidence which would warrant the jury in finding any breach of duty on the part of the defendant. The evidence as to the machine comes from an expert who was a witness for the

plaintiff. He testified that the machine was started and stopped by what is called a belt shipper, such as is used to throw a belt from a tight to a loose pulley; that the machine was stopped by simply moving the lever by which the belt was thrown from the tight to the loose pulley, and the reverse movement to start the machine; that the shipper was two feet long, with nothing to hold it in its place except that it was pivoted in the centre; that in the proper construction of such a machine such levers are not ordinarily locked, or clamped, unless the machine has some special danger; that a machine which required two persons to operate it, one at the end where the shipper is and one at the other end, would make it necessary that there should be something to secure it; that a simple latch would secure it from allowing the belt to run on; that machines sometimes started by means of the belt getting a little twisted and spreading on one side, which is liable to run on the fixed pulley from the loose pulley; that this will be done if a shaft tips, or the belts are improperly adjusted for height; that this would be prevented by having the shifting bar latched or locked; and that this would also prevent the machine being started by any one striking against it. He further testified that the shipper was like the ordinary shipper, such as is used on an ordinary machine; that there was nothing unusual about it; that it was made in the ordinary way; and that he did not see any defect in it.

There is certainly nothing in this evidence, with the exception, perhaps, of a single sentence, which tends to show any breach of duty on the part of the defendant. There is nothing in the case to show that there was any special danger in the machine, or that the shaft tipped, or that the belt was improperly adjusted, or that the belt had got twisted and spread on one side. It is true that the expert testified "that a machine which required two persons to operate it, one at the end where the shipper is and one at the other end, would make it necessary that there should be something to secure it." He however gave no reason for this opinion, and we can conceive of none, except that the one near the shipper might accidentally strike against it. But we assume that there was no one in the room with the plaintiff at the time.

The machine had been stopped before the accident by a fellow servant; and it is obvious that, if the belt had not been entirely removed from the tight pulley to the loose one, there would be danger of the belt working on to the tight pulley and starting the machine. See *Dingley* v. *Star Knitting Co.* 134 N. Y. 552. The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to warrant the jury in finding that there was any breach of duty on the part of the defendant.

In *Donahue* v. *Drown*, 154 Mass. 21, there was evidence that the machine was not put up properly; that the driving pulley upon the main shaft had a convex surface instead of a flat surface, such as it should have had, and was so fixed with reference to the fixed pulley that the tendency was to draw the belt from the loose pulley when the machine was not in motion on to the fixed pulley, and thus to start the machine. There was also evidence that other similar machines in the defendant's factory had previously started without being intentionally set in motion, so that the defendant might by the exercise of reasonable care have known the fact of the starting, and have remedied the defects. The case in these respects differs widely from the one at bar.

In *Mooney* v. *Connecticut River Lumber Co.* 154 Mass. 407, the plaintiff was injured by the automatic starting of a carriage connected with a sawing machine. It was undisputed that a machine which would so start was improperly constructed or adjusted. The machine had three days before the accident started automatically, and this was known to the defendant's foreman, who told the plaintiff before the accident that it had been repaired. Under these circumstances it was held that the jury were warranted in finding that the defendant was negligent.

In *Connors* v. *Durite Manuf. Co.* 156 Mass. 163, the plaintiff was injured by the starting of a stationary engine caused by a leak in the throttle valve. The engine was an old one when bought by

the defendant, and he had caused it to be repaired, but nothing was done to the throttle value. There was also evidence that the wear and tear which would produce the condition of things which caused the defendant to have the engine repaired would tend to cause a leaky throttle valve. It was held that the question of the defendant's negligence was for the jury.

The two cases last cited differ widely from the one at bar.

Judgment for the defendant.

Ellen McManus *vs.* Inhabitants of Weston.
Patrick McManus *vs.* Same.

Middlesex. January 25, 1895. — September 9, 1895.

Present: Field, C. J., Allen, Holmes, Knowlton, Morton, Lathrop, & Barker, JJ.

Personal Injuries — Road Commissioners as Public Officers — Liability of Town — Statute.

An action of tort was brought against a town for personal injuries occasioned to the plaintiff by the alleged negligence of road commissioners in "making and repairing" a town way, under Pub. Sts. c. 52, § 3. *Held*, that the action could not be maintained, as the commissioners acted as public officers, and not as servants of the town.

Two actions of tort, for personal injuries occasioned to the plaintiffs on August 25, 1891, while driving along a county road in Weston called Central Avenue. Trial in the Superior Court, before *Blodgett*, J., who directed the jury to return a verdict for the defendant; and the plaintiffs alleged exceptions, in substance as follows.

There was evidence tending to show that the accident was caused by the failure of persons in general charge of the work hereinafter described to give warning to the plaintiffs that a steam drill was in operation on the avenue, and also by the acts of persons working upon the drill hereinafter described, in allowing steam to escape from the boiler while the plaintiffs were passing by, thereby causing the plaintiffs' horses to take fright.

In March, 1887, the town by a vote directed the road commissioners to petition the county commissioners to define the lines of Central Avenue.

Upon petition of the road commissioners "to define and locate the lines" of Central Avenue, the county commissioners, by an order passed October 19, 1889, laid out the avenue, and directed the town, on or before January 1, 1892, to "lay, open, construct, and complete said highway so that twenty-five feet in width thereof throughout the whole, exclusive of gutters on the sides, shall be safe and convenient," etc., and decreed that upon the completion of the work to their satisfaction the county should pay the town the sum of one thousand dollars, which they adjudged to be a fair and just proportion of the expense of the alteration to be paid by the county, and awarded to an abutter whose land was taken a certain sum as damages therefor, to be paid by the town with all other expenses of the work.

On March 24, 1890, the town passed the following votes under the following article in the town warrant:

"Art. 10. To see if the town will grant money to carry out the order of the county commissioners with regard to Central Avenue, or act anything relative to said order.

"Voted, that five thousand dollars ($5,000) be appropriated for repairs on Central Avenue to carry out the order of the county commissioners.

"Voted, that the town treasurer be empowered to borrow five thousand dollars ($5,000) on the note of the town countersigned by the selectmen, said loan to be called the Central Avenue loan."

On March 23, 1891, the following vote was passed under the following article in the town warrant:

"Article X. To appropriate money for continuing work on Central Avenue as laid out by the county commissioners.

"Voted to appropriate $5,000, to be expended for Central Avenue.

"Voted that the treasurer be empowered by and with the selectmen to borrow the sum of $5,000, to be expended on Central Avenue."

The road commissioners of the town, or some of them, carried out the order of the county commissioners without any

further vote of the town. The location of the county commissioners did not differ much from the old line of fences along the road, and the ledge which was being drilled for blasting was wholly within the old lines of the road, but jutted out so far into the travelled portion that it was necessary to blast part of it to get the twenty-five foot width required by the county commissioners' order. The town treasurer, upon the drafts of the road commissioners, paid the expense of the entire work, and after it was completed received from the county the one thousand dollars which had been awarded to the town as the share of the county towards the expenses.

One Cutter, who was one of the three road commissioners, testified that, by direction of the board of road commissioners, he and one other commissioner employed one Putney to blast this and other ledges for them in the course of the work, upon the terms that Putney should furnish the steam-engine and drill, and men to operate them, at a certain price per day for the drill and each man, and that they should do the drilling and blasting required by the road commissioners, the commissioners furnishing the fuel, water, and explosives; that Putney was there daily and had the immediate direction of the men, who took their orders from him; that he, Cutter, was not there daily, but one of the other road commissioners was, and had the immediate charge of the work, and gave orders to the other men employed and to Putney.

The defendant contended that the road commissioners in doing the work acted as public officers performing a duty imposed upon them by law, and that the town could not be held liable for their negligence, or the negligence of persons employed by them to assist in carrying on the work.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

S. J. Elder & W. C. Wait, for the plaintiffs.

G. L. Mayberry, for the defendant.

Morton, J. These two cases were tried together, and both depend on the same facts, and the principal question in each is whether the road commissioners acted as public officers, or as servants of the town. We think that they acted in the former capacity, and not in the latter.

The office of road commissioner is of recent origin. It was first established by St. 1871, c. 158. By the second section of that act, it was provided that "said road commissioners shall have and perform exclusively all the powers and duties now vested by law in selectmen and surveyors of highways, concerning the laying out, altering, making, repairing, or discontinuing streets, ways, sidewalks, sewers, and drains." This was amended by St. 1873, c. 51, § 1, which substituted therefor a new section as follows: "Said road commissioners, in matters concerning streets, ways, bridges, monuments at the termini and angles of roads, guide-posts, sidewalks, shade trees, sewers, and drains, shall exclusively have the powers and be subject to the duties, liabilities, and penalties of selectmen and surveyors of highways." This section, with an added provision about the moving of buildings in public streets, forms Pub. Sts. c. 27, § 75, and that in turn forms St. 1893, c. 423, § 23, in regard to the powers and duties of town officers. It is evident that the object of the amendment was not to restrict the powers and duties of the road commissioners, but rather to enlarge them, or perhaps to make it clearer what they were originally intended to include. The purpose of the statute was to enable towns to unite in one board, for the sake of greater efficiency, powers and duties which, speaking generally, were exercised by the selectmen and surveyors of highways in regard to streets and ways, and to give them the exclusive control over such matters. And it is apparent that a board so constituted, and acting within the scope of its powers and duties, would act as a board of public officers, and not as servants of the town. *Walcott* v. *Swampscott*, 1 Allen, 101. *Tindley* v. *Salem*, 137 Mass. 171, 173 *et seq.*, and cases cited. *Blanchard* v. *Ayer*, 148 Mass. 174.

The plaintiffs contend, however, that the work in which the road commissioners were engaged upon Central Avenue did not come within their powers and duties as public officers. But we think that what they were doing fairly may be called a "making and repairing," within the meaning of Pub. Sts. c. 52, § 3. Although ordered by the county commissioners, the work did not relate to the construction of a new way, or the building of one that had been materially widened or lengthened, or changed from its original lay-out, but was in the nature of repairs to

and improvement of an existing way, and for the purpose of rendering it safer and more convenient to travellers. The petition under which the county commissioners acted was for the relocation of an existing way. What was to be done was spoken of in the first appropriation by the town as "repairs on Central Avenue," and the exceptions expressly state that the ledge where the work was being done at the time of the injury complained of was wholly within the old lines, and that the location by the county commissioners did not differ much from the old line of fences; meaning, as we infer, that the old road and the road as located by the county commissioners were substantially the same. There is nothing to show that the removal of the ledge would not have been within the ordinary scope of the powers and duties of surveyors of highways. From the absence of any testimony as to the previous condition of the road, it is not easy to say that the repairs, though extensive, were not such as would have come within the province of the road commissioners after the town had appropriated the money for them. *Proctor* v. *Stone*, 158 Mass. 564. The fact that they were unusual, or permanent, or expensive, or authorized by a special vote and appropriation, would not prevent them from being of such a character. *Mitchell* v. *Bridgewater*, 10 Cush. 411. *Denniston* v. *Clark*, 125 Mass. 216. *Pratt* v. *Weymouth*, 147 Mass. 245. *Hennessey* v. *New Bedford*, 153 Mass. 260.

In *Craigie* v. *Mellen*, 6 Mass. 7, it was assumed without question that it was the duty of the highway surveyors to make safe and passable a town way which had been laid out for the inhabitants of Cambridge and approved by them. See also *Cyr* v. *Dufour*, 68 Maine, 492.

In *Callender* v. *Marsh*, 1 Pick. 418, 427, which has never been questioned as an authority, (*Burr* v. *Leicester*, 121 Mass. 241, 242,) it is said that the authority of highway surveyors "would seem to include everything which may be needed towards making the ways perfect and complete, either by levelling them where they are uneven and difficult of ascent and descent, or raising them where they should be sunken and miry." In consequence of this decision, and of the suggestions contained in it, a statute was passed giving a remedy to landowners who sustained damages by any act done in raising, lowering, or otherwise, for the purpose

of repairing a highway or town way. Rev. Sts. c. 25, § 6. Pub. Sts. c. 52, § 15. But as was said in *Denniston* v. *Clark*, 125 Mass. 216, 225, "This statute does not affect the extent of the authority of the public and its officers, or the principle upon which that authority rests." It is true that it has been held that the powers and duties of highway surveyors were confined to repairs, and that neither they nor selectmen had authority by virtue of their respective offices to build or contract for the building of new ways, or of ways that were so widened or altered that what was to be done would amount to the substitution of a new way for an old one, either within the same or other lines. *Todd* v. *Rowley*, 8 Allen, 51. *Bemis* v. *Springfield*, 122 Mass. 110. *Denniston* v. *Clark*, 125 Mass. 216, 220. *Bean* v. *Hyde Park*, 143 Mass. 245. *Blanchard* v. *Ayer*, 148 Mass. 174.

There is no general rule defining what are repairs, and what are changes or alterations so radical that they fairly cannot be called such. *Proctor* v. *Stone*, 158 Mass. 564. The original statute creating the office of highway surveyors gave them power to amend as well as to repair; (St. 1786, c. 81, § 1;) and the law seems to have been liberally applied in favor of repairs. Though the word "amend" was omitted in the Revised Statutes and the later revisions, there is nothing to show that there was any intention to restrict the powers of the surveyors within narrower limits than those established by the original act.

By St. 1877, c. 58, (amending St. 1871, c. 298, § 2,) — which abolished the payment of highway and town way taxes in labor and materials, and provided that towns should raise by assessment on the polls and estates of residents and non-residents such sums of money as were necessary for making and repairing highways and town ways, — it was provided that the sum so voted should be expended by the surveyors of highways and the road commissioners in making and repairing the ways; the difference between the highway surveyors and road commissioners being that, in the case of the former, the expenditures were to be under the direction of the selectmen, but in the latter not. Section 2 of St. 1871, c. 298, with the amendment of St. 1877, c. 58, was incorporated into and forms Pub. Sts. c. 52, § 3, on which the defendant relies. The meaning of the word "making" in this connection does not appear to have been considered,

or to have received any construction. In the act establishing the road commissioners it evidently meant something more than repairing. St. 1871, c. 158, § 2. In the present and earlier statutes it seems to have been used, in some instances, in a sense which would include building or constructing. Pub. Sts. c. 52, § 13; c. 49, §§ 9, 75. Rev. Sts. c. 24, §§ 10, 44, 47, 64; c. 25, §§ 9, 15. St. 1796, c. 58, § 1. St. 1818, c. 121, § 1. It is so used in the sewer acts. Pub. Sts. c. 50, §§ 1, 3, 4. But we do not think that it can be construed, in the section on which the defendant relies, as authorizing the road commissioners, whenever a new way is laid out in a town, to go on and build it. *Craigie* v. *Mellen*, 6 Mass. 7. *Cyr* v. *Dufour*, 68 Maine, 492. The road commissioners are not given power generally over the laying out, making, discontinuing, and repairing of ways, but only such powers as the selectmen and highway surveyors have, and such as are bestowed by the section under consideration. It is clear that neither the selectmen nor highway commissioners have authority to build new ways. We think that the jurisdiction of road commissioners is confined to existing ways, within lines corresponding substantially to existing lines, and possibly to making passable ways newly laid out; *Craigie* v. *Mellen*, *ubi supra*; and that, as applied to them, the word "making" means more than repairing, and may properly include work of the general character of that which they were doing in this case upon Central Avenue, and that after the town had made the appropriation it was for the commissioners, in the absence of any further action on its part, to do the work with such instrumentalities, and in such manner, as seemed to them best. *Pratt* v. *Weymouth*, 147 Mass. 245. *Hennessey* v. *New Bedford*, 153 Mass. 260.

Although the duty of completing the road according to the lay-out and order of the county commissioners is imposed by statute upon the town, there can, we think, be no question that the town fulfils the duty thus imposed upon it if the money necessary to carry out the order of the county commissioners is appropriated by it, and the work is done by public officers duly chosen by it, and within whose jurisdiction it comes. Whether the work is done by public officers, or by persons specially appointed by the town, it is equally within the power of the county commissioners to see that their order is complied with.

The fact that the town voluntarily adopted the statute providing for the election of road commissioners can make no difference as to whether the commissioners were or were not acting as public officers. *Tindley* v. *Salem, ubi supra.*

A majority of the court think that the exceptions should be overruled, and it is so ordered. *Exceptions overruled.*

GEORGE H. PENDERGAST, executor, *vs.* SARAH M. TIBBETTS & others.

Suffolk. March 19, 1895. — September 9, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Devise and Legacy — Revocation — Codicil.

A testator gave by will various pecuniary legacies to certain relatives, including three nieces, A., B., and C., to each of whom he gave ten thousand dollars, and then divided the residue among those relatives in proportion to the respective amounts given. By clause second of the codicil he revoked the legacies to A., B., and C., and in place thereof gave each the sum of five thousand dollars, and by clause third of the codicil he gave to three other nieces not named in the will five thousand dollars each. The first clause of the codicil appointed an executor and trustee in place of one deceased, and the fourth ratified the will in all other respects than those named in the codicil. *Held*, that the change made by the codicil in the legacies to A., B., and C. did not affect their shares under the residuary clause of the will, and that the legacies given by clause third of the codicil to the three other nieces did not entitle them to come in under the residuary clause of the will.

BILL IN EQUITY, filed February 10, 1894, by the executor of the will of John Tibbetts, to obtain the instructions of the court as to the construction of the will, which contained the following clauses:

"Second. I give and bequeath to my niece, Mrs. Abby Nutter of Rochester, N. H., the sum of ten thousand dollars ($10,000); to my niece Mrs. Susan Whitehouse, of said Rochester, the sum of ten thousand dollars ($10,000); to my niece Mrs. Lydia Varney, of said Rochester, the sum of ten thousand dollars ($10,000); to my niece Mrs. Ruth Hartford, of said Rochester, the sum of two thousand dollars ($2,000); to my niece Mary Jane Allen, of Somerville, the sum of five hundred dollars ($500); and to my

niece Eliza Ann Blaisdell, of Dover, N. H., the sum of five hundred dollars ($500). . . .

"Fifth. All the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath to the same persons, and in the same proportions, as I have given the money legacies hereinbefore named, to be held in trust or become the absolute property of the recipients as is hereinbefore provided in respect to said legacies and for the same purposes."

By the first clause in the codicil, which was executed in 1891, nearly six years after the execution of the will, an executor and trustee was appointed in the place of one deceased, and by the fourth and last clause the will was ratified and confirmed in all other respects than those named in the codicil. The other clauses of the codicil were as follows:

"Second. Whereas in the second clause of my said will I have given to each of my nieces, Mrs. Abby Nutter, Mrs. Susan Whitehouse, and Mrs. Lydia Varney, the sum of ten thousand dollars ($10,000) I do hereby revoke said legacies and in place thereof I give and bequeath to each of my said nieces the sum of five thousand dollars ($5,000).

"Third. I give and bequeath to my nieces, Lydia Matilda Tibbetts and Mrs. Mary Ann Silsby, and my nephew, Frank W. Tibbetts, children of my brother Israel Tibbetts, the sum of five thousand dollars ($5,000) each."

The questions were, first, whether the change made by the codicil in the legacies of Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney affected their shares under the residuary clause in the will; and, secondly, whether the legacies given in clause third of the codicil to the three other nieces entitled them to come in under the residuary clause in the will.

The case was reserved upon the bill and answers by *Lathrop*, J., for the consideration of the full court.

J. F. Tyler, for certain defendants.

J. H. Worcester & C. B. Gafney, (*L. P. Snow* with them,) for Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney.

MORTON, J. By his will the testator gives various pecuniary legacies to and for certain persons named therein, who are all relatives, and then divides the rest and residue amongst them in proportion to the respective amounts thus given. Among the

legatees named in the will are Abby Nutter, Susan Whitehouse, and Lydia Varney, all nieces of the testator, who are given in the second clause the sum of ten thousand dollars each. By the codicil, clause second, the testator revokes these legacies and "in place thereof" gives and bequeaths to each of his said nieces the sum of five thousand dollars, and by clause third gives to three other nieces who are not named in the will five thousand dollars each. The first clause in the codicil appoints an executor and trustee in the place of one deceased, and the fourth and last clause ratifies and confirms the will in all other respects than those named in the codicil.

The questions are, first, whether the change made by the codicil in the legacies of Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney affects their shares under the residuary clause in the will; and, secondly, whether the legacies given in clause third of the codicil to the three other nieces entitle them to come in under the residuary clause in the will.

Dealing with the last question first, it is to be observed that there is nothing in the codicil which provides in terms that the three nieces who are named for the first time in it shall share in the residue the distribution of which is provided for in the will. Neither is there in the will. The language there is, "all the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath to the same persons, and in the same proportions, as I have given the money legacies hereinbefore named," which manifestly excludes them. The general rule is that "the codicil shall change the will so far only as the intent is manifest, especially where, in all other respects, the will is in terms ratified and confirmed," which is the case here. *Quincy* v. *Rogers*, 9 Cush. 291, 295. *Chapin* v. *Parker*, 157 Mass. 63.

It is argued that the general plan of the will is to give certain legacies to relatives of the testator, and then to divide the residue among them in like proportions; that the will and the codicil are to be read together as one instrument, (*Gray* v. *Sherman*, 5 Allen, 198,) and that naturally the testator would intend to include the nieces mentioned in the codicil in the distribution of the residue. The difficulty with this is that the codicil expressly provides that the will is to remain as it is save as altered by the codicil, and that that does not manifest any in-

tention on the part of the testator that they shall share in the residue. We think that they take the legacies that are given them by the codicil, and no more.

The application of the rule above stated disposes, it seems to us, of the first question also. The rule is again stated in *Tilden* v. *Tilden*, 13 Gray, 103, in these words: "A codicil, duly executed, is an addition or supplement to a will, and is no revocation thereof, except in the precise degree in which it is inconsistent therewith, unless there be words of revocation," and then, it might be added, only to the precise extent of the revocation. See also *Holden* v. *Blaney*, 119 Mass. 421. The reducing of the legacies given to Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney, in the second clause of the will, from ten thousand dollars each to five thousand dollars, and giving the amounts thus taken from them to the other three nieces named in the codicil is consistent with an intention on the part of the testator to have Mrs. Nutter, Mrs. Whitehouse, and Mrs. Varney share in the rest and residue, as the will provides that they should. Though the will and codicil are to be taken together in ascertaining what disposition is made by the testator of his estate, the will remains, save as altered by the codicil. The latter does not in terms or otherwise purport to deal with the rest and residue, and we think that it would be going too far to infer that the testator intended to change the distribution of the rest and residue because certain legacies named in the will are reduced by the codicil, and as thus reduced are given in place of those named in the will. The testator well may have been content that the sums named in the will should stand, notwithstanding the reduction by the codicil, as the basis for the distribution of the rest and residue. At any rate, that is the way the will reads, and, in the absence of anything in the codicil plainly indicating a contrary intention, we must take the will as it stands. We think that this construction is in accordance with the cases, except perhaps *Courtauld* v. *Cawston*, W. N. (1882) 185, which stands on its own facts, and does not appear to have been followed. *Quincy* v. *Rogers*, 9 Cush. 291. *Chapin* v. *Parker*, 157 Mass. 63. *Wetmore* v. *Parker*, 52 N. Y. 450. *Colt* v. *Colt*, 82 Conn. 422. *In re Gibson's trusts*, 2 J. & H. 656. *Lushington* v. *Boldero*, G. Coop. 216. *Hilleredon* v. *Grove*, 21 Beav. 518. *Decree accordingly.*

EASTERN ELECTRIC CABLE COMPANY *vs.* GREAT WESTERN MANUFACTURING COMPANY & another.

Suffolk. March 21, 1895. — September 9, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Assets, Rights, and Claims to which a Creditors' Bill will not apply.

The unissued bonds of the A. Company in the possession of a trust company, upon which the trust company has made no advances and which it cannot issue except by the order of the A. Company, are not property or assets of the A. Company, and the right to any surplus that may remain after the mortgage of the plant of the A. Company to the trust company to secure the payment of the bonds is paid, the right to a release in case the bonds are paid in full by the A. Company and a possible right to require the return of the bonds in the hands of the trust company are not rights or claims on the part of the A. Company against the trust company to which a bill in equity under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, § 1, will apply.

BILL IN EQUITY, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, § 1, to reach and apply, in payment of a debt due from the Great Western Manufacturing Company to the plaintiff, certain of its bonds in the possession of the American Loan and Trust Company.

The bill alleged that, on November 27, 1894, the Great Western Manufacturing Company executed and delivered to the American Loan and Trust Company, as trustee, a certain mortgage of its plant located in the city of Duluth, Minnesota, to secure the payment of a series of bonds amounting to one hundred thousand dollars; that the mortgagor had delivered the bonds to the Trust Company for the purpose of being sold, the proceeds thereof to be turned over to the Manufacturing Company; that since said November 27 the Trust Company had delivered to sundry parties, as requested by the Manufacturing Company, eighty thousand dollars of the bonds; that the Trust Company now had in its possession the remaining bonds, amounting to twenty thousand dollars, to be held and disposed of by it subject to the order of the Manufacturing Company, the proceeds, upon sale, to be turned over to the Manufacturing Company; and that the Manufacturing Company had no other

property within the Commonwealth which the plaintiff was able by any process to reach and apply to the liquidation of its debt. The prayer was for an injunction, an account, and for a decree that the bonds be sold and the proceeds applied to the payment of the plaintiff's debt.

The defendants demurred separately, assigning, among other grounds of demurrer, want of equity; that the bonds were merely the promises of the Great Western Manufacturing Company to pay to such persons as might purchase and pay for them, and had been placed in the hands of the American Loan and Trust Company to be disposed of, subject to the orders of the Manufacturing Company, and were not the property of that company until sold and delivered, and the court could not compel the Trust Company to issue or part with the bonds; and that if the court should compel the defendants, or either of them, to sell the bonds, and apply the proceeds to the payment of the plaintiff's debt, it would be merely a compelling of the borrowing of money upon the obligations of the Manufacturing Company.

The Supreme Judicial Court sustained the demurrer; and the plaintiff appealed.

S. L. Whipple & H. R. Bailey, for the plaintiff.

W. O. Underwood, for the defendants.

MORTON, J. The bonds in the possession of the Trust Company were the unissued obligations of the Manufacturing Company. The Trust Company had made no advances on them, and could not issue them except, as the bill stated, by the order of the Manufacturing Company. The unissued notes or bonds of a party in his possession and control do not constitute a part of his property or assets. *Richardson* v. *Green*, 133 U. S. 30, 47. *Coddington* v. *Gilbert*, 17 N. Y. 489. See also *Barnes* v. *Mobile & Northwestern Railroad*, 12 Hun, 126; *Sickles* v. *Richardson*, 23 Hun, 559; Cook, Stock & Stockholders, (3d ed.) § 762; Jones, Corporate Bonds & Mortgages, (2d ed.) § 181. And a party cannot be directly compelled to issue his notes or bonds for the purpose of borrowing money to pay his debts.

The plaintiff further contends that there are valuable rights which the Manufacturing Company has against the Trust Company which can be reached and applied, and which are, first, the right to any surplus that may remain after the mortgage is

paid; secondly, the right to a release in case the bonds are paid in full by the Manufacturing Company; and, thirdly, a possible right to require the return of the bonds which are in the hands of the trustee.* There has been no foreclosure or default of the mortgage, there is no present surplus in the hands of the mortgagee to which the Manufacturing Company is entitled, the bonds have not been paid in full by it, and *non constat* that they will be, and no demand has been made for a release, or for a return of the bonds in the possession of the Trust Company.

We have been referred to no case in which it has been held that rights or demands so contingent and conjectural were property that could be reached and applied in payment of debts due to a creditor. See *Pettibone* v. *Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411; *Amy* v. *Manning*, 149 Mass. 487.

Consideration of other questions raised and discussed in the briefs is rendered unnecessary by the result reached on the question whether the Manufacturing Company had any property in the possession of the Trust Company, and whether the alleged rights could be reached and applied in payment of the plaintiff's demand. *Decree affirmed.*

H. A. PRENTICE COMPANY *vs.* MOSES S. PAGE & others.
JAMES M. DAVIS & another *vs.* MOSES S. PAGE & another.

Suffolk. March 22, 1895. — September 9, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Conversion — Fraud — Pledge — Instructions — Statute.

If A. obtains goods from B. by means of false and fraudulent representations that he has reliable customers for them, and by means of forged conditional contracts of sale, and then pawns the goods to C., who takes them in good faith, B. may maintain an action against C. for the conversion of the goods; and an in-

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* The counsel for the plaintiff in their brief cited *Pinney* v. *McGregory*, 102 Mass. 186; *Wiggin* v. *Heywood*, 118 Mass. 514; *Judge* v. *Herbert*, 124 Mass. 330; *Jenkins* v. *Lester*, 131 Mass. 355; *Whipple* v. *Fairchild*, 139 Mass. 232; *Bragg* v. *Gaynor*, 85 Wis. 468; *Massie* v. *Watts*, 6 Cranch, 148, 160.

struction to the jury that, in order to protect C. under Pub. Sts. c. 71, the goods must have been intrusted to A. "to sell and dispose of in the ordinary course of business as a common law sale," is harmless.

Where an agent or factor procures goods to be intrusted to him for delivery to third persons under forged conditional contracts of sale, the goods are not intrusted to him for sale, within the meaning of Pub. Sts. c. 71.

TWO ACTIONS OF TORT, for the conversion of certain personal property. The cases were tried together in the Superior Court, before *Dewey*, J., who reported them for the determination of this court, in substance as follows.

The plaintiffs put in evidence the report of an auditor, and rested. The report, which was the same in each case, found the following facts.

The plaintiff in the first case was a corporation having its principal place of business in Boston, and dealing in diamonds, watches, and miscellaneous jewelry. In the summer of 1887, one Walter F. Gregg came to the place of business of the plaintiff, and, by means of false and fraudulent representations, succeeded at different times in obtaining a large amount of goods from it. The general method of dealing between the plaintiff and Gregg was to intrust Gregg with diamonds, watches, and other property of the plaintiff, to sell and dispose of on leases or conditional contracts of sale, and to return all such contracts to the plaintiff, which would thereupon pay Gregg a commission on all such leases or contracts so turned in.

Gregg, in order to obtain goods from the plaintiff, falsely and fraudulently represented that he had customers who wished to purchase the property he was intrusted with, and, in order to account for the goods, Gregg paid the plaintiff such monthly instalments on the contracts out of his own pocket as he was compelled to do in order to prevent his fraud from being discovered. This course was continued for some three months, until the fraud was discovered by the plaintiff, which thereupon caused the arrest of Gregg on charges of forgery and larceny, to which charges he pleaded guilty and served his sentence.

The title to all goods thus taken out by Gregg remained in the plaintiff until the goods were fully paid for, and Gregg, when so intrusted with goods, would pawn them to the best advantage he could for his personal gain, and account for the goods by means of forged and fictitious contracts as above stated.

Gregg, at the time of his dealings with the plaintiff, had a small shop on the fourth floor of a building on Bromfield Street in Boston, and a sign upon the door reading "Oil and Crayon Portraits Co.," and after commencing dealings with the plaintiff he procured a show-case about eight feet long in which he kept some gold plated ware, diamonds, and jewelry, but the defendants never visited the shop or knew of its existence.

Gregg received from the plaintiff the goods mentioned in the declaration under the circumstances above recited, which goods he pawned to the defendants, and accounted for the same to the plaintiff by means of forged and fictitious contracts of sale purporting to be signed by third parties, and upon discovery of Gregg's doings the plaintiff made demand upon the defendants for the goods, which they refused to deliver up, and the plaintiff thereupon brought this action.

The defendants offered evidence tending to show the following additional facts. In 1887, Gregg purchased of the plaintiff corporation a diamond ring on a conditional contract of sale, which recited the receipt by him of the ring, and his agreement to pay a certain sum on delivery and the balance of the price in monthly instalments, and that the title to the property should remain in the plaintiff until the full sum had been paid by him to it. He then represented to the plaintiff that he was doing business in a building on Bromfield Street in Boston, such business being the manufacture and sale on conditional contracts of oil and crayon portraits; and that he had a large and reliable number of desirable customers to whom he could sell the property of the plaintiff in the same manner, the title of the property to remain in the plaintiff until paid for.

The plaintiff, through its representatives, visited the place of business of Gregg, and was there shown what purported to be a large number of conditional contracts of sale, signed by the customers as before represented, and, after further talk and investigation, the plaintiff entered into an agreement with Gregg substantially as follows: Gregg was to solicit patronage for the plaintiff, and endeavor to make sales for it on conditional contracts of sale, and for the sales made in such manner he was to receive from the plaintiff a sum equal to ten per cent of the face of the contract so made.

It appeared in evidence that the plaintiff, in consequence of the supposed successful business conduct of Gregg, trusted him personally with some two thousand dollars' worth of merchandise, and charged the same to him in the regular course of business, but that none of the goods alleged to have been converted by the defendants were included in any of these transactions, or had ever been charged to him or purchased by him in any way, but were all delivered to him upon his representation that he had a reliable customer for them, to whom the plaintiff supposed they had been delivered.

There was evidence tending to show that the plaintiff intended to retain the title to all goods so intrusted to Gregg until the same were fully paid for; and that Gregg, when he had obtained the goods, would pawn them and account for the same by means of forged contracts.

It also appeared in evidence that, when Gregg was intrusted with merchandise to show to a customer whom he pretended to have, Gregg signed a receipt for the same substantially as follows: "I, the undersigned, have received this day of the H. A. Prentice Company the following articles: [description of the articles]. I promise to return the above named articles on demand."

The facts relating to Gregg's transactions with the plaintiffs in the second case, who were copartners under the name of J. M. Davis and Company doing business in Boston, were the same as with the plaintiff in the first case, the evidence tending to show that the goods were received and disposed of in the same manner.

The defendants asked the judge to rule that, if the jury found that Gregg was intrusted with these goods, either with the power to sell for cash or on conditional contracts of sale, as the agent of the plaintiffs, the defendants were protected by Pub. Sts. c. 71, relating to agents, consignees, and factors, regardless of the fact that Gregg obtained the merchandise by means of forgeries and false and fraudulent representations.

The judge declined so to rule, and instructed the jury as follows: "The provision of Pub. Sts. c. 71, relating to agents, consignees, and factors, means that, in order to protect a *bona fide* pledgee, the goods or merchandise in the hands of an agent must

have been intrusted to him to sell and dispose of in the ordinary course of business, as a common law sale."

The jury returned verdicts for the plaintiffs. If the instruction given was correct, judgment was to be ordered on the verdicts; otherwise, the verdicts were to be set aside and a new trial granted.

L. M. Child, for the defendants.

A. Hemenway, for the plaintiffs.

MORTON, J. The goods which are the subject of these suits were obtained from the plaintiffs by one Gregg by means of false and fraudulent representations and forged conditional contracts of sale. After he had thus obtained the goods, Gregg pledged them to the defendants. Although there is nothing in the report of the presiding justice or in the auditor's report positively showing that the defendants took them in good faith, it is assumed in the instructions to the jury, and we take it for granted that they did. The H. A. Prentice Company also "trusted Gregg personally with some two thousand dollars' worth of merchandise, and charged the same to him in the regular course of business"; but it is expressly stated in the report of the presiding justice that none of the goods which are the subject of these suits were ever "charged to him or purchased by him in any way, but were all delivered to said Gregg upon his representation that he had a reliable customer for them," and we assume were all accounted for by him by forged conditional contracts of sale. The facts show that there was a larcenous taking of the goods by Gregg, for which he was afterwards convicted and sentenced.

The defendants, in substance, requested the court to instruct the jury, that if the goods were intrusted to Gregg to sell for cash, or on conditional contracts of sale, the defendants were protected by Pub. Sts. c. 71, although the goods were obtained from the plaintiffs by Gregg by forgery and fraud.

The court refused to give this instruction, and instructed the jury in effect that, in order to protect a *bona fide* pledgee under c. 71, "the goods or merchandise in the hands of an agent must have been intrusted to" the agent, "to sell and dispose of in the ordinary course of business as a common law sale."

Without undertaking to say that intrusting goods or merchan-

dise to an agent or factor to sell means under all circumstances such a sale as defined by the court, we think, upon the undisputed facts, that the plaintiffs were clearly entitled to recover, and that therefore the instructions could have done no harm in the present case.

There was no evidence to show that the goods were intrusted to Gregg to sell for cash, and therefore so much of the request as related to that was inapplicable to the case before the court and jury.

The object of Pub. Sts. c. 71, is to protect parties dealing in good faith with factors or agents who have been intrusted with goods or merchandise for sale or consignment. It might be said that goods given, as these were, to one to be delivered by him to parties who he represented had purchased them, were not intrusted to him for sale, but as an agent for delivery merely. But however that may be, we do not think that the statute applies when goods or merchandise have been procured by the agent or factor to be intrusted to him for delivery under what purport to be conditional contracts of sale, in consequence of what in law constitutes a larceny of them on his part. In such a case the goods cannot be said to have been intrusted to him for sale in any manner within any fair meaning of those words. It would be a contradiction in terms to say that goods are intrusted for sale to one who steals them. *Stollenwerck* v. *Thacher*, 115 Mass. 224. *Thacher* v. *Moors*, 134 Mass. 156. *Rodliff* v. *Dallinger*, 141 Mass. 1. *Dows* v. *National Exchange Bank*, 91 U. S. 618. *Soltau* v. *Gerdau*, 119 N. Y. 380.

If the goods have been properly intrusted to an agent for sale, a party afterwards dealing in good faith with the agent will be protected, though the latter may violate his instructions, or, in disposing of or dealing with the goods, conduct himself fraudulently towards his principal. *Michigan State Bank* v. *Gardner*, 15 Gray, 362, 374. But that was not the case here.

In regard to the case of *Baines* v. *Swainson*, 4 B. & S. 270, which may seem opposed to the conclusion which we have reached, it should be observed that the English Factors' Acts (6 Geo. IV. c. 94) simply provide that the goods shall be "intrusted," and not, as ours, "intrusted for sale," and the fact that they do not provide that they shall be intrusted for sale is

adverted to in the argument of counsel and in the opinion given by Crompton, J., pp. 275, 281. See also *Cole* v. *Northwestern Bank*, L. R. 10 C. P. 354, 373, 374, where Blackburn, J. says that Willes, J., in delivering judgment in *Fuentes* v. *Montis*, L. R. 3 C. P. 268, "speaks of *Baines* v. *Swainson* as going to the extreme of the law." *Judgment on the verdicts.*

CHARLES H. AUSTIN *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 25, 1895. — September 9, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Assumption of Risk — Evidence.

If a brakeman on a freight train who in the course of his employment has had occasion to go by a gate-post nearly or quite every day for two years, which post is only one of many structures equally near to the track, is injured by striking the post, he cannot recover for his injuries in an action against the railroad company, as he must be held to have assumed the risk of injury whether he actually knew of the danger or not; and evidence of the slight sagging of the post towards the track is immaterial, if it is not shown to have had anything to do with the injury.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ on December 12, 1892, by striking against a gate post maintained by the defendant at the side of its line. The declaration contained four counts, the first and second at common law, the third under St. 1887, c. 270, § 1, cl. 1, and the fourth under cl. 2 of the same statute and section. Trial in the Superior Court, before *Sherman*, J., who, at the close of the evidence, at the request of the defendant, directed a verdict for the defendant, and, at the plaintiff's request, reported the case for the determination of this court, in substance as follows.

The plaintiff was at the time of the accident acting as a brakeman upon a freight train running from Boston to Rockport. For two years or more he had been employed upon this train and had had occasion to go by the post nearly or quite every day. The post was about four feet distant from the track,

and was one of many structures equally near or nearer to it. These structures were posts supporting bridges over the tracks, posts forming portions of drawbridges, telltale posts, telegraph poles, signal and semaphore posts, switch stands, standpipes, walls of passenger stations, abutments of bridges, and similar objects, forty-two in number. There was evidence that the post had sagged slightly towards the track, but the sagging was not shown to have had anything to do with the injury to the plaintiff.

A portion of the plaintiff's testimony was as follows:

"The morning of the accident my train left the Somerville yard at 3.55 A. M. It was very dark, quite dark. . . . The train was proceeding some fifteen to eighteen miles an hour, — a good fifteen miles an hour, and I should think more, when we reached the Saugus River drawbridge. I was at the time setting the brake and trying to hold the train so as to make the stop below the drawbridge before we set them off at the West Lynn siding. I was setting the brake inside the caboose. It did not seem to check the train; it slipped on the rails, and I knew I would have to go up on top and set more brakes. I eased up on the brake, and after we got through the draw I started to go out on top; took my lantern on my arm, opened the door, put the right foot on the ladder on the right hand, put the left on the outside rim of the threshold, leaned all my weight on the right leg and pulled the door, and just as the door slammed I felt a blow right here, right about here (indicating upon a door back of the witness stand and upon his hip). I came out, put my right foot on the round of the ladder, the lantern on my arm, and leaned over, — this foot on the outside threshold of the door, — and just as the door came together — the door snapped together that way — I felt a bang behind. My lantern was lighted and on my arm. As I was going, and as I stood just about to go up the ladder, the lantern was on the arm that was holding to the round of the ladder. As I went out I looked ahead up to the signal mark to see the balls that were on the signal mark. You are supposed to look for these. You have no right to go by them until you get your signals. The light of my lantern as I stood there, about to climb, threw ahead, I should think about six feet or so, at a rough guess — as near as I can get it. I remember being struck

here (indicating on his body). I remember nothing else until I came to myself in the hospital, two weeks and two or three days afterwards. . . . I never noticed the gate except when it was across the track when we were coming towards Boston. I don't remember of ever noticing, of ever looking at the gate anything more than when it was across the track. I was never, during the course of my employment on this or any other road, struck by an object on the side of the car upon which I was working. And I do not remember that in the course of my employment I had ever heard of a brakeman or other person in the employ of the road being struck by an object on the side of the road."

S. C. Darling, for the plaintiff.

S. Lincoln, for the defendant.

MORTON, J. We do not see how this case can be distinguished from *Lovejoy* v. *Boston & Lowell Railroad*, 125 Mass. 79, *Thain* v. *Old Colony Railroad*, 161 Mass. 353, and *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287. The plaintiff had been employed as a freight brakeman on the Rockport freight for two years or more, and had had occasion to go by this post nearly or quite every day. The post was only one of many structures as near to the track as it was, and the plaintiff must be held to have taken the risk of injury from its proximity, whether he actually knew of the danger or not. The slight sagging of the post towards the track, of which there was evidence, is not shown to have had anything to do with the injury to the plaintiff.

Judgment for the defendant.

HENRY A. RICE & others *vs.* NATIONAL CREDIT INSURANCE COMPANY.

Suffolk. March 26, 1895. — September 9, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Indemnity Bond — "Loss" — Construction of Contract.

An insurance company executed an instrument by which it agreed to indemnify A. against losses by sales in his business in excess of one fourth of one per cent of his annual sales to an amount not exceeding $10,000, "save such sum or sums as shall be deducted therefrom as hereinafter provided." Among other conditions the instrument provided that, "in the computation of losses when final adjustment hereinunder is made, no loss on any one claim shall be included to an extent of more than 33⅓ per cent of" a certain rating in a mercantile agency, "and in no event shall claims of loss exceed 7,500 dollars on any one individual or firm"; and that, "in the computation of indemnity under this bond for which this company is liable: 1st, twelve (12) per cent shall be deducted from the total gross losses as calculated under the provisions of this bond; . . . 2d, the said ¼ per cent loss of said second party shall also be deducted from said total losses, and the remainder shall be and constitute the amount of indemnity to be paid by said first party, not to exceed said 10,000 dollars." A. suffered a loss of over $23,000 on sales to one person. *Held*, in an action on the instrument, that the twelve per cent and the one fourth of one per cent were to be deducted from $7,500, and the balance constituted the indemnity to which A. was entitled.

CONTRACT, upon a bond of indemnity. The case was submitted to the Superior Court, and, after a finding and judgment thereon of $1,671.53 for the plaintiffs, to this court, on their appeal, upon agreed facts, the material parts of which appear in the opinion.

S. Williston, (*M. F. Dickinson, Jr.*, with him,) for the plaintiffs.

S. Lincoln, for the defendant.

MORTON, J. The instrument declared on is in the form of a bond of indemnity from the defendant to the plaintiffs, in which the defendant agrees to indemnify the plaintiffs against losses by sales and deliveries in their business in excess of one fourth of one per cent of their annual sales and deliveries to an amount not exceeding ten thousand dollars, "save such sum or sums as shall be deducted therefrom as hereinafter provided."

By the sixth condition it is provided that, "in the computation of losses when final adjustment hereinunder is made, no

loss on any one claim shall be included to an extent of more than 33⅓ per cent of the lowest capital rating in the latest reference book of the Mercantile Agency named above, . . . and in no event shall claims of loss exceed 7,500 dollars on any one individual or firm." And by the eighth condition it is further provided that, "in the computation of indemnity under this bond for which this company is liable: 1st, twelve (12) per cent shall be deducted from the total gross losses as calculated under the provisions of this bond; . . . 2d, the said ¼ per cent loss of said second party shall also be deducted from said total losses, and the remainder shall be and constitute the amount of indemnity to be paid by said first party, not to exceed said 10,000 dollars."

The plaintiffs suffered a loss to the amount of $23,097.64 on sales to one person, and the question is whether, in computing the indemnity to which they are entitled, the twelve per cent and the one fourth of one per cent shall be deducted from that amount, leaving a sum larger than the major limit of recovery, and entitling them therefore to the seventy-five hundred dollars which is fixed as the limit of recovery, or whether the twelve per cent and the one fourth of one per cent are to be deducted from the seventy-five hundred dollars, and the balance is to be regarded as the indemnity to which they are entitled. We think that the latter is the construction that must be adopted.

The word "loss" or "losses" occurs frequently in the bond, and it is evident that it is used as meaning the loss which the plaintiffs have sustained in their dealings with their customers, and not the amount for which the defendant may be liable under the bond. The term by which the latter is spoken of is "indemnity." The sixth condition is directed to ascertaining the amount of the loss, and the eighth to the computation of the indemnity after the loss has been fixed. There are two methods provided for ascertaining the loss. First, it shall not be more than thirty-three and one third per cent of a certain rating, and secondly, it shall in no event exceed the sum of seventy-five hundred dollars. When the loss is ascertained in either one of these modes, it constitutes the gross loss referred to in condition eighth, and from it are to be deducted the twelve per cent and the one fourth of one per cent, and the balance constitutes the indem-

nity which the company is to pay. The agreement to indemnify does not apply to the whole of the excess loss with a limit of liability on the part of the defendant, in which case the method proposed by the plaintiffs would be correct, but only to a certain amount of the excess, and it is from that that the deductions are to be made. *Judgment on the finding.*

MARY J. CUSHING & others *vs.* HENRY E. SPALDING & others.

Suffolk. March 27, 1895. — September 9, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Void Condition against Alienation — Statute of Uses — Appointment of Trustee — Residuary Clause.

A testator by will gave all his real and personal estate to his nephew in trust for the benefit of his insane daughter, the same to be conveyed to her if her reason was restored and to pass by her will, but if she died intestate to pass by the testator's will as follows: "four undivided fifth parts of the same rest and residue of my real estate" to the nephew, "in trust for the use and benefit of his brothers and sisters and their respective heirs, namely: W., B., M., wife of I., and S.; but said rest and residue of my real estate is to be holden upon the condition that the fee simple in the same shall never be sold, but the same be built upon or continue to be used as a farm." After giving numerous legacies, the will concluded with the provision that the residue of the real and personal estate remaining after the decease of the daughter intestate should go to the testator's nephews and nieces and others. The testator died during the life of the daughter, who died during the lives of the other beneficiaries, and the nephew died without having qualified as trustee before the filing of the plaintiff's bill to compel specific performance of an agreement to purchase a portion of the real estate. *Held*, that the condition against alienation was void, and that the provision as to building upon the real estate or continuing to use it as a farm formed part of the condition; that the trustee took the estate for the use and benefit of the devisees and the statute of uses immediately executed the use in them except as to M., who, being a married woman, took an equitable estate in fee simple during coverture, and upon the death of the husband the trust terminated, and the statute executed the use in her so as to give her the legal estate; that the appointment of a trustee was not necessary, and that the real estate in question was not included in the last residuary clause.

BILL IN EQUITY, filed January 30, 1895, by Mary J. Cushing, Sarah C. Cushing, and Frances R. Cushing, the first two being

widows, to compel specific performance of an agreement in writing, dated December 3, 1894, to purchase three undivided fourths of certain real estate. Hearing before *Lathrop*, J., on the bill, answer, and replication, the facts set forth in the replication being admitted by the defendant, in substance as follows.

By her will Mary Cushing gave all her real and personal estate to her nephew Samuel T. Cushing, in trust, to apply the net income thereof to the use and support of her daughter Sarah, an insane person, and, if insufficient, to appropriate any part of the principal for the purpose. If the appointment of a new trustee should become necessary, the Judge of Probate for the county was to select a suitable person for the position; and if at any time the *cestui que trust* became of sound mind, the trustee, upon her request, was to convey to her the entire estate so held in trust, "the same to be holden and used by her as her own property, and upon her decease to pass and be distributed as she may, by her last will and testament, direct; but if she should die intestate, leaving no legal or valid last will and testament, then to pass and be distributed according to the terms and provisions of this my last will and testament as hereinafter expressed."

The will further provided that, upon the decease of the *cestui que trust* intestate, the real and personal property, whether still held in trust or having been conveyed to the said Sarah, should go as follows. Certain real and personal estate was given to the nephew absolutely, and then came the following provision: "I also give to my said nephew, Samuel T. Cushing, and his heirs forever, one undivided fifth part of all the rest and residue of my real estate (except my land at Whitehead in said Hull). I also give the said Samuel four undivided fifth parts of the same rest and residue of my real estate (except my land at Whitehead aforesaid); to be held by him in trust for the use and benefit of his brothers and sisters and their respective heirs, namely, William L. Cushing, Benjamin Cushing, Mary Jane Cushing, wife of Isaac Cushing, and Sarah Abby Cushing; but said rest and residue of my real estate is to be holden upon the condition that the fee simple in the same shall never be sold, but the same be built upon or continue to be used as a farm."

After giving numerous legacies, mostly pecuniary, the will

provided that the executors should sell the testator's land at Whitehead, the proceeds to be paid to the trustee and to be held by him for Sarah under the first-named trust, and the will then concluded as follows: "All the rest and residue of my real and personal estate of every description which shall remain after the decease of my daughter, if the same shall not have been disposed of by my daughter by a last will and testament, I give to my nephews and nieces and to the nephews and nieces of my late husband, whose names have been herein mentioned, and who shall be living at the decease of my said daughter, share and share alike."

The bill alleged that the plaintiffs seasonably offered to convey the real estate to the defendants by a good and sufficient quitclaim deed conveying a good and clear title, which the defendants refused to accept.

The answer alleged that the testatrix died during the life of her daughter Sarah Cushing, who died during the lives of the other beneficiaries above mentioned; that Samuel T. Cushing died before the filing of the plaintiffs' bill, never having qualified as trustee under the will; and that the plaintiffs could not convey a good and clear title to the real estate, for the reasons that there should be a trustee appointed as successor to Samuel T. Cushing to make a valid conveyance; that the real estate was held by Samuel T. Cushing, and by Samuel T. Cushing as trustee, upon a condition inconsistent with a good and clear title; and that under the will it was uncertain whether, upon the death of the daughter Sarah Cushing, said Samuel T. Cushing for himself, and as trustee for William L. Cushing, Benjamin Cushing, Mary Jane Cushing, and Sarah Abby Cushing, took the title to the real estate, or whether the nephews and nieces of the testatrix and of her deceased husband took the title thereto.

The replication admitted the first allegations in the defendants' answer, but denied that the defendants' title was defective, and alleged that before filing the bill they offered to secure the appointment of a trustee to convey the title, although not admitting its necessity, and were still willing so to do.

Such decree was to be entered as justice and equity might require.

F. L. Hayes, for the plaintiffs.

W. S. Pinkham, for the defendants.

MORTON, J. The condition against alienation was clearly void. *Hawley* v. *Northampton*, 8 Mass. 3, 37. *Gleason* v. *Fayerweather*, 4 Gray, 348, 353. *Todd* v. *Sawyer*, 147 Mass. 570, 571. *Winsor* v. *Mills*, 157 Mass. 362. The provision in regard to building upon the real estate, or continuing to use it as a farm, forms part of the condition. The testatrix attempts to mitigate the condition against alienation by providing that, though the estate shall not be sold, it may be used by the devisees for building and farming.

The restraint upon alienation being void, the trustee took the estate simply for the use and benefit of the devisees, and the statute of uses immediately executed the use in them, except as to Mary Jane Cushing, who, being a married woman, took an equitable estate in fee simple during coverture. Upon the death of her husband the trust terminated, and the statute executed the use in her so as to give her the legal estate. *Richardson* v. *Stodder*, 100 Mass. 528. *Moore* v. *Stinson*, 144 Mass. 594, 595, 596. The appointment of a trustee does not appear to be necessary.

It is clear that the rest and residue referred to in the concluding paragraph of the will means so much of the estate as would remain undisposed of under the previous conditions of the will if the daughter should recover and the estate should be conveyed to her and she should die intestate, or so much as would remain undisposed of if the daughter should continue of unsound mind till death. In either of these contingencies the real estate in controversy is disposed of by the will, and the latter contingency is the one that has happened.

It is only when there is a fairly reasonable doubt as to the construction of the instrument on which the title of the plaintiff depends, that a court will be justified in refusing specific performance on account of the absence of parties who would have a right to dispute the defendant's title. *Cunningham* v. *Blake*, 121 Mass. 333. *Butts* v. *Andrews*, 136 Mass. 221. *Hunting* v. *Damon*, 160 Mass. 441. Otherwise, the mere fact of possible litigation would be sufficient to bar a right to specific performance. We see no valid ground for questioning the plaintiffs' title in this case.

Decree for the plaintiffs.

KING BRICK MANUFACTURING COMPANY *vs.* PHŒNIX INSURANCE COMPANY.

SAME *vs.* PENNSYLVANIA INSURANCE COMPANY.

SAME *vs.* GRANITE STATE INSURANCE COMPANY.

SAME *vs.* INSURANCE COMPANY OF NORTH AMERICA.

SAME *vs.* ROYAL INSURANCE COMPANY.

SAME *vs.* ORIENT INSURANCE COMPANY.

Suffolk. March 11, 12, 13, 1895. — September 11, 1895.

Present: FIELD, C. J., HOLMES, LATHROP, & BARKER, JJ.

Fire Insurance — Foreign Statute — Representations and Warranties — "Constant Watch" — Change of Use.

In a statement attached to a fire insurance policy, "Steam pump with sufficient hose to cover buildings, constant watch," the words "constant watch," if they relate to the description of the risk by the terms of c. 49, § 20, of the Rev. Sts. of Maine of 1883, where the insured premises were situated, and the policies were issued, constitute a representation, and not a warranty.

Such a change in the use or occupation of insured property as affects the risk must be permanent or habitual, and does not include the temporary absence of a watchman of which the insured has no knowledge.

Where a fire insurance policy contains a representation that a constant watch will be kept on the insured premises, and the assured uses all reasonable means to see that a watch is kept, a loss caused by the negligence of a servant constitutes no breach of the terms of the policy.

A provision in a fire insurance policy that, "if an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured," refers to some paper outside of the policy, and does not constitute words within the policy itself a warranty.

SIX ACTIONS OF CONTRACT, upon policies of insurance against loss by fire on the buildings and machinery of the King Brick Manufacturing Company, situated at Columbia Falls, in the State of Maine.

The cases were heard in the Superior Court, on an agreed statement of facts, by *Hammond*, J., who found for the plaintiff in each case, and made certain rulings of law, to which the defendants alleged exceptions. The material facts appear in the opinion.

O. D. Baker (of Maine), for the defendants.

F. T. Benner, for the plaintiff.

LATHROP, J. To each of the policies of insurance in this case was attached a rider, which first expressed the amount of the insurance, and the division of this amount on the several subjects at risk, followed by these words: "Situated on east side of Pleasant River, in Columbia Falls, Maine. Steam pump with sufficient hose to cover buildings, constant watch."

The property insured was the plant of a brick manufacturing company, where a fire was liable to break out at any time, and which needed the constant care and supervision of a watchman. It was destroyed by a fire breaking out at night, which we assume might have been put out if the watchman employed by the plaintiff for the purpose had been present; but he was absent at the time, through negligence or a misunderstanding, without the knowledge of the plaintiff or of any one of its officers.

The principal question in the case turns on the meaning of the words "constant watch." The presiding justice of the Superior Court found for the plaintiff in each case; and made the following rulings of law:

"1. The phrase 'constant watch' was not a warranty, but a representation, and it had reference not only to the time the policy was issued, but also to the future.

"2. It must have been true and correct as to things done or existing at the time the policy was issued; and, so far as it related to the future, it was a stipulation to be fairly and substantially complied with.

"3. If the plaintiff established a rule that there should be a constant watch, and employed proper servants to execute such rule, and otherwise exercised reasonable supervision to see that the rule was executed, and such rule had been executed up to the night of the fire, a temporary omission to keep such watch on the night of the fire, owing to accident or the negligence of subordinate persons, servants, or workmen, not known to nor sanctioned or permitted by the insured, or its superintendent or managing officer or agent, and without negligence on the part of the insured or such officer or agent, would not prevent recovery by the plaintiff in this action, even if the fire would not have occurred but for such omission."

We are of opinion that these rulings were right.

The property insured was situated in the State of Maine, and the policies were issued there. The contracts are, therefore, to be construed with reference to the laws of that State. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416, 422. Chapter 49 of the Revised Statutes of Maine of 1883 contains the following section, which is made part of the case: "Section 20. All statements of description or value in an application or policy of insurance are representations and not warranties; erroneous descriptions or statements of value or title by the insured do not prevent his recovering on his policy unless the jury find that the difference between the property as described and as it really existed, contributed to the loss or materially increased the risk; a change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk."

We are somewhat embarrassed in construing this statute by the fact that the decisions of the Supreme Court of Maine afford us but little assistance. The precise question here involved does not appear to have been decided. There are, however, expressions of opinion in several cases which show that the statute is to be liberally construed in favor of the insured.

In *Campbell* v. *Monmouth Ins. Co.* 59 Maine, 430, 434, the court, speaking of the statute in question, say that it "was not designed to lay any additional stumbling-blocks in the way of the policy holder before his case could be heard upon its merits, and it should not be so construed as to give it that effect."

In *Emery* v. *Piscataqua Ins. Co.* 52 Maine, 322, 325, it is said by the court: "Warranties on these points — the valuation and interest of the insured — are to be treated as representations and nothing more."

And in *Day* v. *Dwelling House Ins. Co.* 81 Maine, 244, it is said: "Previous to the enactment of our present insurance law, policies had become so loaded down with provisos, limitations, and conditions, that in many cases they secured to the insured nothing better than an unsuccessful lawsuit in addition to the loss of his property. And one of the purposes of our present statute was to put an end to this evil."

The words "constant watch," in the connection in which they occur, may perhaps amount to a description of the risk,

and, if so, by the terms of the statute they constitute a representation, and not a warranty; but the description cannot be said to be erroneous in this case, for the words in the statute which follow the clause above cited show that the words "erroneous descriptions" refer to descriptions of the property as it really existed, and not to a promise as to the future. The words upon which the defendants principally rely are these: "A change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk."

But in this case there was no change in the property or in its use or occupation. The word "change" in the law of insurance means a permanent or habitual change, and does not include the temporary absence of a watchman of which the insured has no knowledge. *Shaw* v. *Robberds*, 6 A. & E. 75. *Houghton* v. *Manuf. Ins. Co.* 8 Met. 114. *Loud* v. *Citizens' Ins. Co.* 2 Gray, 221, and cases cited.

Was there a breach of any of the terms of the policy by the insured? This depends upon whether the insured absolutely promised that there should be "a constant watch"; in other words, whether it warranted this, or whether the words constitute a representation merely, and are governed by the familiar rules applicable to representations. Unless they amount to a warranty, there is no breach of the agreement. In this part of the case we assume, of course, that the first clause of the section is not broad enough to include a statement as to the future.

It is a familiar rule of construction, that a promise in regard to the future, which is not clearly made a warranty, is a representation only, and not a warranty. *Houghton* v. *Manuf. Ins. Co.* 8 Met. 114. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416. *National Bank* v. *Hartford Ins. Co.* 95 U. S. 673. *Garcelon* v. *Hampden Ins. Co.* 50 Maine, 580.

On the principles laid down in these cases, we cannot regard the words "constant watch" as constituting a condition precedent to the right to recover, and consider them as a representation that a constant watch would be kept.

The duty was thus imposed upon the insured to use all reasonable care, and to take all reasonable means to see that

a constant watch was kept. This was done by making a rule to that effect, and providing a watch. No negligence or fraud is imputed to the assured. The loss was caused by the negligence of a servant, and this is a risk covered by the insurance. There was therefore no breach of the terms of the policy by the insured. *Shaw* v. *Robberds*, 6 A. & E. 75. *Dobson* v. *Sotheby*, M. & M. 90. *Houghton* v. *Manuf. Ins. Co.* 8 Met. 114. *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 416. *Loud* v. *Citizens' Ins. Co.* 2 Gray, 221. *Insurance Co. of North America* v. *McDowell*, 50 Ill. 120, 131. *Aurora Ins. Co.* v. *Eddy*, 55 Ill. 213, 219. *Mickey* v. *Burlington Ins. Co.* 35 Iowa, 174.

The defendants further rely upon certain provisions in the policies as showing that the words "constant watch" constitute a warranty. In four of the policies the language is: "If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured." This clearly refers to some paper outside of the policy, and not to words in the policy itself. Moreover, if the clause were broader, and constituted a description of the property a warranty, it would be in conflict with the provisions of § 20, and void by § 21, which provides: "All provisions contained in any policy of insurance, in conflict with any of the provisions hereof, are null and void."

The other two policies contain this clause: "Any change increasing the hazard, either within the premises or adjacent thereto, and not reported to this company and agreed to by entry in due form in the body hereof, will render this policy void." But, as we have already stated, the word "change" means a permanent or habitual change, and not the temporary absence of a watchman.

Exceptions overruled.

WILLIAM A. PERRY *vs.* OLD COLONY RAILROAD COMPANY.

Suffolk. March 27, 28, 1895. — September 14, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Negligence — Employers' Liability Act.

The fact that the foreman of repairs in a roundhouse of a railroad corporation did not notify the engineer or fireman of a locomotive engine, which was stalled in the roundhouse for repairs, that he had sent A., a laborer in the employ of the corporation, under the engine to do some repair, they knowing that some one would be so sent, and it not being customary to give such notice, or the fact that he did not notify A. that the engine would have to be blown down before the repair was made, and that this was as likely to be done in the roundhouse as elsewhere, A. being aware of both these things, show no negligence on the foreman's part upon which to found an action against the corporation under the employers' liability act, St. 1887, c. 270, for injuries occasioned to A. by being scalded with steam and hot water blown from the engine while making the repair in question.

A locomotive engine, which is stalled in the roundhouse for repairs, is not "upon a railroad," within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 3.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by being scalded with steam and hot water from a locomotive engine. The declaration, which was under the employers' liability act, St. 1887, c. 270, contained three counts, the first and third alleging that the injury was caused by the negligence of a person intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence; and the second alleging that the injury was caused by the negligence of a person having charge or control of a locomotive engine upon the defendant's railroad. Trial in the Superior Court, before *Sherman*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff testified that he had been employed for some years as a laborer in the defendant's roundhouse; that his duties were jobbing around, and doing anything he was told to do; that on December 21, 1892, he was ordered by Charles Noyes, who was the foreman of repairs in the roundhouse and had charge of the repairs of engines, to go and see what was the

matter with the heater pipe of a certain engine, which was then standing on one of the pits in the roundhouse; that he got his tools and went under the engine on the left hand side, between the driving wheels and the forward trucks; that he said nothing to anybody when he went under, and then saw no one else near or on the engine; that he went back under the ash-pan to the heater pipe, which was between the engine and tender and right beside the blow-off cock, which came down between the two rear drivers of the engine; that he had been at work there on the heater pipe five or ten minutes when the steam and hot water came down on him from the blow-off cock and scalded him; that "when engines come in they usually take in coal and water, and back into the roundhouse, and the engineer most generally reports what repairs are necessary"; that "the engineer gives a slip to the engine despatcher, stating what repairs are needed, and he gives it to Noyes, who orders the work done"; that "if the engineer wants to blow her down, he does it in the pit"; that "an engine has to be blown down when a check is to be ground in"; that "an engineer, as a matter of custom or practice, has no duties in the roundhouse any more than if he has a little job on his engine to do, he does it"; that "there is no custom as to what a man shall do when he goes under an engine, — go and do his work, that is all"; and that "there is no custom with relation to what a laborer shall do when he goes under an engine, with regard to water and danger."

William J. Mahar, a witness for the plaintiff, testified that, at the time of the accident, he was employed in the roundhouse as a machinist, and worked on repairs there; that engines were repaired there as far as they could be, and what could not be done there was done in the machine shop; that when an engine came in and needed repairs, the engineer generally reported them to the foreman of repairs or to the engine despatcher on a slip left in his office; that this slip contained a statement of what he wanted done; that from the despatcher it went to the foreman of the roundhouse, and then to the person who did the work; that he could not say that all these slips passed through the foreman of the roundhouse, but as a general rule they did; and that sometimes he gave the slip to the man ordered to do the work, and sometimes not. The witness further testified as

follows: "If there is no work to be done on the engines, they are put in the roundhouse with the fire and water in them, ready to go out on a trip. If they are to remain there for any repairs, they generally take the fire out, most always before going into the roundhouse. The hot water and steam are blown off, sometimes outside, sometimes inside, according to circumstances. When there is a check to be ground in, I have seen it blown off after they have crossed the house and gone into the yard, so as not to interfere with anybody. I have seen an engine blown off in the house when a check was to be ground in. There was no general practice; sometimes the water was let off in the ash-pit, sometimes in the house, and sometimes they used to go beyond the house. Under an engine is a very dangerous place. I never heard of any custom, and do not know of any practice, with regard to the duty of a workman with reference to the hot water and steam, when he receives orders to go under an engine."

On cross-examination, the witness testified: "All repairs that can be made comfortably in the roundhouse are made there without taking the engines to the shop, and that sometimes requires men to be at work on the engines in one part of them and sometimes in another; so that, when a man goes under an engine, there may be half a dozen inside or on top at the same time. Each man looks out for himself where he goes. I knew there were people in the cab of this locomotive, for I heard voices a little before the plaintiff was hurt."

James F. Bailey, a witness for the plaintiff, testified as follows: "I had been in the employ of the defendant as locomotive fireman for two years and a half prior to June, 1893. I was in the roundhouse when the plaintiff was hurt. I was just up on the engine he was working on. I got down off that engine and went across to my own engine, and got ready to go out of the roundhouse. The first thing I heard was the steam blowing, and just as soon as the steam cleared away I saw the plaintiff coming up from under the engine. I did not see him go under the engine. When I went on the engine, the one from under which he came, Rodney Straw was packing the throttle, a fellow named Moore, and a man named Bates, and a man who run the hoisting engine on the dump, and myself, were on her. Straw

run the engine. I saw Straw was packing the throttle, but I did not know of any other repairs to be done on that engine. A man came along to do some work on her, and said there was too much water in her, and Straw said, 'I will blow her down.' I am familiar with the duties of the engineer on this railroad. When an engine comes in after a trip she is put on the coal track, and the engineer generally gets off there and turns her over to the fireman. She takes coal and cleans the fire; if she is to be hauled in, the fire is banked, and then she backs in and takes water and goes to the turn-table and is turned around, and will either be put on the pit or put out in the yard. The practice about blowing down the engine when repairs are to be done depends upon what the repairs are. When an engine has to have a check ground in, and other repairs, the duty of the fireman about blowing her down would generally be for him to wait until he got in the pit. The engineer would know if it was necessary for a check to be ground in. They don't have any regular time, with reference to the time of the engines going into the roundhouse, for doing this. It is a common occurrence to see them blowing off the engine in the roundhouse. An engine that requires a check ground in would be blown down as soon as the engine came in. It is the engineer's duty to blow down. When the engine goes into the roundhouse she is generally assigned to a pit, and generally the tender brake is set up and the wheels blocked, and the engineer goes off for the day, and then the engine is in the charge of the engine despatcher. The engineer usually packs his own throttle."

The defendant offered no evidence, and requested the judge to rule that the plaintiff could not recover.

The judge declined so to rule, and submitted the following questions to the jury:

"1. Was Noyes, the foreman of repairs, negligent?

"2. Was the engineer, Straw, in charge and control of the engine under which the plaintiff was hurt at the time, and, if so, was he negligent with reference to such charge and control?"

The jury answered both questions in the affirmative, and found for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

J. H. Benton, Jr. & C. F. Choate, Jr., for the defendant.

H. L. Boutwell, for the plaintiff.

MORTON, J. This is an action for personal injuries, brought under St. 1887, c. 270. There are three counts in the declaration. The first and third counts allege negligence on the part of a person intrusted with and exercising superintendence, who it appeared was one Noyes, the foreman in charge of the round-house. The second count alleges negligence on the part of a person who had charge or control of a locomotive engine upon a railroad, who it appeared was one Straw, the engineer of the engine under which the accident happened.

The evidence all comes from the plaintiff and his witnesses. It is nowhere expressly stated what was the nature of the repair which the plaintiff was sent to do upon the engine, but from the fact that the repair principally referred to in the testimony was the grinding in of a check, we infer that that was, in part at least, what the plaintiff had to do; and we assume that Noyes knew it, either in the customary way, by a slip from the engineer, or in some other manner. It is said that when he sent the plaintiff to do the job, he should have given notice to the engineer or fireman that he had been sent. But both the engineer and fireman knew that some one would be sent by the foreman to do the repair; and it hardly would seem necessary for the foreman to notify them that he had done what in the ordinary course of things they had every reason to expect he would do. There was nothing to show that there was anything unusual about the job, or manner or place of doing it. The place was dangerous, but the plaintiff knew that. He also knew that the engine would have to be blown down if a check was ground in, and that that was done over the ash-pit as commonly as anywhere. There was no negligence on the part of the foreman in failing to notify the plaintiff of what he well understood himself. There was nothing to show that it was customary, when men were sent to grind in checks, to notify the engineer or fireman, or anybody else, of the fact, and that they must be careful about blowing down, or that it had ever been done before, or that anything was omitted in this case on which the men habitually relied or had a right to rely. There was testimony that the workmen looked out for themselves, as they needs

must in many things. Some details a foreman may safely ignore, or leave to the men over whom he has charge. We discover no evidence of negligence on the part of Noyes.

In the next place, even if Straw was negligent in blowing down, which we do not decide, we do not think that he had charge or control of a locomotive upon a railroad track within the meaning of the act. The statute, as it is said in *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13, 18, "seems chiefly to contemplate the danger from a locomotive engine or train as a moving body, and to provide against the negligence of those who, either wholly or in part, control its movements." This engine was stalled in the roundhouse for repairs, and was not upon a railroad track as the words ordinarily are used. The case would be different, perhaps, if it had been standing on a track, waiting to be coupled to a train, or for some temporary purpose. If the engine had been in the repair shop, no one, we think, would contend that it was upon a railroad track within the fair meaning of the act. The fact that it was in the roundhouse instead, where such repairs were made as could be made comfortably, does not, it seems to us, make any difference. It is also a matter of great doubt whether the engine was in the charge or control of Straw. The testimony tended to show that, when an engine came into the roundhouse, it was generally assigned to a pit, the tender brake set up and the wheels blocked, and then the engineer went off, and the engine was in charge of the train despatcher; or, as the plaintiff put it, "an engineer, as a matter of custom or practice, has no duties in the roundhouse any more than if he has a little job on his engine to do, he does it," which is far from saying that in the roundhouse he has charge or control of the engine. The blowing down of the engine was in response to an outside suggestion, and might as well have been done by any one else for aught that appears. But even if the engine was in charge or control of Straw, that is not sufficient. In order to make the defendant liable, it must also have been upon a railroad track, which we do not think it was.

The views expressed above render it unnecessary to consider the question of the plaintiff's due care.

The result is, that a majority of the court think the exceptions should be sustained, and it is

So ordered.

EMILY B. WRIGHT *vs.* VERMONT LIFE INSURANCE COMPANY.

Suffolk. March 8, 1895. — September 16, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, LATHROP, & BARKER, JJ.

Life Insurance — Party to sue — Action — Demand of Payment — Satisfactory Proof of Death — Statement of Occupation of Insured — Amendment — Judgment.

An action upon a policy of life insurance issued before the passage of St. 1894, c. 225, should be brought by the administrator of the estate of the insured, and not by the beneficiary.

If the promise in a policy of life insurance is to pay the sum named therein at the office of the insurance company in a certain city within ninety days after satisfactory proof of the death of the insured, a right of action accrues at the expiration of ninety days after such satisfactory proof is furnished, without any formal demand of payment.

It is no bar to an action on a promise to pay money that the promisee was not present at the time and place appointed for payment; but it is for the promisor to show in defence that he was ready to pay, and he must make a tender accompanied by a *profert in curia*.

In an action upon a policy of life insurance, by the terms of which the insurance company promised to pay the sum named therein "at its office in the city of B. . . . ninety days after satisfactory proof, at its said office, of the death of the said insured," it appeared that the proof of death was made out on blanks furnished by the company, was taken to the office of the company in another city, and there received by a person apparently in charge of the office, who promised to forward it to B.; and it was produced at the trial by the defendant's counsel. It was admitted that the proof was regularly and properly made out; and no evidence was produced by the defendant to show that it was not received at B. *Held*, that the jury were warranted in finding that the proof of death had been furnished in accordance with the requirements of the policy.

To the question in an application for life insurance, which required the applicant to state his "occupation or employment," the answer was, "Waiter." In an action upon the policy subsequently issued, the evidence was that the insured had been a calker, but at the time the application was made he was a waiter in a restaurant. In the proof of death signed by the beneficiary, who was the wife of the insured, she stated that he was employed as a waiter, and was also doing jobbing in calking for different persons, and that he was a calker and waiter; and she testified that, although his trade was that of a calker, he did not do any calking at the time of the policy or afterwards, though he tried to get some jobs at calking. *Held*, that the judge rightly refused to rule that the plaintiff could not recover, because the answer of the insured was not full, complete, and true; and that it was for the jury, upon the evidence, to say what the applicant's occupation was at the time the answer was made.

It is within the power of the Superior Court, after a verdict for the plaintiff in an

action upon a policy of life insurance, and after the defendant's exceptions on the merits have been overruled by this court, to allow an amendment of the writ substituting for the beneficiary's name as plaintiff the name of the administrator of the insured's estate, as nominal plaintiff, for her benefit, and, although the defendant's exception to the refusal to rule that the action could only be maintained by the administrator has been sustained, it is unnecessary that the case should be tried again, but, if such an amendment is allowed, judgment may be entered on the verdict.

CONTRACT, upon a policy of insurance issued by the defendant on the life of Alexander H. Wright, and payable to the plaintiff, who was his wife. At the trial in the Superior Court, before *Richardson*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

J. Woodbury, for the defendant.

P. H. Cooney, for the plaintiff.

LATHROP, J. 1. We are of opinion that the first request for instructions should have been granted.* The promise to pay to the plaintiff was by intendment of law made with Alexander H. Wright, and his administrator was the proper party to sue. The St. of 1887, c. 214, § 73, did not change this rule of law. *Nims* v. *Ford*, 159 Mass. 575. *McCarthy* v. *Metropolitan Life Ins. Co.* 162 Mass. 254. The St. of 1894, c. 225, which gives the person to whom a policy of life insurance is made payable the right to maintain an action thereon in his own name, by its terms applies only to policies thereafter issued, and has no application to the policy in this case, which was issued in January, 1890.

2. The second request for instructions was properly refused. The bill of exceptions on this point is as follows: "There was no evidence that the plaintiff personally had ever demanded payment of the policy at the office of the company in Burlington, but she testified that she had demanded payment from the agent of the company at 40 Water Street, Boston; and the defendant asked the court to rule that, in the absence of such evidence, this action could not be maintained, but the court refused said request, and the defendant excepted thereto."

Treating the request literally, it would be enough to say that, if a demand was necessary at Burlington, the plaintiff was not

* The defendant requested the judge to rule that the action could not be maintained by the plaintiff, but only by the administrator of the estate of the insured.

required to make it personally, but could make it by an agent; and that, as the request was based entirely on the want of evidence of a personal demand by the plaintiff at Burlington, the judge was not bound to give it. But we may go further, and say that there is nothing in the policy which requires any demand at Burlington or elsewhere. The promise is to pay at the office in Burlington within ninety days after satisfactory proof of death of the insured. At the expiration of ninety days after satisfactory proofs were furnished, a right of action accrued, without any formal demand.

It is no bar to an action on a promise to pay money that the promisee was not present at the time and place appointed for payment. *Ruggles* v. *Patten*, 8 Mass. 480. *Carley* v. *Vance*, 17 Mass. 389. *Payson* v. *Whitcomb*, 15 Pick. 212. In *Carter* v. *Smith*, 9 Cush. 321, in an action on a promissory note payable at a time fixed at either of the banks in Portland, the defendant objected that the plaintiff must prove a demand. This objection was overruled, and this court, Chief Justice Shaw giving the opinion, overruled the defendant's exceptions, with double costs.

It is for the promisor to show in defence that he was ready to pay, and he must make a tender accompanied by a *profert in curia*. *Carley* v. *Vance*, and *Carter* v. *Smith*, *ubi supra*.

3. The third request for instructions, that the evidence was insufficient to establish that the proof of death had been furnished in accordance with the requirements of the policy, was properly refused. It is true that the promise to pay in the policy is "at its [the defendant's] office in the city of Burlington . . . in ninety days after satisfactory proof, at its said office, of the death of the said insured." The proof of death was made out on blanks furnished by the company, was taken to the office of the defendant in Boston, and there received by a person apparently in charge of the office, who promised to forward it to Burlington; and it was produced at the trial by the defendant's counsel. It was admitted that the proof was regularly and properly made out. No evidence was produced by the defendant to show that it was not received at Burlington. We are of opinion that the jury were well warranted in finding against the defendant on this issue.

4. The next objection is, that the insured did not make a "full, complete, and true" answer to the third question in the application for insurance, which required him to state his "occupation or employment." The answer was, "Waiter." The evidence was that the insured had been a calker, but at the time the application was made he was a waiter in a restaurant. It is true that in the "proof of death" signed by the plaintiff, she stated that he was employed as a waiter, and was also doing jobbing in calking for different persons, and that he was a calker and waiter; but she explained in her testimony that, although his trade was that of a calker, he did not do any calking at the time of the policy or afterwards, although he tried to get some jobs at calking.

The question did not call for the past occupation of the insured, as in *Dwight* v. *Germania Ins. Co.* 103 N. Y. 341, but for his occupation at the time of the application. The question was submitted to the jury under instructions not now objected to by the defendant. The defendant on this point has relied solely upon the refusal of the judge to rule that the plaintiff could not recover, because the answer of the insured was not full, complete, and true. On the evidence, such a ruling was rightly refused. It was for the jury, upon the evidence, to say what the applicant's occupation was at the time the answer was made. The statement made by the plaintiff was evidence against her, but was not conclusive.

5. It is within the power of the Superior Court to allow an amendment of the writ, substituting for her name as plaintiff the name of the administrator of her husband's estate, as nominal plaintiff, for her benefit. *Winch* v. *Hosmer*, 122 Mass. 438. *Costelo* v. *Crowell*, 134 Mass. 280. *Lewis* v. *Austin*, 144 Mass. 383. As the defendant's exceptions on the merits have been overruled, there seems to be no reason why the case should be tried again, or why, if the amendment above suggested be allowed, judgment should not be entered on the verdict. *Pierce* v. *Charter Oak Ins. Co.* 138 Mass. 151, 164. As the judge erred in refusing to give the first instruction requested, the entry must be

Exceptions sustained.

MASONIC BUILDING ASSOCIATION & others, petitioners, *vs.* STEPHEN A. BROWNELL & others.

FRANCIS B. GREENE, petitioner, *vs.* SAME.

Bristol. March 18, 1895. — September 21, 1895.

Present: FIELD, C. J., ALLEN, MORTON, LATHROP, & BARKER, JJ.

Betterment — "Order laying out" Way — Statute — Constitutional Law — Board of Public Works for New Bedford — Validity of Assessment — Description of Estate assessed — Error in Name of Owner — Uncertainty.

The board of public works of a city, established by a statute which vested in the board sole jurisdiction of the laying out and altering of streets or ways, passed an order reciting that, in the opinion of the board, common convenience and necessity required that P. Street should be widened for a certain distance, and directing that notice be given to the abutters, naming them, of the intention of the board to lay out P. Street by taking a portion of their land and laying it out as a public street, and that the board intended to assess a portion of the expense on the estates benefited, and would be on the line of the proposed lay-out at a certain time to view it, and to hear any objections to the lay-out or assessment. Three weeks later the board passed another order, which, after repeating that common convenience and necessity required the widening of P. Street, and reciting that due notice had been given of the intention of the board to take for that purpose certain parcels of land described, adjudged that these parcels were taken and laid out as a part of P. Street, and assessed the damages therefor. *Held*, that the two orders should be taken together, and constituted "the order laying out" the street, within Pub. Sts. c. 49, § 98; and that, thus construed, it clearly appeared that the order expressly declared that the way was laid out under the provision of law authorizing the assessment of betterments.

If a petition for a writ of certiorari to quash a betterment assessment for the widening of a street alleges that the widening was not completed when the assessment was made, and the reservation of the case for the full court contains the stipulation that the facts alleged in the petition and answer are to be taken as true, and a copy of the assessment order annexed to the petition and forming a part of it recites that the work of widening had been completed, it cannot be said that it appears that such widening had not been completed.

It is within the constitutional power of the board of public works for New Bedford, established by St. 1889, c. 167, to make a betterment assessment.

An order adopted by the board of public works of a city recited that common convenience and necessity required that P. Street should be widened on the east side for a certain distance, and for that purpose it was necessary to take certain parcels of land, among others, "belonging to the C. estate, viz. the heirs of B. and W. C.," and awarded damages to the "C. estate." A subsequent order of the board assessing betterments for the widening of P. Street included among others, the "C. estate, land on the east side of P. Street." *Held*, that there was not such indefiniteness in the description of the estate as would invalidate the assessment.

A mistake in the middle initial of a name, or giving it a middle initial when it has none, in describing the person whose estate is assessed for a betterment, is not such an error as will defeat the assessment, it not appearing that there is more than one person of the same first and last name who owns land on the street for the widening of which the assessment is laid.

It is the estate which is benefited that is to be assessed for a betterment, and, if that is correctly designated in the order laying the assessment, justice does not require that the assessment should be quashed because the name of a former owner has been used in describing the estate, instead of the name of the present owner, when it does not appear that any one has been or will be misled or prejudiced by the error, if it is one.

Assessments to A., B., C., and others on two tracts of land, each of which belongs to several owners some of whom own in both, will not be invalid if it appears from the order in which the estates are assessed, to which estate the respective assessments apply.

MORTON, J. These two cases were argued together and have been considered together. They are petitions for writs of certiorari to quash certain betterment assessments made upon the estates of the petitioners by the board of public works of the city of New Bedford, in consequence of the benefit adjudged by it to have been received by the estates in the widening of a public street called Pleasant Street.

The character of the objections to the assessments is the same in both cases, except that in the case of Francis B. Greene, petitioner, it is alleged in the petition, in addition to the causes stated in the petition of the Masonic Building Association, that the action of the Board on September 26 and October 17, 1892, was not lawful by reason of the absence from the meeting of the board of the city clerk, who is made by the act creating the board its recording officer, and the choice of a clerk *pro tempore*, who was duly sworn. This objection has not been pressed, and we regard it as waived.

The first and principal objection is that "the order laying out" the widening did not expressly declare that the widening was under the provisions of the law authorizing the assessment of betterments, as it is required by Pub. Sts. c. 49, § 93, that it should be in order to justify such assessment. *Fuller* v. *Springfield*, 123 Mass. 289.

The petitioners contend that the order of October 17 constituted "the order laying out" the widening. The respondents contend that the statute means "the order for laying out," and that that was the order of September 26. This contention de-

rives some support from the language of the original act limiting the time within which betterment assessments should be laid, which was, "such assessment shall be laid within two years after the passage of the order for the laying out," etc. St. 1869, c. 367, § 1. The question would still remain, however, whether there was any substantial difference between the two readings. The petitioners also contend that § 1 of Pub. Sts. c. 51, is to be construed as if it read "laid out in pursuance of an order," etc.

The board of public works for New Bedford was established by St. 1889, c. 167. By § 3, all the duties and powers in relation to laying out and altering streets or ways vested in the city council or either branch thereof, or the mayor and aldermen, as supervisors of highways or otherwise, are vested in and are to be exclusively exercised by the board. The city charter of New Bedford provides that "the city council shall have the same power in relation to laying out, acceptance, altering or discontinuing of streets and ways, and the assessment of damages, which selectmen and inhabitants of towns now by law have; but all petitions and questions relating to laying out, widening, altering, or discontinuing any street or way, shall be first acted on by the mayor and aldermen." St. 1847, c. 60, § 12.

It is evident, therefore, that all the powers which selectmen and the inhabitants of towns have in regard to the laying out or altering of streets or ways are vested in the board, that they form the basis of its authority in such matters, that the powers which previously had been divided between the mayor and aldermen and the city council are now consolidated in its hands, and that it has sole jurisdiction in matters committed to its charge.

The order of September 26, which the board adopted, recited that in its opinion common convenience and necessity required that Pleasant Street should be widened from William Street to Union Street, and directed that notice be given to the abutters, naming them, of the intention of the board to lay out the street by taking a portion of their land and laying it out as a public street, and that the board intended to assess a portion of the expense on the estates benefited, and would be on the

line of the proposed way or lay-out at a certain time to view it, and to hear any objections to the lay-out or assessment.

It is manifest that this order did not constitute a laying out. It contained no description of the way, nor of the lands taken, nor of the owners thereof, nor of the sums awarded as damages, and no statement that the way was in fact laid out, or that land was taken for the purpose of laying out a way. It was not a laying out within the statute, which allows a party aggrieved by an assessment of his damages to have the matter of his complaint determined by a jury "within one year after such laying out." Pub. Sts. c. 49, § 79. *Commonwealth* v. *Boston*, 16 Pick. 442, 446. *Eaton* v. *Framingham*, 6 Cush. 245. *Russell* v. *New Bedford*, 5 Gray, 31. *Loring* v. *Boston*, 12 Gray, 209. *Brookline* v. *County Commissioners*, 114 Mass. 548. *Peterson* v. *Waltham*, 150 Mass. 564. But the recitals and the direction as to notice contained in the order of September 26 constituted important steps in the laying out of the way. That order also contained the adjudication of the board that common convenience and necessity required the laying out of the way. It stated the intention of the board to lay it out, and it directed notice to be given to the abutters of the time and place when and where the board would proceed to lay out the way, and hear the parties in the matter of damages and betterment assessments. All of these things were absolute prerequisites to the final laying out on October 17. *Fitchburg Railroad* v. *Fitchburg*, 121 Mass. 132. The repetition of the adjudication of common convenience and necessity in the order of October 17 gave no added force to the previous adjudication.* There is nothing in the statutes defining what is meant by "the order laying out"; whether it refers to some particular step or stage in the proceedings, or whether it means the whole proceedings by which the way is laid out. In

* This order recited that common convenience and necessity required that Pleasant Street should "be widened ten feet on the east side, between Union and William Streets," and for that purpose it was necessary to take certain parcels of land, among others, "belonging to the Cummings estate, viz. the heirs of Benjamin and William Cummings"; and that due notice had been given of the intention of the board to take "said parcels of land for the purpose aforesaid"; adjudged that these parcels were taken and laid out as a part of Pleasant Street; and assessed the damages therefor, awarding a certain sum to the "Cummings estate."

the present case the notice which was served on the abutters is made by reference a part of the order of October 17, and refers in terms to the order of September 26. We think, on the whole, that the two orders, being thus connected by reference, and having been adopted for the purpose of laying out the way in question by a board having sole jurisdiction of the laying out of streets, and the essential facts contained in both being equally necessary to the final laying out, should be taken together, although passed at different times, and regarded as constituting one order, which would be correctly described as "the order laying out the way." Construing thus the words "the order laying out," it clearly enough appears that the order expressly declares that the way was laid out under the provisions of law authorizing the assessment of betterments.

It is also objected that the widening was not completed at the time when the betterment assessments were made. This objection is based on an allegation in one of the reasons for the issuing of the writ, coupled with the stipulation in the reservation in each case that the facts alleged in the petition and answer are to be taken as true. It is perhaps sufficient to say in regard to this objection, that it appears from a copy of the assessment order passed by the board on September 25, 1894, which is annexed in each case to the petition and forms part of it, that the work of widening had been completed. *Dickinson* v. *Worcester*, 138 Mass. 555, 560. In view of the doubt thus thrown upon the existence of the fact, it could hardly be said that on this ground substantial justice had not been done, even if, as matter of pleading, the statement contained in the assessment order annexed to the petition was not to be taken as true. Besides, the averment seems to be argumentative rather than a statement of a substantive fact.

It is further objected that it is not within the constitutional power of officers appointed by the mayor and confirmed by the aldermen, as the act establishing this board provides that its members shall be, to make a betterment assessment. We have been referred to no authority supporting this proposition. It is attempted to deduce it from some general principles in regard to the right of representation in matters relating to taxation. But the citizens of New Bedford were represented in the Legis-

lature which passed the act, and, if they did not accept the original act, they accepted by formal vote an amendment to it. The authority of the Legislature to delegate to boards and commissions appointed by the Governor and Council, or by the courts, or as this was, the power to assess and apportion certain expenses, reserving to parties aggrieved the right to a jury trial, has been exercised too long to admit of question now. *Brayton* v. *Fall River*, 124 Mass. 95. *Agawam* v. *Hampden*, 130 Mass. 528. *Boston & Albany Railroad* v. *Newton*, 148 Mass. 474. *Kingman, petitioner*, 153 Mass. 566, 576. St. 1888, c. 384. St. 1889, c. 439. St. 1890, c. 205. St. 1891, c. 380. St. 1892, c. 404. St. 1893, c. 450. St. 1894, cc. 288, 497. St. 1895, c. 450. Pub. Sts. c. 112, § 131 *et seq.* It is for the Legislature to say who shall have supervision and control in matters relating to streets and ways in any given locality, and how he or they shall be selected, elected, or appointed.

The remaining objection is that the property of the respective petitioners on which betterments have been assessed is incorrectly, imperfectly, insufficiently, and indefinitely described. It is not alleged that the petitioners have no property situated on Pleasant Street which is subject to assessment. Although more than two years have elapsed since the laying out, it is possible that the tax could be reassessed under Pub. Sts. c. 51, § 2, in which case it would seem that substantial justice would not require that these assessments should be quashed. But aside from that consideration, we do not think that the assessments are invalid for the reason assigned. In the order of October 17, 1892, assessing the damages, the land belonging to the Cummings estate, to which damages were awarded, is described as that "belonging to the Cummings estate, viz. the heirs of Benjamin and William Cummings," and inferentially as on the east side of Pleasant Street. And it is only fair to suppose that where, in the order of September 25, 1894, the Cummings estate is assessed for betterments, the same estate is intended that was included in the assessment of damages.* The statutes contain no provision respecting the description of estates benefited. But

* The description in this order was as follows: "Cummings estate, land on the east side of Pleasant Street."

a deed describing the property conveyed as on the east side of Pleasant Street, in New Bedford, belonging to the heirs of Benjamin and William Cummings, would operate as a good conveyance; and we do not see why a similar description is not sufficient to base a betterment assessment upon. How the amount of this tax shall be divided among the different owners is a matter with which the board can have no concern.

We fear that we do not appreciate the force of this objection so far as regards the Masonic Building Association. The petition alleges that Charles W. Clifford and others, trustees and executors under the will of Charles L. Wood, conveyed certain premises bounding on Pleasant Street to Edward D. Mandell and others, trustees; that Samuel P. Richmond conveyed to the same persons, also as trustees, another tract bounding on Pleasant Street, and that said grantees conveyed said tracts to the Masonic Building Association. In the assessment of damages an award is made to "est. Elizabeth Wood or Clarence A. Cook *et ali*, trustees, $10,400." An award of damages was also made to S. P. Richmond, and it is alleged that the damages awarded to him, and to Clarence A. Cook and others, trustees, were paid to the Masonic Building Association, which had acquired the right thereto by the aforesaid conveyance. In the order of September 25, 1894, assessing betterment assessments, is the following: "Elizabeth J. Wood, land on the east side of the street, between Union and William Streets, $2,332.55; Samuel P. Richmond, land on the east side of the street, between Union and William Streets, $1,194.73"; and the petition alleges that demand for the payment of these sums has been made on the Masonic Building Association, and that they constitute a lien on a part or all of its real estate. If the objection is that the middle initial is "J," and should be "T," or *vice versa*, or that there should be no middle initial, that is not such an error as will defeat the assessment, it not being alleged that there is more than one Elizabeth Wood who owns land on Pleasant Street between William and Union Streets. If the objection is that the land of Elizabeth Wood and of S. P. Richmond is not sufficiently identified, that is answered by what has been already said in regard to the Cummings estate. If the objection is that the tax should have been assessed to the Masonic Build-

ing Association, and not to Elizabeth Wood and Samuel P. Richmond, the answer is that it is the estate benefited which is to be assessed, and so long as that is correctly designated, justice does not require that the assessment should be quashed because the names of former owners have been used in describing it, instead of the name of the petitioner, when it does not appear that any one has been or will be misled or prejudiced by the the error if it be one. *Monterey* v. *County Commissioners*, 7 Cush. 394.

In regard to the objection that it is uncertain to which of the two tracts for which "F. B. Greene *et ali*" are assessed the respective assessments apply, we think that will plainly appear when the order of the assessments is applied to that in which the estates follow each other on the street.

On the whole, we discover no error which requires that the assessments, or either of them, should be quashed.

Petitions dismissed.

W. Clifford & E. D. Stetson, (*L. LeB. Holmes* with them,) for the petitioners.

H. M. Knowlton, (*T. F. Desmond* with him,) for the respondents.

DANIEL S. BURNHAM *vs.* HAROLD W. WINDRAM.
SAME *vs.* SAME.

Suffolk. March 25, 1895. — September 21, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Promissory Note — Collateral Security — Unperformed Agreement — Instructions — Taking Judgment in two Actions with one Satisfaction of Debt.

A. signed two promissory notes to the order of B. of the same date, payable thirty days thereafter, one for five hundred and fifty and the other for three hundred and fifty dollars, and a third note identical with the others except that it was for nine hundred dollars and contained a provision that A. had deposited therewith as collateral security certain shares of stock with authority on the part of B. to sell the same on non-performance of the promise. On the same date B. signed a paper acknowledging receipt of the first two notes, and "as collateral security for payment of same" the last note with the shares," and I agree, upon payment

of the first two mentioned notes, to deliver to him the last described note and the shares." Nothing having been paid by A. on or after maturity of the notes, B. brought action on the first two notes and a second action on the third note, and the judge instructed the jury to return a verdict in each action for the amount of the notes and interest, not to exceed the *ad damnum* of the writ in either case; and they returned a verdict in each action for one thousand dollars, the amount of the *ad damnum* of the writ. *Held*, that, the condition in the agreement not having been performed, the agreement did not constitute a defence, that the fact that the last note was described in the agreement as collateral to the other two notes was immaterial, and that, while B. could have but one satisfaction of his debt, there was no objection to his taking judgment in both actions.

TWO ACTIONS OF CONTRACT, upon three promissory notes. In the Superior Court the actions were tried together, before *Sheldon*, J., who allowed a bill of exceptions, in substance as follows.

The first action was on two promissory notes signed by the defendant, each dated October 24, 1892, and payable thirty days after date to the order of the plaintiff, the first being for $550, and the second for $350. The second action was on the following promissory note signed by the defendant:

"$900.00. Boston, Oct. 24, 1892. Thirty days after date, for value received, I promise to pay to D. S. Burnham, or order, nine hundred dollars, and interest at the rate of six per centum per annum for such further time as said principal sum or any part shall remain unpaid, I having deposited with this obligation, as collateral security, five hundred shares of the capital stock of the Boston Woven Cordage Company, with authority to sell the same without notice, either at public or private sale or otherwise, at the option of the holder or holders hereof, on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining after paying all sums due from me to the said holder or holders, or to his or their orders. And it is further agreed, that the holder or holders hereof may purchase at said sale."

The following paper signed by the plaintiff was introduced in evidence:

"Boston, Oct. 24, 1892. Received of Harold W. Windram his two notes, this day, payable in thirty days, one for $350.00 and one for $550.00, and, as collateral security for payment of same, his note for $900.00, on thirty days, with five hundred

shares of the capital stock of the Boston Woven Cordage Company, and I agree, upon payment of the first two mentioned notes, to deliver to him the last described note and the shares of the Boston Woven Cordage Company."

The plaintiff testified that on the day of their date the notes were delivered to him, with the certificate for five hundred shares of stock of the Boston Woven Cordage Company, and in return therefor, at the same time, he gave to the defendant three hundred and fifty dollars in money, surrendered a note for five hundred and fifty dollars, then overdue, (which note was made by the defendant, and indorsed by one Nutter,) and signed and delivered the paper above mentioned. The plaintiff also testified that nothing had been paid on the note, that he had not been able to sell the stock or any part thereof, although he had offered the same for sale at public auction under the terms of the note upon which the second action was brought, and that he still held the original certificate delivered to him as aforesaid, and that the stock was now worthless.

The defendant requested the judge to rule:

"1. That the notes and the paper should be construed together, and, being so construed, showed that the defendant owed the plaintiff only the amount of the two first notes, with interest from the date of maturity thereof; on payment of which the plaintiff was bound to return the third note, and the shares of stock of the Boston Woven Cordage Company. 2. That upon the foregoing evidence the defendant owed the plaintiff only nine hundred dollars, the amount of the two first notes, with interest from the date of maturity thereof. 3. That, upon the evidence, the jury should find for the plaintiff in the first action for the amount of the two first notes, and interest as aforesaid, and should find a verdict for the defendant in the second action."

The judge declined so to rule, and ruled that the plaintiff, on the evidence, was entitled to a verdict in both actions, and instructed the jury to find a verdict in each action for the amount of the notes declared on therein, and interest, not to exceed the *ad damnum* of the writ in either case.

The jury returned a verdict for the plaintiff in the first action for one thousand dollars, which was the amount of the

ad damnum of the writ therein, and a verdict in the second action for one thousand dollars, which was also the amount of the *ad damnum* of the writ therein; and the defendant alleged exceptions.

W. O. Kyle, for the defendant.

C. R. Elder, for the plaintiff.

MORTON, J. Upon their face, the three notes constitute separate and distinct causes of action. The plaintiff is the *bona fide* holder for value of all of them. There can be no question of his right to recover upon the two notes in the first suit. Neither could there be as to the one in the second suit if it were not for the agreement. The condition in the agreement which would have entitled the defendant to a return of the notes and of the stock has not been performed, and the agreement does not, therefore, constitute a defence. The fact that the note in the last suit is described in the agreement as collateral to the other two notes is immaterial. *Vanuxem* v. *Burr*, 151 Mass. 386, 389, and cases cited. *Costelo* v. *Crowell*, 134 Mass. 280. *Miller's River National Bank* v. *Jefferson*, 138 Mass. 111. *Royal Bank of Liverpool* v. *Grand Junction Railroad*, 100 Mass. 444. Of course the plaintiff can have but one satisfaction of the debt due him, but we see no valid objection to his taking judgment in both actions. *Savage* v. *Stevens*, 128 Mass. 254. We discover no error in the rulings or refusals to rule.

Exceptions overruled.

GEORGE P. PRIOR & another *vs.* CHARLES PYE & another.

Suffolk. March 26, 1895. — October 2, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Bond to Dissolve Attachment.

In an action against A. and B., the property of B. was attached, and he gave a bond with sureties to dissolve the attachment which bound him to pay the judgment which the plaintiff might recover "in said action." Afterward, by agreement, "neither party" was entered as between the plaintiff and B., and judgment was recovered against A. *Held*, that the sureties on B.'s bond were liable.

CONTRACT, on a bond dated August 11, 1892, executed by Henry E. Holbrook as principal and the defendants as sureties, and reciting that whereas the plaintiffs "have caused the goods or estate of the said Henry E. Holbrook . . . to be attached on mesne process" in a certain action "in favor of the said plaintiffs and against the said Henry E. Holbrook and W. C. Holbrook; . . . and whereas the said Henry E. Holbrook desires to dissolve said attachment according to law, — Now, therefore, if the said Henry E. Holbrook shall, within thirty days after the final judgment in the aforesaid action, pay to the plaintiffs therein the amount, if any, which they shall recover in said action, . . . then this obligation shall be void, otherwise it shall be and remain in full force and virtue." The case was submitted to the Superior Court, and, after judgment for the defendants, to this court on appeal, upon an agreed statement of facts, in substance as follows.

On August 4, 1892, the present plaintiffs brought an action against Henry E. Holbrook and W. C. Holbrook for certain goods which had been furnished and delivered to the latter, and for which the plaintiffs contended the defendants were jointly liable. The property of Henry E. Holbrook only was attached, and in order to release it from attachment the bond in suit was given by him as principal, and the present defendants, Charles Pye and W. H. Holbrook, as sureties. Subsequently, in November, 1893, by agreement an entry of neither party was made as between the plaintiffs and Henry E. Holbrook, and in December, 1893, judgment by default was obtained against W. C. Holbrook, which at the commencement of this action, on August 16, 1894, remained unsatisfied.

The case was submitted on briefs to all the judges.

J. C. Sharkey, for the plaintiffs.

O. A. Marden, for the defendants.

LATHROP, J. The liability of the defendants in this case depends upon the contract which they have made. The condition of the bond recites the attachment of the goods of Henry E. Holbrook in an action brought by the plaintiffs against Henry E. Holbrook and W. C. Holbrook, and the wish of Henry E. Holbrook to dissolve the attachment according to law, and binds him to pay within thirty days the final judgment "in the afore-

said action." If the judgment is paid the obligation is to be void, otherwise the principal and sureties on the bond are liable.

It seems to us impossible to say that this bond can be construed to mean a promise to pay only a judgment against Henry E. Holbrook. The case cannot be distinguished from *Campbell* v. *Brown*, 121 Mass. 516, which it resembles in every particular, except in the fact that in that case the property of both defendants was attached.

In *Eveleth* v. *Burnham*, 108 Mass. 374, the bond, in reciting the title of the action, only stated the name of the plaintiff and that of the defendant whose property was attached; and the promise to pay the amount recovered in such action was held to apply only to a judgment against this defendant.

The case of *Walker* v. *Dresser*, 110 Mass. 350, was decided on the grounds that the action, being against the maker and guarantor of a promissory note, required separate judgments, and that the bond referring to a "judgment" only, and not "judgments," meant a judgment against the obligor in the bond.

Since the St. of 1871, c. 114, (Pub. Sts. c. 161, § 129,) if the individual property of one defendant is attached in an action against several defendants, he may dissolve the attachment, "but the bond to dissolve such attachment shall be so conditioned as to apply only to a judgment recovered against such defendant alone or jointly."

If the sureties in the case at bar wished to escape liability for a judgment against either defendant, they should have seen to it that the bond was drawn under the Pub. Sts. c. 161, § 129. See *Leonard* v. *Speidel*, 104 Mass. 356, 360; *Poole* v. *Dyer*, 123 Mass. 363; *Dalton* v. *Barnard*, 150 Mass. 473, 475.

Judgment for the plaintiffs.

WHITTENTON MANUFACTURING COMPANY *vs.* HERBERT M. STAPLES.

Bristol. October 23, 1894. — October 4, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Deed — Mill — Easement — Prescription — Equity.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself and the circumstances existing at the time of its execution.

A deed to A. of a mill site, for the use of which and four others on the same stream the grantor had built a reservoir dam, conveyed "all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power and privileges, and head and fall of water," with all "the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith"; and also provided that A. and his assigns should pay to the grantor and his assigns one fifth of the flowage damages caused by the reservoir dam. B. acquired the mill site by mesne conveyances, the deed to him conveying "all rights of flowage appurtenant to said estate." All parties in interest, after the deed to A., treated the reservoir as existing for the common benefit of all the mill privileges. *Held*, that a right to have the use and benefit of the reservoir was included in the deed to A., and that such right descended to B.

A stipulation in the deed of a mill site, for the use of which and four others on the same stream the grantor had built a reservoir dam, that the grantee and his assigns shall pay one fifth of the flowage damages caused by the dam, imposes an obligation in the nature of an easement or servitude upon the estate, which may be enforced in equity, though not as a personal obligation, against a subsequent grantee, and a servitude may also be imposed on the land by prescription for one fifth of the cost of repairing the dam and one fifth of the compensation for drawing the water from the reservoir, which may be enforced in like manner. FIELD, C. J., HOLMES & LATHROP, JJ., dissenting.

BILL IN EQUITY, filed in the Superior Court on February 15, 1894, by the owner of a mill on Mill River in Taunton, against another mill-owner on the same river, to recover one fifth of the sums paid by the plaintiff for flowage damages caused by the reservoir dam above the mills, and for repairs upon the dam, and also one fifth of the compensation for drawing the water from the reservoir. The case was submitted upon an agreed statement of facts, on which the Superior Court ordered that

the bill be dismissed; and the plaintiff appealed to this court. The facts appear in the opinion.

The case was argued at the bar in October, 1894, and afterwards was submitted on the briefs to all the judges.

A. M. Alger, for the plaintiff.

G. E. Williams, for the defendant.

ALLEN, J. The parties have agreed upon all the facts deemed to be material.

The Taunton Manufacturing Company built the reservoir dam on land owned by it in 1832, at a time when it was the owner of five mill privileges on the stream below, all of which were then in operation. This dam was for the sole use of the mills upon said mill privileges, and was essential to the reasonable enjoyment of all of the water powers, as the natural flow of the stream during much of the year would be inadequate for furnishing power.

Under this state of things, the corporation in the first place, on August 12, 1833, conveyed to the Bristol Print Works Company the two lowest mills, the land being described by metes and bounds, "together with all the buildings thereon, and all the rights, privileges, easements, and appurtenances to the said land in any wise appertaining or belonging, and all the streams and water rights and power thereof, also the dam and force of water."

On September 6, 1833, the corporation conveyed the next lowest mill to Charles Richmond, under whom, through mesne conveyances, the defendant claims. This deed conveyed the land and buildings, "and the water power, dam, and all the appurtenances and privileges thereto belonging"; and contained further provisions as follows: "First. This conveyance is made subject to the right and privilege granted by said Taunton Manufacturing Company to the Bristol Print Works Company, their successors and assigns, to draw water from a reservoir of said Taunton Manufacturing Company through the premises herein described and conveyed, and to enter on said premises for the purposes of relaying and repairing the aqueduct and pipes leading through the same. Secondly. The said Richmond, his heirs and assigns, grantees of these premises, shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agree to pay for flowage or

damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns, of any part of the estate of the said Taunton Manufacturing Company upon any stream or waters flowing to their mills. . . . Fourthly. This conveyance is made subject to the reservations and privileges granted to the Bristol Print Works by the Taunton Manufacturing Company. Fifthly. . . . The said Taunton Manufacturing Company, intending hereby to alien and assign unto the said Charles Richmond, his heirs and assigns, all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power and privileges, and head and fall of water (excepting as above excepted) for the considerations above mentioned and set forth. To have and to hold the lands, buildings, waters, and works aforesaid, with all and singular, the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith, unto him the said Charles Richmond, his heirs and assigns forever, except as above excepted."

The defendant contends that the above deed conveyed no right in the reservoir, and that the clause requiring Richmond and his heirs and assigns to pay one fifth of the damages for flowing is not binding on subsequent owners; and these are the principal questions which have been argued in the case. It is not disputed that the title and rights of the Taunton Manufacturing Company to the upper mill and privilege have come through mesne conveyances to the plaintiff.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself, and the circumstances existing at the time of its execution. *Reynolds* v. *Boston Rubber Co.* 160 Mass. 240, and cases there cited.

Until recently, the parties in interest have assumed, and have acted on the theory, that Richmond and his heirs and assigns had an interest in the additional water power created by the reservoir, and were bound to pay one fifth of the damages for flowing. This is shown by the following facts.

On July 15, 1835, the Taunton Manufacturing Company con-

veyed to James K. Mills and others the upper mill and privilege on the stream, "with the dams and water privileges thereon, together with all the right which said Taunton Manufacturing Company have to flow the land between the premises hereby conveyed and the bridge where the old road to Boston crosses Canoe River; the dams, water privileges, and rights of flowage hereby intended to be granted and reserved being fully set forth in, and subject to, an agreement by and between the grantor and grantees bearing even date with and to be referred to always as a part of these presents." The said agreement provided, amongst other things, as follows: "First. The reservoir dam at White's Bridge above Whittenton shall not be altered in any mode without the consent of the parties therein interested or a majority of them. Provided, however, that the proprietors of the Whittenton Mill shall always cause to be let down from said reservoir a quantity of water sufficient to propel the present machinery of the Hopewell Mills [the Hopewell Mills were next below the Whittenton Mill] until the water in said reservoir shall be drawn down to the level of the present Whittenton dam, and the proprietors of the Whittenton Mill shall be entitled to a fair compensation from all the parties interested in the said reservoir for the time and labor of drawing the water as aforesaid. Second. The water between said reservoir dam and Whittenton Mills shall be used hereafter as has been heretofore customary, that is to say, the Whittenton proprietors shall do no act to prevent the natural flow of water over their premises by raising their dam above its present height. . . . Fourth. The damages accruing from time to time for flowage shall be apportioned between the proprietors of the Whittenton Mills and the mills now and formerly belonging to the Taunton Manufacturing Company by the award of judicious persons," etc.

The defendant derived his title as follows. The title of Richmond passed to Galen Hicks, under the foreclosure of a mortgage dated October 4, 1833, in which reference was made to the deed of the Taunton Manufacturing Company to Richmond. On March 1, 1848, Hicks conveyed to Dean and Morse, with a similar reference; and they in like manner, on April 1, 1849, conveyed to the Dean Cotton and Machine Company,

which in its turn, on November 28, 1874, conveyed to the Taunton Cotton and Machine Company the land and water privileges, "together with all the rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the Reservoir and Flowage Company [this company will be hereinafter described], and subject to all the liability on account of such rights, and in relation thereto reference may be made to an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, . . . and to the award," etc. On June 1, 1880, the Taunton Cotton and Machine Company conveyed the property to the Park Mills, a corporation, with this provision: "This conveyance shall also include whatsoever rights, title, and interest, with the liabilities thereon, said corporation has in the Taunton Reservoir and Flowage Company." On July 12, 1889, the Park Mills conveyed to Staples, the defendant, with a similar provision. On the same day, the Taunton Cotton and Machine Company also executed a deed of the same premises to the defendant, "together with all rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the Reservoir and Flowage Company, and subject to all the liabilities on account of such rights. And in relation thereto reference may be made to three papers, namely, 1st, an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, . . . together with the award," etc.

The Reservoir and Flowage Company referred to in some of the above deeds was established as follows.

In 1852, the owners of the several mills, all being corporations associated together as a voluntary association under the name of the Taunton Reservoir and Flowage Company, "for the purpose of aiding in the supplying themselves with water by the reservoir dam," appointed Willard Lovering, one of the owners of the Whittenton Mills, their agent, from time to time, as the damages for flowing should become due, to collect their proportions thereof, and to pay the same to the owners of lands flowed. The annual damages for flowing were in the same year fixed by agreements at $1,842.89, and have not since been changed. These damages are fair and reasonable. From that

time to the present, Lovering (who died in 1875) and the successive owners of the Whittenton Mills have continued without objection, in behalf of the owners from time to time of the several mills, under the name of the Taunton Reservoir and Flowage Company, to collect from said mill-owners and to pay out said damages for flowing, and to repair the reservoir dam, and to draw water from the reservoir, and to collect from the several mill-owners their respective shares of the expense thereof. The defendant, however, without assenting thereto or dissenting therefrom, otherwise than is herein stated, refused from time to time as said charges accrued to pay any part thereof, on the ground that he had not used the water. Bills for the annual expense of maintaining the reservoir dam as rendered to the several mill-owners were usually made out under the general statement, "To Flowage," without setting forth items for repairs or for drawing the water; but sometimes the bills were itemized. In 1885, the reservoir dam having been injured by a freshet, it was repaired at an expense of $812.12, and the owners of all of said mills paid their proportional shares of such expense.

From the time of the execution of the above agreement to the present, the use of the reservoir dam, except as herein stated, has been in accordance with the terms of the agreement, and no person has objected thereto or made any claim inconsistent therewith; and all the mills, when operated, have had the enjoyment of the head of water created by said reservoir dam, and of the reserve waters thereby stored, and no person other than the owners from time to time has used the same or had any interest therein.

The water rights belonging to the two lower mill privileges have been legally extinguished by abandonment. The defendant's mill buildings are standing; the water-wheels are in position; but the dam at his mill was carried away by a flood a few months before the conveyance to him, and he has not operated the mill or used the water power, but he has not abandoned the same.

The defendant contends that the above agreement, whereby the Taunton Reservoir and Flowage Company was formed, was for a partnership, and was one which the corporations were not

authorized to make, under the decision in *Whittenton Mills* v. *Upton*, 10 Gray, 582. We have no occasion to consider that question. This agreement is referred to for the purpose of showing the practical construction put upon the grant to Richmond, and for this purpose it may be looked at, whether valid or invalid. The right of the plaintiff to maintain the bill in equity does not depend upon that agreement.

The owners of the defendant's mill, from the time of the conveyance to Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the damages for flowing caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same, and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that since steam came into general use steam power has also been employed. But since 1890 the defendant has refused to make such contribution.

The owners of the two lowest privileges contributed in like manner their proportion, as fixed by the award referred to, down to the time of the extinguishment of their water privileges; and the owners of the two upper privileges have also paid their respective proportions, according to the award.

Such being the facts, we come now to consider the question of the defendant's right and liability.

The reservoir would naturally be of some benefit to the lower mill privileges, without any express grant. But upon the construction of the deed to Richmond, taken by itself alone, and without reference to what followed, there would be strong reason for holding that some right, the extent of which is not defined, in the water power created by the reservoir dam was intended to be included in the grant. This water power was in actual use at the time of the grant, and was essential to the reasonable enjoyment of what was in terms granted. Moreover, the reference in the deed to the rights of the Bristol Print Works Company under the deed, then recent, of the grantor to that company, shows clearly that it was understood that some right in the water power created by the reservoir was included in that deed. The provision binding Richmond and his heirs and assigns to

pay one fifth part of the damages caused by the flowing to some extent implies that a similar right was intended to be granted to Richmond and his heirs and assigns. The conveyance includes in broad terms "all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power and privileges, and head and fall of water," with all "the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith." It would seem, therefore, even upon the deed alone, when construed in view of the facts then existing, that some right in the power created by the reservoir dam was by implication included. The plaintiff has cited several cases to show that there is an implied grant of whatever within the grantor's power is necessary to the beneficial enjoyment of the thing granted; and others may be found collected in *Case* v. *Minot*, 158 Mass. 577, 585. In this respect, the deed to Richmond is not like the deeds which were under consideration in *Brace* v. *Yale*, 4 Allen, 393, and *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396, cited by the defendant.

But this construction of the deed, if otherwise doubtful, is made very clear by the subsequent acts of the parties. The whole plan was to treat the reservoir as existing for the common benefit of all the mill privileges which have been mentioned. This is shown especially by the agreement in 1835, and by the voluntary association formed by the owners of the several mills in 1852, under the name of the Taunton Reservoir and Flowage Company. The deed of 1874, in the defendant's chain of title, refers to both of these. The two deeds to the defendant himself, in 1889, both contain a like reference. The action of all the defendant's predecessors in title, and of the owners of the other privileges, has from the beginning been in accordance with this view as to the title. We find nothing tending in any degree to show that any other view was ever taken, till after the defendant's purchase in 1889.

Looking therefore at the deed itself under which the defendant's title is derived, and at the subsequent acts of the parties in interest, we are of opinion that a right to have the use and benefit of the reservoir was included in the grant to Richmond and his

heirs and assigns, and that such right has descended to the defendant. The extent of this right, and the manner of defining and enforcing it, we need not now consider.

The question then arises whether a court of equity should enforce against the present owner of the premises the stipulation in the deed that Richmond and his heirs and assigns should pay one fifth part of the sums paid for flowing or damages to the proprietors of lands above the reservoir dam.

In England, it seems to be the tendency of recent decisions to hold that the burden of a covenant, unless possibly one which amounts to a grant, never at law runs with the land, except as between landlord and tenant; and that in equity the court will not as against assigns enforce covenants calling for the payment of money, but only covenants which are merely restrictive as to the use of land. *Haywood* v. *Brunswick Building Society*, 8 Q. B. D. 403. *Austerberry* v. *Corporation of Oldham*, 29 Ch. D. 750. *Clegg* v. *Hands*, 44 Ch. D. 503. Gale on Easements, (6th ed.) 61, 62. Goddard on Easements, (4th ed.) 24.

This doctrine has not usually been accepted in the United States. It has been held in many decisions, in this Commonwealth and elsewhere, that at law the burden of a covenant may run with the land. *Savage* v. *Mason*, 3 Cush. 500. *Bronson* v. *Coffin*, 108 Mass. 175. *Richardson* v. *Tobey*, 121 Mass. 457. *King* v. *Wight*, 155 Mass. 444. *Joy* v. *St. Louis*, 138 U. S. 1, 34. *Fitch* v. *Johnson*, 104 Ill. 111. *Hazlett* v. *Sinclair*, 76 Ind. 488. *Norfleet* v. *Cromwell*, 64 N. C. 1. Pomeroy, Eq. Jur. 1295. It has also often been held elsewhere that a provision like that contained in the deed to Richmond is itself a covenant binding upon the grantee and his heirs and assigns; that it will run with the land; that it is valid in law; and that the relief granted by a court of equity is not to be limited to those covenants which are merely restrictive, but will be extended to covenants to do positive acts involving the expenditure of money. *Burbank* v. *Pillsbury*, 48 N. H. 475. *Kellogg* v. *Robinson*, 6 Vt. 276. *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35. *Bowen* v. *Beck*, 94 N. Y. 86. *Finley* v. *Simpson*, 2 Zabr. 311. *Sparkman* v. *Gove*, 15 Vroom, 252. *Maynard* v. *Moore*, 76 N. C. 158. *Georgia Southern Railroad* v. *Reeves*, 64 Ga. 492. *Conduitt* v. *Ross*, 102 Ind. 166. *Maxon* v. *Lane*, 102 Ind. 364. See also Rawle on Covenants, (5th ed.) § 272, *n.*

In this Commonwealth, however, it has been held that such a provision in a deed poll does not constitute a technical covenant. *Parish* v. *Whitney*, 3 Gray, 516. *Maine* v. *Cumston*, 98 Mass. 317. *Martin* v. *Drinan*, 128 Mass. 515, 516. In *Kennedy* v. *Owen*, 136 Mass. 199, 203, the court followed the earlier decisions in saying that such a provision is not technically a covenant running with the land, because the grantee sealed nothing; but that it is rather "a mere personal obligation, imposed upon and assumed by the grantee, and binding upon him and his legal representatives as an implied contract entered into with the grantor; . . . an obligation, which, if enforceable at all against purchasers, is to be enforced against them by a court of equity alone." That case did not call for the determination of the question whether such equitable remedy existed or not. The present case, however, raises that question.

An ordinary easement binding the granted premises may be created in favor of the grantor, his heirs and assigns, by words contained in a deed poll. *Atkins* v. *Bordman*, 2 Met. 457, 462. *Bowen* v. *Conner*, 6 Cush. 132, 135. The grantee's acceptance of the deed subjects the granted estate, both in his own hands and in the hands of all others who may come in under him, to the easement reserved. And we see no good reason why, under circumstances like those existing in the present case, an easement or servitude calling for the performance of positive acts may not also be created in like manner. This seems to be implied by the language of the court in *Dyer* v. *Sanford*, 9 Met. 395, 405. See also *Maine* v. *Cumston*, 98 Mass. 317; *Schwoerer* v. *Boylston Market Association*, 99 Mass. 285, 297, 298; *Woburn* v. *Henshaw*, 101 Mass. 193. It is binding upon the original grantee; and his assigns with notice are bound in like manner, at least to the extent that the performance of the duty may be charged upon the land to which they succeed. The general doctrine of the equitable enforcement of agreements concerning the occupation and mode of use of real estate is explained in the familiar cases of *Whitney* v. *Union Railway*, 11 Gray, 359, and *Parker* v. *Nightingale*, 6 Allen, 341. We are brought, therefore, to the conclusion that the obligation imposed by the deed to Richmond may be enforced as an obligation in the nature of a servitude upon the estate of the defendant, though not as a personal obligation of the defendant.

The final question which we have to determine is whether the plaintiff is entitled to recover one fifth part of the cost of repairs upon the reservoir dam, and of the plaintiff's compensation in drawing the water, as well as one fifth part of the sum paid for flowing.

The deed to Richmond does not in terms include such cost of repairs. The language is, that Richmond and his heirs and assigns "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns, of any part of the estate of the said Taunton Manufacturing Company, upon any stream or waters flowing to their mills." This language does not admit of a construction which will bind Richmond and his heirs and assigns to pay for repairs of the dam. It is limited to sums paid for flowing to the proprietors of other lands.

Independently of this provision, the relation of the parties growing out of the conveyance of the mill privilege and water power would not bind the grantees to pay any part of the cost of such repairs. The right which was granted in respect to the reservoir was not any interest in the dam, but merely some right in respect to the flow of water in addition to that which the grantee would take as riparian owner. The ownership and immediate control of the dam remained with the grantor. The duty of exercising due care to make it safe rested with the grantor alone. The grantor and grantees did not become joint owners of the dam, and would not be jointly liable for damages in case of its giving way, by reason of negligent construction. A right to have a quantity of water, in addition to the natural flow of the stream, sent down from the reservoir, does not carry with it an ownership in the reservoir dam.

The agreement between the Taunton Manufacturing Company and James K. Mills and others, which was made a part of the deed from the former to the latter in 1835, is significant as showing the mode in which it was then understood that the water was to be used; but Richmond was not a party to it, nor does

the agreement contain anything to show that it was understood that he was to bear a part of the cost of making repairs.

The agreement entered into by the various mill corporations in 1852, under the name of the Taunton Reservoir and Flowage Company, contained nothing in respect to the cost of repairs, so far as is shown by the agreed statement of facts.

No distinct agreement or stipulation being shown calling for the payment of one fifth of the cost of maintaining the dam, we have to consider whether a servitude has been imposed on the defendant's land by prescription, requiring such contribution. It is agreed that the owners of the defendant's property, "from the time of its conveyance to Charles Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the flowage damages caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same, and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir." After describing the agreement of 1852 between the various mill corporations, the statement of facts recites that from that time down to the present Lovering and the successive owners of the Whittenton Mills have continued without objection to collect from the owners of the several mills the "flowage damages, and repair the reservoir dam, and draw water from the reservoir, and collect from the several mill-owners their respective shares of the expense thereof." The one party collected the money as a right, the other paid it as a duty. It would seem that the evidence is sufficient to establish such a servitude by prescription, if in law such a servitude can be so created.

The duty is of the same character as that which is created by the provision in the deed to Richmond, binding him and his assigns to pay one fifth of the sums paid for flowing. Its connection with the estate and rights granted is equally close. A covenant to make the payments would run with the land. A duty imposed on the grantee and his assigns by stipulation in the deed would be enforced in equity against the land. We see no reason why the same duty may not be established by prescription. In *Doane* v. *Badger*, 12 Mass. 65, it was recognized,

though not expressly decided, that where the owner of a close had an ancient right to take water from a well and pump situated on another close, he might be bound by prescription to keep the well and pump in repair. It is well established that there may be a prescriptive duty to maintain fences. *Bronson* v. *Coffin*, 108 Mass. 175, 185, and cases cited. Also ways. *Middlefield* v. *Church Mills Knitting Co.* 160 Mass. 267. See also *Lynn* v. *Turner*, Cowp. 86; *Kingston-upon-Hull* v. *Horner*, Lofft, 576, 586; where it was held that there may be a prescriptive duty of keeping the bed or banks of a stream in order. So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole or in a specified proportion may be established by prescription as a charge against one of the estates in interest.

The duty of paying one fifth of the reasonable compensation for drawing the water rests on the same grounds.

For these reasons, in the opinion of a majority of the court, the payment of the whole sum claimed may be enforced against the land of the defendant. *Decree for the plaintiff.*

FIELD, C. J. I am unable to assent to the opinion of a majority of the court. That opinion in effect is that there has been acquired by prescription an easement or servitude in the land of the defendant and its appurtenances, whereby that land is bound to contribute one fifth part of the annual flowage damages caused by the reservoir dam erected by the Taunton Manufacturing Company in 1832, and one fifth part of the reasonable expenses incurred in repairing that dam, and one fifth part of a reasonable compensation for the time and labor expended in drawing water from the reservoir, in accordance with the requirements of the agreement of 1835. The case was submitted upon an agreed statement of facts. The defendant acquired his title to his land, being the Brick Mill and its appurtenances, by two deeds, each dated July 12, 1889. At that time the dam formerly on the land conveyed to the defendant had been carried away and had not been rebuilt, but the mill buildings were standing and the water-wheels were in position, and this condition of things has remained to the present time. The defendant has never operated the mills or used the water power,

although he has not abandoned any rights he may have in the water power or in the reservoir.

It is agreed in the statement of facts, among other things, as follows: "The defendant at the time he accepted his deeds did not have actual knowledge of the contents of the award alleged therein to have been delivered to him, or of any of the agreements herein mentioned, but the said award and agreements, and the books of the Taunton Reservoir and Flowage Company, running back for more than forty years, were then and ever since have been in the possession of the plaintiff, and, upon inquiry, the defendant could at any time have ascertained all facts which are herein stated, although he had no actual knowledge of the existence of the said books or agreements. This statement shall not, however, be so construed as to exclude a finding on the facts stated of constructive knowledge." Neither the defendant nor any of his predecessors in title, while owners or occupiers of the estate, was a party to any of these agreements or to the award.

There is much discussion in the opinion of the majority of the court upon the effect of the deed of the defendant's premises from the Taunton Manufacturing Company to Charles Richmond, dated September 6, 1833, and of the mesne conveyances under which the defendant claims title, as well as of the two deeds to the defendant, although this discussion seems not absolutely necessary to the decision. In the deed to Richmond, it is stipulated that the grantee, his heirs and assigns, "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns, of any part of the estate of the said Taunton Manufacturing Company upon any streams or waters flowing to their mills." This provision is referred to in the subsequent deeds. It covers, however, only one fifth part of the damages for flowage, and does not include any part of the expenses of repairing the reservoir dam, or of drawing off the water of the reservoir.

It is conceded by the majority of the court, that under our

decisions these stipulations on the part of the grantees in the several deeds do not constitute technical covenants on their part, because the deeds are deeds poll. Whatever may be true of covenants, I do not think that the promise on the part of the grantee which is implied from the acceptance of the deed can be held to create an easement or servitude in the land of the kind described in the opinion. The decision of a majority of the court does not proceed on the ground of any promise, express or to be implied, on the part of the defendant to perform the stipulations on the part of the grantee in the deed to Richmond, or the stipulations on the part of the grantees in any of the subsequent deeds which constitute the defendant's chain of title. The decree is not against the defendant personally, but it is a decree against his land, and it establishes a charge against this land, not only for one fifth of the damages caused by flowage, but also for one fifth of the expenses of repairing the reservoir dam and of drawing off the water. The decree proceeds on the ground of a right acquired by prescription more comprehensive than anything contained in any of the deeds under which the defendant claims title, which is in the nature of an easement or servitude inherent in the land, but which does not involve any personal obligation of the owner of the land. To establish this easement or servitude, the majority of the court rely upon the following clause in the agreed statement of facts: "The owners of the Brick Mill, from the time of its conveyance to Charles Richmond in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the flowage damages caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same, and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that, since steam came into general use, steam power has also been employed."

The effect of this decision seems to me to be, that, when any one buys a mill privilege on a stream which at the time of the purchase is unused because the dam on the privilege has been carried away, if the stream has on it a reservoir dam belonging to other persons some distance above the mill privilege, and if

as a fact his predecessors in title have maintained the dam on the mill privilege and used the mill, and have also contributed to the maintenance of the reservoir for more than twenty years continuously, an easement or servitude is acquired by prescription in the land which constitutes the mill privilege, for the benefit of the owners of the reservoir, or as appurtenant to the reservoir, to have this contribution continued payable out of the land, even although the purchaser at the time of the conveyance of the mill privilege to him knew nothing of any such contribution, and the registry of deeds contained no information on the subject.

With perhaps one or two exceptions, easements in land are passive in their character, and when acquired by prescription consist in the right to use the servient tenement in a certain manner defined by an adverse user continued for the requisite period of time, and they are acquired by notorious acts done on the land under a claim of right. Payments of varying sums of money from year to year by an owner of a mill privilege to the owners of a reservoir situated on the stream some distance above the privilege are not in their nature notorious acts done on the mill privilege. It is said that there may be a prescriptive duty to maintain fences and ways, and *Bronson* v. *Coffin*, 108 Mass. 175, and *Middlefield* v. *Church Mills Knitting Co.* 160 Mass. 267, are cited. The actual decision in *Bronson* v. *Coffin* was upon the effect of a covenant of the grantor in a deed. *Middlefield* v. *Church Mills Knitting Co.* was decided upon a demurrer to the declaration, and it was said that the duty of the defendant to maintain the highway was "sufficiently alleged for the purposes of the case at bar." The manner in which that duty originated did not appear in the declaration. But if it be conceded, without expressing any opinion on the subject, that a duty to maintain fences and repair ways can be established either by prescription or by covenant, these are confessedly exceptions to the general rule that active duties cannot be attached to land. To deduce from these exceptions the rule that there can be attached to land by prescription an active duty to pay money from time to time for the maintenance of an artificial reservoir of water belonging to other persons, miles away from the premises, which is a permanent easement in the land whether the water is used

or not, is, so far as I know, attaching unusual incidents to land for which there is no precedent. Secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, certainly ought not to be extended.

As the decision of the majority of the court rests, I think, upon the doctrine of prescription, I do not consider whether such incidents as are attached to the land of the defendant by the decision can be attached to land by covenants in a deed, or whether in the present case, from the stipulations in the deeds poll which concern the duty of the grantees, a promise can be implied against the present defendant to perform these stipulations, as a continuing promise to whosoever maintains the reservoir, or whether the deeds can be construed as deeds upon the condition that these stipulations shall be performed. Neither do I consider whether a court of equity in this Commonwealth will enforce stipulations for the payment of money contained in a deed poll against the assigns of the grantee. I dissent from the doctrine that, on the facts agreed in the present case, an easement in the defendant's land of the kind described in the opinion of the majority of the court has been established by prescription.

Justices HOLMES and LATHROP concur in this dissent.

LEVI PIXLEY *vs.* EDWARD PIXLEY & another.

Berkshire. September 10, 1895. — October 15, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Statement of Cause of Sale in Collector's Deed.

A collector's deed contains a sufficient statement of the cause of the sale of the real estate, if it is intelligible and conveys the title which it was intended to convey, even though the statement does not follow the exact words of the legislative form at the end of St. 1888, c. 390, and is less specific than is desirable.

TORT, for breaking and entering the plaintiff's close in West Stockbridge and digging up the soil, scattering lumber upon the same, and tearing down and removing stone walls and fences.

At the trial in the Superior Court, without a jury, before *Maynard*, J., no question was made as to the plaintiff's title to and possession of the premises, and right to damages for the alleged trespasses, except that the defendants justified in virtue of a deed from one George N. Wilson, tax collector of the town, to James S. Moore, dated May 12, 1888, and of a quitclaim deed from Moore to the defendants, dated April 28, 1892.

The deed from Wilson to Moore, after a formal statement of the authority of the grantor as collector, recited: "Whereas the assessors of said town of West Stockbridge, in their list of assessments committed to me, the said George N. Wilson, to collect, have assessed Levi Pixley, a resident owner of a certain tract of land situated in said West Stockbridge [description]; the taxes assessed on said premises being fifteen dollars and eighty-nine cents for the year eighteen hundred and eighty-six, and also the sum of eleven and $\frac{70}{100}$ dollars as a tax on said premises for the year eighteen hundred and eighty-seven, the amount of both said unpaid taxes being twenty-seven dollars and fifty-nine cents; and whereas I, the said George N. Wilson, have demanded payment of each and both of said taxes of said Levi Pixley more than fourteen days before proceeding to advertise and sell as hereinafter set forth; and whereas the said Levi Pixley has given no written authority to any inhabitant of said town as his attorney to pay the tax imposed on said land, and no mortgagee of said land has given written notice to the clerk of said town that he the said mortgagee holds a mortgage thereon, nor given written authority to any inhabitant of said town as his attorney to pay said tax, according to the provisions of chapter twelve of the General Statutes of eighteen hundred and sixty; and whereas I, the said George N. Wilson, having given public notice of the time and place of sale of the said land for the non-payment of said taxes by an advertisement thereof three weeks successively in the newspaper called the Berkshire Courier, printed and published in Great Barrington in said county, the last publication of said advertisement being one week before the time of said sale; also by posting a like notice on said land three weeks before the time of said sale; and also by posting a like notice on said premises, a part thereof being bounded by a highway, and also in the post office

and in the railroad office in West Stockbridge Village, being two public places in said town, three weeks before the time of said sale, which notices severally contained the name of the said Levi Pixley the amount of the taxes for said years assessment on said land; also a substantially accurate description of said land, did on the twelfth day of May instant, pursuant to the authority and notice aforesaid, no person appearing to pay said tax, and it being the opinion of me, that the said land could not be conveniently divided and a part thereof set off without injury to the residue, and judging it to be most for the public interest to sell the whole of said land, sell at public auction the said land above described to James S. Moore of said West Stockbridge, for the sum of fifty-one dollars, he being the highest bidder therefor. Now therefore," etc.

The plaintiff requested the judge to rule that the above was insufficient to convey to Moore a valid title to the premises, and that the deed from Moore to the defendants conveyed, as against the plaintiff, no title. The judge refused so to rule, and found for the defendants; and the plaintiff alleged exceptions.

M. Wilcox, for the plaintiff.

H. C. Joyner, (*W. C. Spaulding* with him,) for the defendants.

KNOWLTON, J. The only question in this case is whether the collector's deed is fatally defective for want of a sufficient statement of the cause of the sale of the real estate. Such a statement is required by Pub. Sts. c. 12, § 38, and this requirement has been construed with considerable strictness. *Harrington* v. *Worcester*, 6 Allen, 576. *Reed* v. *Crapo*, 127 Mass. 39. *Langdon* v. *Stewart*, 142 Mass. 576. But the deed before us differs materially from any of those which have been held to be void for want of proper recitals. While it does not follow the exact words of the legislative form for a collector's deed at the end of St. 1888, c. 390, it contains language which amounts in substance to a statement that the sale was made because the taxes remained unpaid after a demand duly made for the payment of them, and the expiration of fourteen days from the time of the demand, and the giving of proper notices of the time and place of sale by advertising in a newspaper and by posting. As was said in *Adams* v. *Mills*, 126 Mass. 278, 281, "No one reading this deed could fail to understand that the sale

was made because the tax remained unpaid after demand for more than fourteen days before the land was advertised, and was still unpaid when the sale was made." In this particular the deed is informal, and less specific than is desirable, but it is intelligible, and it conveyed the title which it was intended to convey. *Exceptions overruled.*

COMMONWEALTH *vs.* IRA E. NEWHALL & another.

Berkshire. September 10, 1895. — October 15, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Itinerant Vendors — Statute — Revenue Act — Police Power — Tax upon Interstate Commerce.

Persons who are a part of a travelling troupe composed of Indians, a comedian, and a physician, which troupe gives entertainments consisting of songs, dances, farces, Indian ceremonies, and lectures, the purpose of which and its entertainments is to advertise certain proprietary medicines, and which hires and occupies for two weeks a public hall in a town, and there offers for sale, and sells, both during the entertainments, which are in the evenings, and during the daytime, bottles of the medicines to such parties as call for them, may be found to be itinerant vendors within St. 1890, c. 448, § 1.

The St. 1890, c. 448, as to itinerant vendors, as amended by St. 1894, c. 525, is not a revenue act, but a statute passed under the police power of the Commonwealth, and does not impose a tax upon interstate commerce.

INDICTMENT, against Ira E. Newhall and James P. Campbell, for violating the provisions of St. 1890, c. 448, as amended by St. 1894, c. 525, relating to itinerant vendors. At the trial in the Superior Court, before *Gaskill*, J., the defendants asked the judge to rule that, upon all the facts and evidence in the case, the defendants could not be convicted on the indictment, they not being itinerant vendors within the meaning of St. 1890, c. 448, as amended by St. 1894, c. 525; and also because the defendants were in the employ of a foreign company, and had in their possession goods the property of such foreign company, imported or sent into this Commonwealth by said foreign company for the purpose of sale, and offered for sale by the defendants in the same form and shape in which they were imported into this Commonwealth.

The judge declined so to rule, and ruled that, if the jury should find that the defendants engaged in a temporary or transient business as alleged, selling the goods in question, and if one of the objects and purposes of the defendants in hiring the building in question was to expose for sale and to sell therein these medicines, and if they did there keep a stock of such medicines and expose them for sale and sell them there, it would be competent for the jury to return a verdict of guilty; otherwise, they should return a verdict of not guilty.

The jury rendered a verdict of guilty against each of the defendants, and sentence was passed; and the judge, at the request of the defendants, reported the case for the determination of this court. The facts appear in the opinion.

If the ruling and refusals to rule were correct, or it was competent upon the evidence for the jury to return a verdict of guilty, the verdict and sentence were to stand; otherwise, the verdict was to be set aside.

H. C. Joyner, for the defendants.

C. L. Gardner, District Attorney, for the Commonwealth.

BARKER, J. By the statute definition, all persons "who engage in a temporary or transient business in this State, either in one locality or in travelling from place to place selling goods, wares, and merchandise, and who for the purposes of carrying on such business hire, lease, or occupy any building or structure for the exhibition and sale of such goods, wares, and merchandise," are itinerant vendors. St. 1890, c. 448, § 1.

The defendants' first contention is that they are not within this definition. They are part of a travelling troupe, which is composed of Indians, a comedian, and a physician, and which gives entertainments consisting of songs, dances, farces, Indian ceremonies, and lectures. The purpose of the troupe, and of their entertainments, is to advertise certain proprietary medicines. The troupe hired and occupied for two weeks a public hall in Great Barrington, and there offered for sale, and sold, both during the entertainments, which were in the evenings, and during the daytime, bottles of the medicines to such parties as called for them.

Without considering whether the statute was meant to include all travelling troupes which, in the course of some entertainment to which the public are admitted, sell books explanatory of the

entertainment, refreshments, or like wares, we are of opinion that upon the evidence the defendants were clearly engaged in the business of selling merchandise, and were for that purpose temporarily hiring and occupying a building for the exhibition and sale of their goods, and so within the statute. Whether Sts. 1890, c. 448, and 1894, c. 525, are open to objection as imposing a tax prohibited by the Constitution of the Commonwealth is a question not raised, and upon which we express no opinion.

The defendants also contend that because they were employed by a foreign company, and had in their possession its goods imported into this Commonwealth for sale, and offered for sale here by the defendants in the same form and shape in which the goods were imported, the defendants were not liable for not having licenses as itinerant vendors. This contention is not put upon the ground that the goods offered for sale were in the original packages, but upon the ground that the statute is a revenue statute, and that in the case of the present defendants the licenses required were merely for revenue, and their requirement void as a tax upon interstate commerce under the doctrine of *Brennan* v. *Titusville*, 153 U. S. 289. But in that case the license, the requirement of which from the soliciting agent of a foreign manufacturer was held invalid, was a license which was not exacted and did not purport to be exacted in the exercise of the police power, but of the taxing power of the State, being for general revenue purposes, as stated by the ordinance imposing it, which ordinance was made by the municipality under a grant of authority to levy and collect license taxes. On the other hand, our statutes now under consideration purport to be and are passed under the police power of the Commonwealth, for the purpose of preventing and punishing fraud in sales by itinerant vendors, and an examination of the statutes makes it appear that such is their real design, and that the provisions for State and local licenses are merely incidental means of compensating the State and the localities in which the itinerant vendors ply their business for the expenses of necessary State and local supervision. See *Commonwealth* v. *Crowell*, 156 Mass. 215, and cases cited.

Sentences having been imposed upon the defendants in accordance with the provisions of St. 1895, c. 469, the verdict and sentences are to stand.

So ordered.

JOHN W. SCAMMELL & others *vs.* CHINA MUTUAL INSURANCE COMPANY.

Suffolk. January 11, 1895. — October 16, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Marine Insurance — Memorandum — Contract — Expiration by Limitation — Evidence — Usage.

In order to bind the parties by a contract of insurance, all the essential elements of the contract must be agreed upon, but, where it is impossible at the time to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can.

A memorandum, in the form of an application for insurance on the chartered freight of a vessel, containing a brief statement of particulars and marked "binding" before the signature of each party's agent, but not stating exactly the amount of the insurance, or naming the rate of premium, which is left "open for particulars," and purporting on its face to contemplate the subsequent issuing of a policy, constitutes a binding contract for the purpose for which it is made.

If a contract of insurance on the chartered freight of a vessel, in the form of a memorandum which purports on its face to contemplate the subsequent issuing of a policy, leaves the rate of premium "open for particulars," and the particulars of which the parties are then ignorant and which determine such rate are shown by the charter party, which is received by the insured ten days before the vessel sails on the voyage by which the freight is to be earned, he is bound to furnish the particulars to the insurer within a reasonable time, and, upon his failure so to do, the contract expires by limitation.

Evidence of the understanding of insurers as to when a contract of insurance is consummated or becomes binding is not competent to affect the legal interpretation of such a contract contained in a written memorandum executed by the parties.

CONTRACT, to recover $3,000 for loss of freight of the brigantine Peeress, alleged to have been insured by the defendant under an agreement, the material part of which was as follows: "About $3,000 insurance is wanted by Scammell Bros., for account of whom, etc. loss, if any, payable to them or order for $ on chartered freight per Brigt 'Peeress' valued at $ amount of charter at and from Santa Fé to a port in the U. K. or on the Continent. Priv. of port of call for orders. Premium, open for particulars." Before the signature of each party's agent appeared the word "binding"; and at the bottom were the words, "Send policy to Walker & Hughes, 63 Wall Street,

New York." Trial in the Superior Court, before *Dunbar*, J., who, upon the defendant's motion, at the close of the plaintiffs' evidence, directed the jury to return a verdict for the defendant; and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered upon the verdict; otherwise, the case was to stand for trial. The facts appear in the opinion.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

C. T. Russell, Jr., for the plaintiffs.

L. S. Dabney & J. D. Bryant, for the defendant.

KNOWLTON, J. The memorandum relied on by the plaintiffs as a contract is in the form of an application for insurance containing a brief statement of particulars and is marked "binding." At the bottom are the words, "Send policy to Walker & Hughes, 63 Wall Street, New York." On its face it purports to be a preliminary and temporary arrangement, which contemplates the making of a full and definite contract in the form of a policy covering the same subject, with additional provisions. The premium which is to be paid as the consideration for the insurance, and which is perhaps the most important of the terms of the contract, is not fixed, but is left to be agreed upon when further information is obtained. At the time of the application the only information which the parties had in regard to the freight which was the subject of the insurance was derived from a very brief telegraphic message. Several of the particulars given in the application are stated in the most general terms and against the word "Premium" are written the words, "Open for particulars."

It is contended with much force by the defendant, that the memorandum lacks the essential features of a contract in its failure to fix exactly the amount of the insurance, or to state the rate of premium, and authorities are cited which go far towards sustaining this contention. *Hartshorn* v. *Shoe & Leather Dealers' Ins. Co.* 15 Gray, 240, 244, 247, 249. *Orient Ins. Co.* v. *Wright*, 23 How. 401, 408, 409. *Piedmont & Arlington Ins. Co.* v. *Ewing*, 92 U. S. 377, 381. *Kimball* v. *Lion Ins. Co.* 17 Fed. Rep. 625. *Hamilton* v. *Lycoming Ins. Co.* 5 Penn. St. 339. *Strohn* v. *Hartford Ins. Co.* 37 Wis. 625, 631.

In order to bind the parties by a contract of insurance, all the essential elements of the contract must be agreed upon, but in a case like this, where it is impossible at the time to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can. The memorandum, applied to the admitted facts in this case, shows plainly that the parties desired to enter into a definite contract of insurance in the form of a policy which should clearly state their rights and obligations. They had not sufficient facts in their possession to enable them to determine what would be a reasonable rate of premium, and the defendant declined to fix the premium until further information could be obtained. The risk was to commence soon, and the plaintiffs desired to be protected from the inception of it. The defendant was willing to give them this protection on reasonable terms, and both parties doubtless expected that the additional information necessary to enable them to make the final contract for the voyage would soon be obtained. They therefore agreed that the insurance should be binding to the amount of three thousand dollars temporarily, at a rate of premium which should be fair and reasonable, until such time as the rate could be fixed and the contemplated contract entered into. Each doubtless thought the other would act reasonably by agreeing to a fair rate of premium when the time should come for making the final contract, and each was willing to trust the other to that extent. Plainly, neither of them expected this to be anything more than a temporary arrangement to meet the emergency until further particulars could be obtained. We think this was a binding contract for the purpose for which it was made. If the vessel had sailed, and had been lost at sea before the plaintiffs had a reasonable opportunity to furnish the further particulars, the defendant would have been bound to pay the insurance and the plaintiffs would have been bound to pay a premium at a reasonable rate for the risk as it was when the contract was made. If the plaintiffs, when they received the charter party had communicated the additional information obtained from it to the defendant, the parties would probably have agreed upon a rate of premium, and have embodied their contract as then made in a policy; but if they had then been unable to agree upon the

premium, their temporary contract would have been terminated by its own limitation, the plaintiffs would have been at liberty to seek insurance elsewhere, and would have been liable to pay the defendant at a reasonable rate for the time the insurance had continued. The legal effect of the memorandum is the same as if it stated in terms that the insurance should continue at a reasonable rate of premium until the plaintiffs had an opportunity to furnish the further particulars, that the plaintiffs would furnish them, and that both parties would then endeavor to agree upon a premium and make a contract in the form of a policy. The plaintiffs were bound by their implied agreement to furnish the particulars without unreasonable delay, and upon their failure to do so the preliminary contract of insurance came to an end. This is in accordance with the decision in *Baker* v. *Commercial Union Assurance Co.* 162 Mass. 358, although in that case the agents who made the agreement had their offices side by side in the same building, and it was held upon the conflicting testimony that there might have been a finding either that the parol contract was for insurance to continue temporarily for a short time until one of the agents should terminate it, or that it should continue only until the expiration of a reasonable time to enable the plaintiffs to ascertain in what terms they wished to take policies in writing. It was held that there was no evidence which would warrant a finding that there was a contract of insurance for a year.

In the present case all the additional facts necessary to enable the parties to complete their contract and to put it in the form of a policy were known to the plaintiffs as soon as they received the charter party. This was sent them by the master of the vessel, and they received it about September 12, 1890. The memorandum sued on bears date July 30, 1890. The vessel did not sail on the voyage by which the freight was to be earned until September 22, 1890. The two particulars of which the parties were ignorant which were important in determining the rate of premium to be paid, were the nature of the cargo and the port of destination. The cablegram which furnished their only information on the subject was in these words: "The vessel is fixed to load on the spot. Wood, forty francs. Queenstown, etc. for orders. U. K. or Continent." The charter party shows that the cargo was to

be Quebracho wood in logs, and contains stipulations in regard to their length and how they should be loaded. The charter party also shows that the vessel was to proceed to Queenstown, Falmouth, or Plymouth for orders, and was liable to be ordered to any port in the United Kingdom, or on the Continent between Hamburg and Havre, Rouen excepted. It also contains provisions in regard to the mode of giving the orders. There was uncontradicted testimony that this kind of wood was very heavy, and was considered an undesirable risk. There was also evidence which was not disputed, that the language of the cablegram and of the memorandum, "on the Continent," might include St. Petersburg and ports on the North Sea, for which rates of insurance for a vessel starting at that season of the year would be very high, and that the charter party included only the usual range of ports on the Continent.

The plaintiffs' agent testified, and it was not denied, that he tried to have the defendant's agent fix the rate of premium when the application was presented, but the defendant's agent said he would rather leave it open for particulars of the cargo. There is nothing in the circumstances to show that the rate of premium was to be kept open for any other particulars than those which were shown by the charter party, and these were in the possession of the plaintiffs at their office in St. John ten days before the vessel sailed. It was the duty of the plaintiffs to communicate these facts to the defendant at once, upon their receipt of them. Instead of doing so, they made no communication to the defendant until February 11, 1891, when they made a claim for a total loss. They broke their implied contract when they neglected to communicate these facts within a reasonable time after the receipt of the charter party. Even if they were justified in waiting for the letter from the master of the vessel, which showed the exact quantity of the cargo, they failed to furnish the particulars to the defendant within a reasonable time, for they received this letter on October 27, 1890. This was almost two months before they got information of the loss of the vessel, which came by telegraph on December 16. The vessel was abandoned at sea by the captain and crew on November 16.

There is no ground for the contention that the contract con-

templated a delay in fixing the premium until the voyage should be made to Queenstown, Falmouth, or Plymouth, and orders should be received there to proceed to the port of discharge. To wait for the receipt of these orders and the communication of them to the defendant in the ordinary way would be to postpone the making of the contract of insurance until after the termination of the risk.

Upon the conceded facts of the case, the plaintiffs failed to furnish the defendant within a reasonable time with the facts which were to be the foundation of the contemplated substantive contract of insurance, and the incidental and temporary arrangement made at the time of the application expired by the limitation which was one of its implied terms.

The construction which we put upon this preliminary arrangement in regard to the undertaking of the plaintiffs to furnish additional facts without unnecessary delay, accords with the testimony of all the experts as to the usage in similar cases. This usage almost necessarily results from the fact that the essence of a contract of insurance is to provide indemnity upon the payment of an agreed sum, and not to insure for a price to be determined upon a *quantum valebat* after the termination of the risk.

We see no error in the exclusion of certain answers in the depositions offered by the plaintiffs.* Only one or two of those answers, if received, would have had any tendency to show that the contract made in this case was to continue after the time when the plaintiffs should have furnished additional particulars to the defendant, and these were statements of the understanding of insurers which were not competent to affect the interpretation which the law gives to such a contract. *Odiorne* v. *New England Ins. Co.* 101 Mass. 551, 553. *Haskins* v. *Warren*, 115 Mass. 514, 535, 536.

A majority of the court are of opinion that there should be

Judgment on the verdict.

* The depositions were those of certain marine insurance brokers and underwriters in New York, and the answers excluded were to questions, in substance, as to when a contract of insurance is understood to be consummated, as to what is understood to be necessary to be inserted in order to the consummation of such a contract, or to make it binding, and as to when such a contract becomes binding.

BARNABAS CLARKE *vs.* RACHEL A. SCHWARZENBERG, executrix, & another.

Suffolk. March 12, 1895. — October 16, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Beneficiary Association — Certificate of Membership — Reinstatement of Member — New Contract — Waiver of Forfeiture.

The condition in a certificate of membership issued by a beneficiary association, that, after a forfeiture, "said party may again renew his connection with the association by a new contract made in the same manner as the first, or for valid reasons to the officers of the association, (such as a failure to receive notice of an assessment,) he may be reinstated by paying assessment arrearages," seems to imply that, when the reinstatement is by a new contract, a new certificate shall be issued, and that unless this is done the reinstatement is merely by way of a waiver of the forfeiture.

If a member, before St. 1885, c. 183, of a beneficiary association fails, after the statute, to pay assessments seasonably, and, upon his application, is reinstated after each failure, but no new certificate of membership is issued, a creditor, who is the beneficiary named in the certificate, cannot recover the proceeds of the certificate, after the member's death, if the evidence tends to show that in the several instances the reinstatement was by way of a waiver of the forfeiture, and not by way of a new contract.

BILL IN EQUITY, filed February 3, 1894, and amended October 23, 1894, by the beneficiary in a certificate of membership issued by the Massachusetts Benefit Association to Moses H. Schwarzenberg, on May 5, 1855, against the first named defendant as executrix of the will of Schwarzenberg, her husband, and in her own right, and against the association. After the former decision, reported 162 Mass. 98, the case was heard by *Barker*, J., and, at the request of the parties, reported for the consideration of the full court; such decree to be entered as justice and equity may require. The facts appear in the opinion.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

E. C. Bumpus, (*R. F. Simes* with him,) for the plaintiff.

A. Hemenway & W. N. Buffum, for the first named defendant.

ALLEN, J. It was held in 162 Mass. 98, that, under the statutes in force when the certificate in this case was issued, a

member could not designate one who was merely a creditor as a beneficiary, and that there was nothing in the subsequent legislation which made the designation of Clarke valid; and that therefore, as the case then stood, the plaintiff was not entitled to recover any part of the proceeds of the certificate of membership. After that decision, the plaintiff was allowed to amend his bill by introducing certain new grounds upon which he sought to recover.

At the trial, it appeared that the member Schwarzenberg failed sixteen times to pay assessments seasonably, and upon his application was reinstated after each failure; but no new certificate was issued. On some of these occasions the overdue assessments were paid by the plaintiff; but this does not entitle him to recover upon the certificate. *United Order of the Golden Cross* v. *Merrick*, 163 Mass. 374, and cases there cited.

The justice before whom the case was tried found that in these several instances the reinstatement was by way of a new contract, and not by way of a waiver of the forfeiture; subject, however, to the question of law whether the evidence warranted that conclusion. Upon an examination of the evidence, a majority of the court is brought to the conclusion that it is not sufficient for that purpose.

The eighth condition in the certificate provides that after a forfeiture "said party may again renew his connection with the association by a new contract made in the same manner as the first; or for valid reasons to the officers of the association, (such as a failure to receive notice of an assessment,) he may be reinstated by paying assessment arrearages." This seems to imply that, when the reinstatement is by a new contract, a new certificate shall be issued, and that unless this is done the reinstatement is merely by way of waiver of the forfeiture.

The supposed new contract relied on by the plaintiff consisted of oral assurances of Olney, the defendant's soliciting agent, to the plaintiff, which were to the general effect that the policy would be ample security for what Schwarzenberg might owe him, and the pencil memorandum made by Litchfield, the secretary and assistant treasurer of the association, upon a small piece of paper which was pinned on to the original application of Schwarzenberg. This was as follows: "Mr. Olney says Clarke

ought to be protected; so do not assign policy without Clarke's consent. Mar. 4, 1892. E. S. Litchfield." This was made by Litchfield in consequence of Olney's telling him that Clarke was a creditor and ought to be protected. Litchfield had the custody of the papers of the association. Nothing else was done in respect to the matter.

So far as appears, Schwarzenberg took no part in this transaction. He did not surrender the original certificate, nor request a new one, nor know of what was done by Olney and Litchfield. His applications to the association are more consistent with the theory that he sought a reinstatement under his existing certificate, than that he expected to have a new and independent contract of membership. Even if it be assumed that it would be possible to make a new contract within the meaning of the eighth condition without issuing a new certificate, yet in that case it is obvious that it must be one which is understood by the parties to supersede the old contract, and take its place. The facts in evidence show no intention on the part either of Schwarzenberg or of the association to supersede the old contract by a new one. When an overdue assessment was paid on April 13, 1893, a conditional receipt was taken, which expressly recited that the money was received for an assessment on the policy, and it implies throughout that membership under that policy or certificate was reinstated. When the last overdue assessment was paid, on June 12, 1893, Schwarzenberg furnished a health certificate, setting forth that his certificate of membership or policy of insurance had lapsed and become void for non-payment of assessments, and desiring that the same might be renewed; warranting that his health was then good, and that his answers and representations in his original application were true and still applicable; and adding that this warranty was made a part of the certificate or policy above referred to. This all goes to show that both Schwarzenberg and the association acted on the basis of a reinstatement under the old certificate.

The payments above referred to were both made long after the date of the memorandum by Litchfield. That memorandum was not in the form of a contract, and was not delivered to anybody, but was pinned on to the application, which remained with Litchfield, and seems to have been merely a memorandum

for the use of the association. Olney had no power to bind the association by a new contract, even if he had attempted to do so. He was merely a soliciting agent.

It seems probable that all parties acted under the mistaken supposition that the original assignment of the certificate by Schwarzenberg to Clarke was valid. However that may be, we see no sufficient evidence to warrant a finding that a new contract was made, as distinguished from a waiver of the forfeiture and a reinstatement under the original certificate; and the plaintiff is therefore not entitled to recover any part of the proceeds of the certificate.

The question of the plaintiff's right to be reimbursed out of the proceeds of the certificate for the premiums paid by him has not been argued, and is not now before us.

Ordered accordingly.

CHELSEA DYE HOUSE AND LAUNDRY COMPANY *vs.* COMMONWEALTH.

Suffolk. March 22, 1895. — October 16, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Land Damages — Metropolitan Sewerage Act — "Taking."

If the Metropolitan Sewerage Commissioners, under Sts. 1889, c. 439, and 1890, c. 270, take "the right to carry and conduct under" a highway in a city, "and therein to construct, operate, and forever maintain an underground main sewer," a person whose property is injured by the temporary drying up of a pond, which is his source of water supply on his land in the vicinity, caused by the work of constructing the sewer, the water returning to the pond after the work is finished, cannot maintain a petition for an assessment of damages, under § 1 of St. 1890.

PETITION for an assessment of damages occasioned to the petitioner's property in Chelsea by the laying out and constructing of a sewer by the Metropolitan Sewerage Commissioners, under Sts. 1889, c. 439, and 1890, c. 270. The case was submitted to the Superior Court, and, after judgment for the petitioner, to this court on appeal, upon agreed facts, in substance as follows.

The commissioners, on August 17, 1891, filed in the registry of deeds a description setting forth that they had taken "the right to carry and conduct under the following described lands, and therein to construct, operate, and forever maintain an underground main sewer, . . . to wit, that part of Second Street in Chelsea," describing it.

The petitioner was a duly organized and existing corporation, and on or about July 10, 1891, it became the owner of certain property on Auburn, Spruce, Arlington, and Williams Streets, in Chelsea, for the purpose of operating a laundry which was situated thereon.

On a vacant lot of the petitioner's land, separated from the laundry buildings by a public street called Spruce Street, was a pond of water, fed by springs from undisclosed underground sources. This pond had been used in connection with the laundry buildings, for laundry purposes, by the petitioner and its predecessors in title for a period of over forty years, and had never failed to furnish a sufficient supply of water for the laundry during the last twenty-five years, except when the city of Chelsea, some years previously, constructed a sewer in Spruce Street, which temporarily dried it up. This pond was considered by the petitioner, when purchasing, to be a valuable part of the property.

The petitioner, after purchasing the premises, made large repairs, and commenced a laundry business, for which such a water supply was very important.

On or about October 15, 1891, the pond, which the petitioner was using in the daily prosecution of its business, suddenly became dry, and the supply was entirely cut off, by reason of the work of the employees of persons who had contracted with the Metropolitan Sewerage Commissioners in constructing and laying a sewer under and by virtue of the above named statutes. The petitioner's business was interrupted, and it was put to large expense in providing a fresh supply of water, by driven wells and otherwise.

The parties did not agree as to the amount of the damage to the petitioner, whose contention was that the peculiar quality of the water made it indispensable; while the respondent contended that the city water, with which the building was

connected, was equally desirable and available for laundry purposes.

After the work upon the sewer in that vicinity was finished, the supply returned again, and filled the petitioner's pond. The drying up of the pond and the cutting off of the water therefrom was not due to any negligent conduct of the work by the Metropolitan Sewerage Commissioners, or by their agents, contractors, or employees, but was a necessary consequence of the construction of the sewer, which lowered the water in many wells in the vicinity.

Second Street, through which the sewer was laid, was long before the petitioner purchased its laundry, and has ever since remained, a public highway of the city of Chelsea, and it was the laying of the sewer in that street, and the pumping necessary to keep the sewer trench free from water while the digging was going on for some months after October 15, 1891, which cut off the underground supply from the pond and caused it to become dry.

The land upon which the pond is situated does not abut upon Second Street, nor upon any land or highway through which the sewer was laid, and the portion of the petitioner's land nearest to the sewer is upon Auburn Street, which is parallel with and at least two hundred and sixty-five feet distant from Second Street, or any other point of the sewer; and other land, owned by private individuals, is situated between the petitioner's land and the sewer.

If, upon the above facts, the petitioner was entitled to recover, judgment was to be entered for it in the sum of $3,000, with interest from October 15, 1891; otherwise, judgment was to be entered for the respondent.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

W. D. Turner, for the Commonwealth.

E. E. Blodgett, for the petitioner.

HOLMES, J. The petitioner seeks to recover for the temporary drying up of its pond caused by the work of constructing a part of the metropolitan sewer in a public highway. After the work was finished, the water returned to the pond. The statutes under which the work was done and the damages are claimed are

St. 1889, c. 439, and St. 1890, c. 270. By § 1 of the latter act, amending § 4 of the former, the Commonwealth is to pay "all damages that shall be sustained by any person or corporation by reason of such taking or entering as aforesaid." The entering referred to is the entering of existing sewers as authorized earlier in the section. With that we have nothing to do in this case. The petitioner's case must stand on the word "taking." But as the sewer was built under a highway, and as the board of sewerage commissioners only purported to take "the right to carry and conduct under the following described lands [viz. the highway], and therein to construct, operate, and forever maintain an underground main sewer," etc., no additional servitude was imposed upon the land under the highway. *Lincoln* v. *Commonwealth*, *ante*, 1. No right of any sort was taken in the petitioner's land.

But we do not need to decide that no damages can be recovered in any case under this act where property not taken in terms is injured in a permanent manner. The question is one of construction, and may be left open until it is necessary to decide it. It is enough to say that it is not disposed of by any authority which has been called to our attention. There are further considerations in the case at bar. So far as appears, nothing has been done which would have been actionable if no statute had been passed. It is true that some statutes have been interpreted as giving damages for harm for which no action could have been maintained at common law. But the fact mentioned is a circumstance to be considered. The damage in this case not only would have been *damnum absque injuria* at common law, but it was temporary in its nature. It is not a permanent consequence of maintaining the sewer, but was merely a temporary interruption caused by the work upon it. Whatever latitude may be given to the statute, it does not extend to damages of this sort. As has been held in *Lincoln* v. *Commonwealth*, decided since the argument, such temporary damage is left by the statute to lie where it falls. See *Bacon* v. *Boston*, 154 Mass. 100. It follows that, in the opinion of a majority of the court, judgment must be for the respondent.

Judgment for the respondent.

ARNOLD A. RAND & others, trustees, *vs.* CITY OF BOSTON.

Suffolk. January 24, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Land Damages — Diminution in Value of Land by building Embankment and Bridge on opposite Land in abolishing Grade Crossing — Statute.

A petition cannot be maintained against a city for an assessment of damages, under Sts. 1890, c. 428, § 5, and 1891, c. 123, § 1, for diminishing the market value of the petitioner's land, obstructing its light and air, and causing dust to be blown upon it, by building an embankment and bridge on land taken from a third person on the opposite side of the street from the petitioner's land, no part of which is taken, for the purpose of abolishing a crossing of the street by a railroad at grade. KNOWLTON & MORTON, JJ., dissenting.

PETITION, under Sts. 1890, c. 428, § 5, and 1891, c. 123, § 1, for an assessment of damages caused to the property of the petitioners by the abolition of the grade crossing of Everett Street by the tracks of the Boston and Albany Railroad Company in that part of Boston called Allston. Trial in the Superior Court, before *Hopkins*, J., who reported the case for the determination of this court, in substance as follows.

The petitioners offered in evidence the report of the commissioners appointed to act upon the petition of the directors of the railroad corporation for alterations in the crossing. It appeared that the report had been duly confirmed by the Superior Court.

The petitioners also offered evidence tending to prove that at the date of the commissioners' report they had been for several years, and still were, owners of the premises set out in the petition, which recited that their damages had been assessed at $10,000 by the street commissioners of Boston; that the same were situated on the corner of Everett and Braintree Streets, and consisted of about 140,000 square feet of land, upon which prior to the commissioners' report the petitioners had erected seventy-one dwelling-houses, all of which were occupied at the time of the report, and that the total rents from the property were then about $34,000; that an embankment and bridge, ordered by the commissioners to be built, were erected opposite to the

Everett Street front of the petitioners' premises; that subsequently to the construction of the same, and in consequence thereof, a large part of the petitioners' houses were vacated, and that they had remained vacant; that the petitioners were obliged to lower their rents, and to accept a different class of tenants; and that the actual diminution in rents received by the petitioners was about one half.

The petitioners further offered evidence of persons acquainted with the petitioners' premises, and with real estate values in that part of the city, to the effect that at the time of the commissioners' report the petitioners' premises were worth about $300,000; and that the market value of the same had been diminished by the work done, as ordered by the commissioners' report, to the extent of one quarter to one half.

The petitioners also offered evidence tending to prove that the erection of this embankment obstructed light and air to the petitioners' premises, and occasioned dust to be blown into the same, and was on many accounts very objectionable to the tenants of the premises.

It was conceded that no land had been taken from the petitioners; and that no part of Everett Street, as it existed prior to the taking of land under the commissioners' report, had been changed in grade.

Upon this evidence and offer of evidence, the judge ruled that the petition could not be maintained; and directed the jury to return a verdict for the respondent.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

R. M. Morse, for the petitioners.

T. M. Babson, for the respondent.

HOLMES, J. The only question argued in this case is whether damages can be recovered under Sts. 1890, c. 428, and 1891, c. 123, for diminishing the market value of the petitioners' land, obstructing its light and air, and occasioning dust to be blown upon it, by building an embankment and bridge upon land taken from a third person on the opposite side of the street from the petitioners' land.

It will be observed that, if any other owner of the land had done the acts complained of, he would have had a perfect right

to do them, and would not have been liable for any of the harm suffered by the petitioners in consequence. The same thing would be true as to the city if it had owned the land before, and had not taken it under the powers conferred by the statute. If the city has greater liabilities in respect of land taken under the statute they must be imposed by statute. Whether they are imposed or not is a question of the construction of the particular words used, not of general principle.

So far as there is any general tendency or principle of construction to be gathered from the decisions, while damages which the common law would not allow have been held in some cases to be given by general words which probably would have been construed more narrowly in England, (*Woodbury* v. *Beverly*, 153 Mass. 245, see *Stanwood* v. *Malden*, 157 Mass. 17,) still, here as well as in England the tendency is well settled to deny damages like the present unless some land of the plaintiff is taken. *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1. *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10, 14. *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27, 28. *Johnson* v. *Boston*, 130 Mass. 452, 454. *Sawyer* v. *Davis*, 136 Mass. 239, 242. *Wellington* v. *Boston & Maine Railroad*, 158 Mass. 185, 189. *Taft* v. *Commonwealth*, 158 Mass. 526, 548, 549. *Titus* v. *Boston*, 161 Mass. 209, 211. *In re Stockport, Timperley, & Altringham Railway*, 33 L. J. (N. S.) Q. B. 251. *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153. See also *Benton* v. *Brookline*, 151 Mass. 250, 260. It is true that when land is taken such damages sometimes can be recovered to a certain extent. The grounds for the exception are discussed in *Lincoln* v. *Commonwealth*, *post*, 368. But the difficulty, if there is one, is to justify the exception in the form which it has taken, rather than the rule; and it seems to us putting the cart before the horse to start from the exception, and to argue that, if such damages are allowed to any extent under any circumstances, they ought to be allowed to their full extent and always.

The language of the statute before us, so far as material, is: "All damages sustained by any person in his property by the taking of land for, or by the alteration of the grade of, a public way . . . shall primarily be paid by the city or town." St. 1890, c. 428, § 5. St. 1891, c. 123, § 1. These are the words

which fix the damages to be paid. The later provision for a trial in the Superior Court, "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively, in such city or town," refers to the mode of ascertaining the damage already given, and does not enlarge the express statement of what is to be paid for. It is not argued that there has been an alteration of grade within the meaning of the act, so that the petitioners' case stands on the words "all damages sustained by the taking of land for a public way." In *Bacon* v. *Boston*, 154 Mass. 100, 102, the words "said city shall make compensation to the owners for such lands as it shall take," in St. 1881, c. 303, § 3, were held not to give damages to any one whose land was not taken. In that statute, as in this, there was a reference to the proceedings upon the taking of land for highways. A majority of the court are of opinion that the statute before us has no broader meaning. Cases like *Trowbridge* v. *Brookline*, 144 Mass. 139, under statutes providing expressly, as in Pub. Sts. c. 49, § 16, that "regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner," do not apply. We repeat that the question is simply one of construction. The operative words here are narrower than those just quoted from the Public Statutes as to ways and sewers, or even those as to railroads, ("all damages occasioned by laying out, making, and maintaining its road," Pub. Sts. c. 112, § 95,) although, as will have been noticed, the two leading cases which we have cited from 103 Mass. arose under the railroad acts. How the line is to be drawn between those and other decisions under similar statutes we have no occasion to consider further at this time.

Judgment on the verdict.

KNOWLTON, J. I regret that in this case I am unable to agree with the majority of the court.

The dwelling-houses and building lots of the petitioners have been very greatly diminished in value by the taking of a strip of land along the line of the street on the opposite side, and the location upon it of a way which crosses over the railroad on a bridge. The petitioners' property, which was situated at a con-

venient grade upon a pleasant street, is now left far below the line of travel, and its light and air and outlook are cut off by a high embankment in front of it. According to the recitals in the petition, these damages were assessed at $10,000 by the street commissioners of Boston. The change was made under the St. of 1890, c. 428, and the St. of 1891, c. 123, which provide for the abolition of grade crossings. Such changes are being made and are likely to be made in great numbers throughout the Commonwealth. By the terms of the statute the damages are to be paid in part by the city or town, in part by the railroad company, and in part by the Commonwealth. "All damages sustained by any person in his property by the taking of land for, or by the alteration of the grade of, a public way," are to be determined "in the same manner, and under like rules of law, as damages may be determined when occasioned by the taking of land for the locating and laying out of railroads and public ways, respectively, in such city or town." St. 1891, c. 123, § 1. The language of the statute seems to me plainly to show that the principles on which the assessment is to be made are not less favorable to persons claiming damages than those applicable to assessment when land is taken for the laying out of any other public street or way. The language defining the damage, as well as the language in regard to the mode of assessing it, is substantially the same as in the Public Statutes. The case of *Bacon* v. *Boston*, 154 Mass. 100, was decided under a statute which requires the city only to "make compensation to the owners for such lands as it shall take under this act."

In my view of the case, the question is whether one who has suffered substantial damages in his property by the taking of land for a public way is entitled to damages if no part of his land is taken. The Pub. Sts. c. 49, § 16, provide that, "In estimating the damage sustained by laying out . . . a highway . . . regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner." The provision in regard to damages for laying out, making, and maintaining a railroad, although in different language, is in substance the same. Pub. Sts. c. 112, § 95. The statute giving damages for a change of grade, or other work done in making repairs upon a way, differs from these in limiting the compensation to owners of land adjoining the way. Pub. Sts. c. 52, § 15.

The right taken under these statutes is only an easement, but the nature of the easement is such that the damage is usually the same as if the fee were taken. There were different ways in which the Legislature might have dealt with this subject. They might have said that the Constitution requires compensation only for the land itself which is taken, and no provision shall be made for damages occasioned by the use to which it is appropriated, however great they may be. In this view, even if such a use would constitute a nuisance if made by a private owner, it could not be a ground of compensation, and damages to a person whose land is taken could never exceed the value of the land, and no damages could ever be allowed to any one from whom no land was taken. This would be an extreme view, which, so far as I know, has never been adopted by any court or legislature. Another view less extreme would allow damages only when the use, as affecting the adjacent land, would constitute a nuisance at common law if it were not authorized by the statute; but when there was injury to that extent would allow any person, whether any part of his land was taken or not, such damages as, if caused by a private owner, would be the subject of an action at the common law. A more liberal provision would give compensation to every person suffering special and peculiar damages in his property from the use to which the land is appropriated, whether any part of his own land is taken or not, and without reference to the question whether the land might have been used in a similar way by an individual owner. Such a provision is not inequitable, for even if no greater damage is done than might have been done by the owner of the fee without liability, there is usually little probability that an individual proprietor would ever put his property to such a use, and if it is appropriated by the public for the general good, it is not unjust that the public should compensate the individual for the loss which it causes him. *Trowbridge* v. *Brookline*, 144 Mass. 139.

Our statutes upon this subject were enacted many years ago, and their language seems to me to show that the Legislature intended to make this last liberal provision for landowners. These acts received a very early interpretation. Whenever they have been discussed by this court, they have been treated as designed to give compensation to every one whose property is

materially diminished in value by any special and peculiar damage resulting from the taking of land. It has been held without exception in a long line of cases, that if a strip, however narrow, of the petitioner's land along his boundary line is taken, damages are to be awarded for the injury done by the location and construction of the highway or the railroad to all the adjacent land. *First Church in Boston* v. *Boston*, 14 Gray, 214. *Geraghty* v. *Boston*, 120 Mass. 416. *Murphy* v. *Boston*, 120 Mass. 419. *Brady* v. *Fall River*, 121 Mass. 262, 264. *Lane v. Boston*, 125 Mass. 519. *Sisson* v. *New Bedford*, 137 Mass. 255. It often happens that a lot from which land is taken is left of such size and shape as to be worth less proportionally than it was as a whole, and this diminution in value is often treated as one kind of damage from the taking. It would be more accurate to consider it, not as damage from the taking to that which is left, but as a part of the value of the land taken which is to be paid for in making compensation, not at its value considered by itself alone, but at its value as a part of the whole lot with reference to the use to which it could be put in connection with that from which it is cut off. This kind of damage, if it is to be called damage, can only exist when a part of the petitioner's land has been taken. But most kinds of damage resulting from the use to which the land is put may exist as well when the location of the highway or railroad is along the side of the petitioner's land two inches away from his boundary line as when a strip two inches wide is taken from him. If a deep cut or a high embankment is made along a location, there is no good reason why large damages should be awarded in one of these cases and nothing in the other.

The authorities seem to me to forbid such an unjust discrimination. In *Dodge* v. *County Commissioners*, 3 Met. 380, the plaintiff owned a lot of land no part of which was taken by the railroad company, but it was held that he was entitled to damages under the statute for injury to a building upon the lot done by blasting a ledge of rocks in the construction of the railroad. In *Ashby* v. *Eastern Railroad*, 5 Met. 368, it is said that "parties interested in land, not taken for a railroad, but so near as necessarily to be damnified by it, are entitled to damages." In *Parker* v. *Boston & Maine Railroad*, 3 Cush. 107, it was held

that under this statute the railroad was liable for the draining of a well on land adjoining the railroad but not crossed by it, when an individual owner of the land taken would not have been liable if he had so used the land as to drain the well. Chief Justice Shaw says: "This is a remedial provision, and to be construed liberally to advance the remedy. It is made in the spirit of the Declaration of Rights, giving compensation to persons sustaining damages for the public benefit. . . . The terms of the section must include damages which are caused by something else besides taking land and materials, because damages of that kind are distinguished from the former by the word 'or.' So the word 'occasioned' points to any damage, which may be directly or indirectly caused by the railroad. We are of opinion, therefore, that a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may sue a complaint for compensation for such damage." In *Curtis* v. *Eastern Railroad*, 14 Allen, 55, the same doctrine is fully set forth by Mr. Justice Hoar, who says: "There are damages to land which may be occasioned by the construction or maintenance of a railroad, where the land is not taken, and yet where the acts done are justifiable, as necessarily incident to the grant of authority to build and maintain the road. For such acts the railroad company are not answerable as wrongdoers, but the remedy of the party injured is by a petition for the assessment of his damages in the mode provided by statute." In *Babcock* v. *Western Railroad*, 9 Met. 553, 555, Chief Justice Shaw, referring to Rev. Sts. c. 39, §§ 45, 54, 56, says: "Upon this principle, it has been decided that all persons — not merely those whose land is taken for laying the road, and for supplying materials, under §§ 54, 55, but, by § 56, all persons who may sustain damage occasioned by laying out, making, or maintaining their road — shall have a remedy against the corporation." The same doctrine is repeated with elaboration in *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385. In *Marsden* v. *Cambridge*, 114 Mass. 490, it was held that where a street was laid out under Gen. Sts. c. 43, §§ 14, 16, a person could recover damages under the statute for the loss of support and of shelter to a part of a building owned by him because the other part of the building and the land under it were taken

by the city. No part of the petitioner's land or building was taken. The opinion, without assuming to determine what might be the rights of the petitioner against the owner of the adjacent premises, rests the decision entirely upon the principles laid down in *Ashby* v. *Eastern Railroad* and *Parker* v. *Boston & Maine Railroad*, *ubi supra*. In *Trowbridge* v. *Brookline*, 144 Mass. 139, the doctrine is reaffirmed, with a citation of the authorities, and applied to an assessment of damages under the statute authorizing the construction of sewers. In this case no part of the petitioner's land was taken for the sewer, nor entered upon, nor used in the construction of the sewer, nor did any part of it abut upon any portion of the sewer, nor upon any land taken or used for the construction thereof. None of these cases are treated as exceptions to the general rule, but all are dealt with as illustrations of it. In *Collins* v. *Waltham*, 151 Mass. 196, 198, Mr. Justice Holmes says: "The right to compensation under the Pub. Sts. c. 49, §§ 68, 79, is not confined in terms to owners of land adjoining the highway, as it is in c. 52, § 15. *Jamaica Pond Aqueduct* v. *Brookline*, 121 Mass. 5. It would be going pretty far to deny compensation for damage which could be recovered for if caused by a private person. But we shall not undertake to construe the statute until we find it necessary to do so, beyond saying that it has been intimated that compensation might be recovered under it for damage of this character, and that, so far as we know, it never has been decided that the right, whatever it may be, depended upon the lands touching the highway."

The rule of damages to be applied in these and similar cases was stated by Chief Justice Shaw in *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385, 391, in these words: "All direct damage to real estate, by passing over it, or part of it, or which affects the estate directly, though it does not pass over it, as by a deep cut or high embankment, so near lands or buildings as to prevent or diminish the use of them; by endangering the fall of buildings, the caving in of earth, the draining of wells, the diversion of watercourses, so far as these are the necessary results of suitable and proper works, to accomplish the enterprise and secure the public easement, which is the object of the charter. Also, as being of like character, the necessary blast-

ing of a ledge of rocks, so near to houses or buildings as to cause damage; running a track so near them as to cause imminent and appreciable danger from fire; by obliterating or obstructing private ways leading to houses or buildings. These, and perhaps many others of like kind, which particular circumstances may present, we think, are proper subjects for the assessment of damages. But that no damage can be assessed for losses arising directly or indirectly from the diversion of travel; the loss of custom to turnpikes, canals, bridges, taverns, coach companies, and the like; nor for the inconveniences which the community may suffer in common, from a somewhat less convenient and beneficial use of public and private ways, from the rapid and dangerous crossings of the public highways, arising from the usual and ordinary action of railroads and railroad trains, and their natural incidents."

The damages which are excluded from consideration are, first, those that are remote and consequential, and, secondly, those that affect the public generally, as distinguished from those that are direct, special, and peculiar. Damages for discontinuing a way are allowed under the statute which provides damages for laying out a way. Pub. Sts. c. 49, §§ 14, 16. But damages are not allowed if the land does not abut on the portion of the way discontinued if there is access by any public way, because in such a case the damage suffered is only from loss of the enjoyment of a public right which is also suffered in greater or less degree by every member of the community. *Davis* v. *County Commissioners*, 153 Mass. 218. *Hammond* v. *County Commissioners*, 154 Mass. 509. So in setting off benefits, only those that are direct and special, as distinguished from those that are general, are allowed. *Allen* v. *Charlestown*, 109 Mass. 243, 246. *Cross* v. *Plymouth*, 125 Mass. 557. *Parks* v. *Hampden*, 120 Mass. 395. Under the betterment act benefits are assessed upon estates no part of which is taken for the improvement for which the assessments are made, as well as upon others. Pub. Sts. c. 51, § 1.

It seems to me that no one reading the cases above cited can doubt that at the time of the decision in *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10, it was the settled law of this Commonwealth that direct and special damages to land from the location or construction of a railroad or highway might be

allowed as well when no part of the petitioner's property was taken as when the land damaged was the remainder of a lot from which a part had been cut off by the location. If it were not for certain dicta found in that case and in two or three recent cases which have adopted the same language, I think no one would question that this is the law of Massachusetts to-day. The adjudication in this case was clearly correct, for the testimony admitted under exception, and the instruction of the sheriff, allowed the jury to include in their assessment damages which were general, and not direct or special. But the statement of the learned judge that if no part of the petitioner's land had been taken he would have had no right to recover the particular damages claimed, was purely *obiter*. He was dealing with a claim for damages from noise, dust, and smoke by one from whom land had been taken, and it seems to me that he fell into an error on account of the nature of the damages claimed. He recognized the rule, that, in addition to the value of the land taken, a petitioner is entitled to recover his damages growing out of the use for which the land is taken. See also *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1. But a part of the annoyances for which compensation was asked were suffered, not in the occupation or use of the property, but in going and coming over the public streets, in tarrying and visiting in the neighborhood, and in other ways in which they were common to the whole community, although the petitioner suffered them in greater degree than those who lived farther off. It is clear that such damages are not a subject for compensation. That the judge had these in mind appears not only from the language of the opinion in this case, but from that in *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1, 6. Damage suffered directly in the occupation and use of the petitioner's property is of a different kind. The statement of the judge, taken in its broadest meaning, would allow a railroad company to establish a freight yard under the windows of a valuable dwelling-house, if it took no part of the owner's land, and by switching and making up trains at all hours of the night to create a nuisance tenfold greater than the ringing of the factory bell which was enjoined in *Davis* v. *Sawyer*, 133 Mass. 289. The injury, although of a similar kind, might be far greater than that for which recovery was had at the common

law in *Wesson* v. *Washburn Iron Co.* 13 Allen, 95. For all this, destructive of his property though it might be, the petitioner would be remediless because the Legislature had authorized it under a statute which gave him no compensation. In the same opinion the judge stated a rule for assessing such damages to a person from whom land is taken. He said that depreciation of value from such causes should be considered so far as it is due to proximity secured by means of taking a part of the petitioner's land, and would not have resulted but for such taking. This has been understood to mean that, instead of assessing the whole of a petitioner's damages, the court should allow him his actual damages, less the amount which he would have suffered if the location of the railroad were just outside of his boundary. If the petitioner's land is a large parallelogram, and a railroad is located exactly in the middle of it, he is to be allowed under this rule for noise and dust and smoke his actual damages diminished by what his damages would have been if the railroad ran along the line of his land outside of it. His land on one side may be of such a character that he would suffer no damage if the railroad ran just outside of it, while on the other side it may be such that he would suffer as much from a railroad just outside of it as from one in the middle of the tract. To which side shall the jury go for their subtrahend? If they take the hypothetical damages from one side, there will be little or nothing to subtract, and he will receive all his actual damages; if they take them from the other, the amount to be deducted equals the minuend, and he will get nothing. I can see nothing reasonable in a rule which makes the amount of the damages to be allowed to a claimant depend upon the question whether he would have suffered much or little if the location had been in one place or another just outside of his farm or lot. It seems to me that the amount to be disallowed should be the general damages which he suffers as one of the community who happens to be much in that vicinity, as distinguished from those that he suffers directly in the use and occupation of his property. The nature of the damages claimed has no relation to the question whether the location runs an inch upon the petitioner's land or is an inch away from it. In attempting to meet the difficulty in his mind the judge stated a distinction which made the rights of a peti-

tioner depend upon whether any of his land was taken, and afterwards for one from whom land had been taken he stated another distinction which made his rights depend upon the nature and condition of his property at a distance from the railroad along his boundary line.

I do not think that either of these propositions has ever been adjudicated by this court, and I do not know of more than one or two decisions in which it can reasonably be contended that either of them was involved. There are cases in which they have been assumed in the opinion to be correct, and have been repeated, but never with any discussion of the earlier authorities. I do not think the court, in *Walker* v. *Old Colony & Newport Railway*, intended to overrule the former decisions without referring to them. That there was no such intention seems certain when we notice that the judge who wrote the opinion in that case wrote also the opinion in the later case of *Marsden* v. *Cambridge*, *ubi supra*, reaffirming the earlier decisions. Nor do I think that there has been any such repetition of these dicta as should be held to have changed the policy of the Commonwealth in regard to the assessment of damages in such cases. I prefer to hold that these equitable principles, applied and fully reaffirmed in the late case of *Trowbridge* v. *Brookline*, 144 Mass. 139, are still the law that should govern us.

As I understand the fundamental principles, the taking of land for a highway or a railroad involves, first, the acquisition of the title, and, secondly, the appropriation to a use. Damages caused by the taking considered merely as the acquisition of a title concern only those whose land is taken. Damages caused by an appropriation to a use concern everybody to whose property a direct and special detriment is caused by the use. Damages of the first class include not only the value of the land considered by itself alone, but, as I have already pointed out, its value for use in connection with that from which it is taken, as affecting its size and shape.

Damages caused by the use to which the land is to be put are entirely apart from the mere change of title. They are allowed because the use causes detriment to property owners in the vicinity. Of course only those owning land near the road can be so affected in their property, but if one is so affected he

should receive compensation. In this particular, one who has parted with a title to land and been fully paid for it is no more deserving than one from whom no land has been taken.

It is important to decide cases, so far as possible, upon principles of general application. It would be possible to hold in these cases that no damages are ever to be allowed that are caused by such a use as might lawfully be made by an individual proprietor. But it has never been so held in this Commonwealth, and there are many cases to the contrary. It might be held that damages from the use should always be allowed to persons who are also paid for a title, and not to any others. But this would be an arbitrary and unjust rule which is in conflict with our decisions. It might be held that certain kinds of damage shall be allowed whether the petitioner's land is taken or not, and that damage of certain other kinds, although direct and special and greater in amount, shall never be allowed. But I know no warrant in law or justice for such a rule, and among the kinds of special and peculiar damage which are real and substantial I know not what should receive favor and what should be rejected. I think it can make no difference in law whether the effect of an injury is felt above or below the surface of the ground, — whether it comes from blasting a ledge of rocks, as in *Dodge* v. *County Commissioners*, or from draining a well, as in *Parker* v. *Boston & Maine Railroad*.

If a foot in width of the petitioners' land had been taken, and a high embankment had been built along the front of their houses and lots, there is no doubt under all of the authorities that the damage to their property caused by the embankment would be allowed them, although an adjacent individual owner might have built it upon his land without liability. If the embankment had been built upon the street without taking any land, full damages would have been allowed for the change of grade. Pub. Sts. c. 52, § 15. I know no good reason why the distance of a few feet between the property of the petitioners and the embankment should affect their rights otherwise than to diminish the amount that should be allowed them.

I am authorized to state that Mr. Justice Morton concurs in this opinion.

CHARLES S. LINCOLN, executor, *vs.* COMMONWEALTH.

Suffolk. January 17, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Land Damages — Metropolitan Sewerage Act — Taking — Future Damages — Evidence — Report of Engineer — Division of Land by Way — Special Damages to remaining Land — Rental Value of Land.

When the Legislature authorizes something to be done in the neighborhood of a person's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the owner of the land cannot claim any under the Constitution, because what is done does not amount to a taking; and even if the thing authorized would be actionable at common law and a nuisance but for the statute, still it is not necessarily a taking. KNOWLTON & MORTON, JJ., dissenting.

If land adjoining that taken by the Metropolitan Sewerage Commissioners, under St. 1889, c. 439, for the construction of a sewer, and owned by the same person, is diminished in value by such taking, the owner is entitled to recover damages therefor; and, in estimating the damages, the jury may take into consideration the probable future consequences of the proximity of the sewer.

At the trial of a petition for an assessment of damages, under St. 1889, c. 439, for the taking by the Metropolitan Sewerage Commissioners of land for the construction of a sewer, an item for "sand sump and overflow" at the petitioner's premises, in the estimate of cost of the sewerage system by the engineer in his report attached to the report of the State board of health, which latter report is adopted and made the foundation of the statute, and which approves the estimate, is admissible in evidence.

Although the uncontradicted testimony of the engineer, at the trial of a petition for an assessment of damages, under St. 1889, c. 439, for the taking by the Metropolitan Sewerage Commissioners of land for the construction of a sewer, shows that the original plan of constructing an overflow there had been changed, the truth of which testimony is assumed in the charge to the jury, the respondent is not entitled to a ruling that there was no evidence that the construction of an overflow on the land taken was necessary or reasonably probable, but the jury have a right to form an independent opinion upon the matter.

At the trial of a petition for an assessment of damages, under St. 1889, c. 439, for the taking by the Metropolitan Sewerage Commissioners of land for the construction of a sewer, the respondent has no ground of exception to the refusal to rule that there was no evidence that the uses for which the land was taken were inconsistent with the laying out of a way over the same "by the proper authorities."

If land is taken by the Metropolitan Sewerage Commissioners for the construction of a sewer, the mere fact that a portion of the remaining land of the owner is separated from that taken by a way legally established, but not visible on the surface of the ground, is not conclusive against his right to recover for damages

to such portion, but if the whole estate is practically one he is entitled to have the damage to the whole of it considered.

Such damages only to the remaining land of a person, by reason of the use to which land taken from him for the construction of a public sewer is to be put, as do not result to all the land in that locality, are recoverable.

The owner of land taken for the construction of a public sewer is qualified to testify to the rental value of the property; and such rental value may be stated as a means of arriving at the value of the land.

PETITION to the Superior Court, for a jury to assess the damages of the petitioner's testator, Orray A. Taft, for the taking by the Board of Metropolitan Sewerage Commissioners, in behalf of the Commonwealth, under St. 1889, c. 439, of a triangular parcel of land at Point Shirley, in Winthrop, containing about 12,450 square feet of upland and 9,000 feet of beach, for the purpose, expressed in the instrument of taking, which was recorded on April 30, 1890, of using the same "for the construction, maintenance, and operation of an underground sewer, or sewers, syphons, gate-chambers, and necessary appurtenances."

After the former decision, reported 158 Mass. 526, (*Taft* v. *Commonwealth*,) the case was tried in the Superior Court, before *Bond*, J., who allowed a bill of exceptions, in substance as follows.

At the time of the taking, the premises to low-water mark were owned by the petitioner's testator, Orray A. Taft, who died after the first verdict upon this petition, and before the decision in 158 Mass. 526.

The plan printed in that case may be referred to for the purpose of showing the triangle taken, the way in controversy, and the hotel and remaining land belonging to the estate of the petitioner's testator.

The petitioner's testator had owned since 1853, and controlled since 1848, a parcel of land containing about twelve acres, bounded on all sides but one by the salt water, and the extreme end being the northerly shore of Shirley Gut, with Deer Island on the other side. This land was flat and even, with sandy soil, with no trees, fences, or buildings upon it except the buildings used by the petitioner's testator as a hotel, with its yard, stables, and outbuildings. At the time of the taking there was a way, without fences at the side, which extended from a point on what was conceded by both parties to be Shirley Street, through land of one Hale, formerly of the Revere Copper Company, and

thence in a straight line through the land of the petitioner's testator to his hotel, the corner of which was within about two hundred and twenty-five feet of the high-water mark at Shirley Gut. The judge ruled that the way in question was a public way.*

The respondent contended, and offered evidence to show, that the value of the land taken was from $500 to $1,500; and that there was no damage to the remaining land not taken.

J. M. Meredith, a witness called by the petitioner, was asked the following question:

"Leaving out of account the buildings, and assuming that there is a public street, 33 feet wide and 1,000 long, through the premises, past the corner of the hotel, what in your judgment was the value of the entire property the 30th of April, 1890, before any taking by the Commonwealth?"

The respondent objected to this question, upon the ground that the value of the parcel of land on the opposite side of the public street from the triangular parcel taken was incompetent and immaterial, but the objection was overruled, and the witness answered, "I have always considered that property would have brought $35,000." The respondent excepted.

The testimony of the petitioner's testator, given at the previous trial, was read by the petitioner; and the respondent excepted to the admission of certain questions and answers as to the rental value of the property, which the witness testified to be $10,000 a year in 1890 and 1891.

No evidence of his qualifications as an expert, other than his long ownership and occupation of the property, was introduced.

The petitioner read in evidence certain portions of the report of the State board of health to the Legislature of 1889.

The petitioner also put in evidence the plan of the North Metropolitan Sewerage System, showing the territory embraced; also a portion of the report of Howard A. Carson, civil engineer, to the State board of health, which was appended to the above mentioned report of the State board of health.

The petitioner also read in evidence, from the table of estimates in the report of Carson, the following words: "Sand sump

* This ruling is in accordance with that made in the other case between the same parties, and sustained by this court. See *ante*, 1.

and overflow, Shirley Gut"; and to the admission of these words the respondent excepted.

The respondent requested the judge to instruct the jury as follows:

"1. There is no evidence that the construction of an overflow on the land taken is necessary or reasonably probable. 2. There is no evidence that there will be any noise or smoke for which the petitioner may recover damages in this proceeding. 3. The jury are not to consider the possibility of a nuisance resulting from the sewerage works. 4. There is no evidence that any of the purposes for which the land taken may be used will injuriously affect the use of the remaining land for the business of a hotel, as it was used before the taking. 5. The jury should not include in their verdict any damage to the remaining land on account of the uses to which the land taken may be put. 6. The jury should not consider offensive smells as enhancing damages even if not so offensive as to cause a nuisance. 7. There is no evidence that the uses for which the land was taken are inconsistent with the laying out by the proper authorities of a road or way over the same. 8. The land on the opposite side of the public street cannot be considered as part of the remaining land of the petitioner, for damage to which he can recover in this proceeding. 9. If there is any damage to such land, it is of a kind common to the neighborhood, and not peculiar to the petitioner."

The judge refused to give any of the above instructions, except the third; and instructed the jury, among other things, as follows:

"There has been some controversy here between the parties as to whether it [the property] is to be used for an overflow, as that has been described to you. And it seems that at a time in 1889, before this taking, there had been a scheme which had been prepared by the engineers and reported by the officers of the Commonwealth which contemplated the use of that piece for an overflow. But taking the testimony of the engineer who has had this matter in charge, who has attended to the construction of the sewer, that that plan of constructing an overflow as it was first described has been departed from, and that no overflow has been constructed, and that it is not now the plan of the

parties who have it in charge to make any such construction there, to consider any overflow, yet if in the future such an overflow should be needed in the opinion of those who have it in charge at such time, there is the right taken to construct such an overflow. It is not a mere possibility that in the future it may be constructed that you are to consider, because you might concede that anything was possible with reference to it in the sense that I use that term; but you are to determine upon the evidence what use is reasonably to be expected with reference to this tract in the future. . . . The difficulty is in a case like this to determine just what elements are to be considered by you in this matter of the depreciation of the value of the remaining land. . . . What are the elements that ought to be considered? What is the annoyance to that remaining property? Can it be put into words in any way that you can see what it is, and just what you should consider with reference to it?

"One suggestion is that the appearance of these structures which are made or which may be made upon this property in the future, as you shall determine that fact, will be unsightly, will be objectionable to people who would otherwise buy property, and they will go away from it on that account. Determine then what is the nature of the structures that are to be there. . . . And of course you ought to try to determine as well as you can from what you saw, and from the testimony which has been introduced here, what will be about the appearance of the property when it is completed upon the plan that it is being constructed with reference to now, and then what change will be made in the appearance there in the future, any future use that you are satisfied will be made of it, reasonable for its purposes. Will there be anything there that will be unsightly, that will be objectionable to people? If so, determine what that is, and then see if there are any other elements that you can determine which ought to be considered.

"Another suggestion is that there may be odors from the operation of such structures as are there now, or such as may be put there in the future, as will be put there in the future, not amounting to a nuisance, not amounting to anything detrimental to health or to the comfort of persons living in that locality, or to render their habitations unhealthy and uncomfortable, yet

may be such that people will so object to them that they will not buy property in that locality. . . . Then, if you are satisfied that an overflow is to be constructed there at some time, what will be the effect of that? not as creating a nuisance there, because that is not to be considered by you, but in this other way; not amounting to a nuisance, and yet so objectionable that people will not purchase property in that locality.

"Then there is another suggestion: not that an overflow is to be built, not necessarily that any change is to be made in the structures in this locality for the purposes of this work that is to be carried on, but that there does exist the right to make some changes, and that the fear that there will be changes made, people do not know what and do not know when, but that that right existing there will deter people from going to that locality and purchasing property there, and that that dread or fear on the part of people who would otherwise purchase would lead them to go elsewhere and purchase property in another locality rather than to purchase it here; — all of this, you see, affects the demand, and the demand has to do with the value of this remaining property.

"Determine as well as you can just what the fact will be, as to what will be done there, what the effect of the work will be, what is to be feared with reference to that, what view would people take of that. You have had there the opinion of witnesses with reference to it, some saying that in their opinion that would affect it, and others that it would not. In the first place there is the question how far any of these elements are to be considered by you, whether they are any elements, either of them, one or another of them, as I have suggested, that are elements of damage for you to consider with reference to this remaining property. . . .

"If the petitioner sustains other and different damages to his remaining land, by reason of the use to be made of the land taken from him, than he would have sustained if the land had been taken from another and adjoining his, or so near his land, such additional damages, such other and different damages sustained by him by reason of the taking at that place, may be assessed in connection with the value of the land taken there. In other words, it is not to assess the damages resulting to the

remaining land from these different elements that occur to all the land in that locality, but it is the difference between some annoyance which is outside the petitioner's original parcel and the same in its intended place which is the measure of damages; it is the difference between the two, if there is any; if there are other and additional damages, because of the tract being taken there where it is taken, to the remaining land, it is that increase, that difference, that is to be assessed. You will not assess the damages to the remaining land, or the depreciation in value of the remaining land, resulting to all of the land in that locality whether the property is taken from the petitioner or some one else. And it is upon that theory that you ought to assess the damages and depreciation to this remaining land; adding that, whatever you may find that to be, to the value of the land as you find that to be, the value of the land taken, the triangular piece."

The jury returned a verdict for the petitioner in the sum of $15,262.50, and found specially that the damage to the remaining land of the petitioner not taken was $10,000.

The respondent alleged exceptions.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

W. D. Turner, for the Commonwealth.

S. J. Elder, (*E. A. Whitman* with him,) for the petitioner.

HOLMES, J. This case brings before us once more the question of the rule of damages to be applied when land is taken and the purpose for which it is taken is such that adjoining land of the same owners is made less in value. The matter was discussed in the former decision of this case, but we will state our views once more in the hope of making them somewhat clearer.

When the Legislature authorizes something to be done in the neighborhood of a plaintiff's land which diminishes its value, but which would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation the plaintiff cannot claim any under the Constitution, because what is done does not amount to a taking. And even if the thing authorized would be actionable at common law and a nuisance but for the statute, still it is not necessarily a taking, and unless it does amount to that no compensation can be recovered if the

statute does not give it. *Titus* v. *Boston*, 161 Mass. 209. See *Bacon* v. *Boston*, 154 Mass. 100, 102; *Caledonian Railway* v. *Ogilvy*, 2 Macq. 229, 235; *Ricket* v. *Metropolitan Railway*, L. R. 2 H. L. 175, 187. If what is done does amount to a taking, of course, if the statute gives no compensation, an action can be maintained, since the Legislature cannot authorize property to be taken without being paid for.

The question what the statute gives compensation for is a matter of construction. But as the phraseology is likely to be somewhat general, it is desirable that a general rule should be applied. Such a rule exists in England, but under our decisions there are difficulties which are mentioned in *Stanwood* v. *Malden*, 157 Mass. 17, and *Taft* v. *Commonwealth*, 158 Mass. 526, 547, 548. In the former of these cases the English rule is stated a little too broadly. 157 Mass. 18. One thing seems pretty clear, however, and that is that, if the damages complained of would be a nuisance but for the statute, a court should be more ready to find a remedy under the act than in a case of *damnum absque injuria* at common law. We mention this because the contrary assumption seems to be made in the third and sixth requests of the respondent, the former of which was given by the court. If the nuisance, instead of being a necessary consequence of what the act allows, is a result of mismanagement, the case is different. *Badger* v. *Boston*, 130 Mass. 170.

Statutes like the present, which contemplate a taking of land, generally do not provide for compensation unless there is a taking, and therefore in proceedings under the act some of the petitioner's land must have been taken in order to give him a standing in court. Whether this is just or not, so long as it is within the limits of the Constitution, is not for us to consider. It is enough for us that this condition generally is found in the words of the act. See *Rand* v. *Boston*, *ante*, 354. If, however, a part of the petitioner's land has been taken, his *locus standi* is established, and the question of construction just referred to arises, as to what, if any, damages shall be allowed for the harm to his adjoining land. Assuming that none of the damages claimed could be recovered under the act but for the taking, one naturally asks why the taking of adjoining land should make a difference. The question has been asked a great

many times, and the difficulty will be found forcibly stated by Lord Esher, in *The Queen* v. *Essex*, 17 Q. B. D. 447, 452. If such a difference is to be made, the foundation for it must be found in the words of the statute. It may be said, to be sure, that the petitioner gets no more than justice even if others get less; and that when he is compelled to sell the land we ought to consider all that he naturally would consider in fixing the price for a voluntary sale. See *Blesch* v. *Chicago & Northwestern Railway*, 48 Wis. 168, 189; *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, 177. A suggestion has been made that the injurious affecting of the petitioner's land by the use of the land taken, as distinguished from the construction of the works, is a particular injury different in kind from that which is suffered by the rest of the world. *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, 161, 162. But the distinction remains a somewhat arbitrary one. The case in which it was laid down under the English statutes, *In re Stockport, Timperley, & Altringham Railway*, 33 L. J. (N. S.) Q. B. 251, was criticised often before it finally was accepted, although there is no doubt that now it is settled law. *The Queen* v. *Essex*, 17 Q. B. D. 447; *S. C. sub nom. Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, 162, 164, 169, 173, 178. And it is to be noticed that Lord Westbury, Lord Bramwell, and some other judges, vainly insisted, with a good deal of energy, that the language of the statutes allowed similar compensation when no land was taken, even if at common law there would have been no right of action. *Ricket* v. *Metropolitan Railway*, L. R. 2 H. L. 175, 202. *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, 170; *S. C.* 17 Q. B. D. 447, 450. *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, 461. *Hammersmith & City Railway* v. *Brand*, L. R. 4 H. L. 171, 215 *et seq.*

Some damages are allowed by our decisions which could not be suffered except by reason of the taking. The lot from which a part is taken is considered as one whole, as it is in England. *Maynard* v. *Northampton*, 157 Mass. 218. A disadvantageous change in the shape or size of what remains clearly is a matter for compensation. And the principle which warrants such allowances was held logically enough in *Walker* v. *Old Colony & Newport Railway*, 103 Mass. 10, 15, to extend to considering

depreciation of value arising from the proximity of a railroad and the running of trains "so far as it is due to proximity secured by means of taking a part of the petitioner's land, and would not have resulted but for such taking," although it is settled that similar depreciation would not be paid for if no land had been taken. *Presbrey* v. *Old Colony & Newport Railway*, 103 Mass. 1. *Fay* v. *Salem & Danvers Aqueduct*, 111 Mass. 27. *Sawyer* v. *Davis*, 136 Mass. 239, 242. *Taft* v. *Commonwealth*, 158 Mass. 526, 547. *Rand* v. *Boston*, *ubi supra*. This rule is narrower than that laid down in the Wisconsin and English cases, and if it is open to the objection that it is hard to apply and too refined for practical purposes, at least it has the advantage of cutting down and in theory of doing away with the anomaly which those cases recognize. To that extent the damage could not have been suffered but for the taking of the petitioner's land, whereas for similar works just outside the petitioner's land he could not have recovered in the case supposed, either at common law or by the Constitution. The rule laid down gives the damages, but only the damages due to the taking of the petitioner's land. It is true that the works might not have been constructed at all if they had not been put where they were, but this consideration is met by the fact that, if they had been constructed just outside his land, the petitioner would have suffered no wrong under the Constitution, or at common law if no statute had been passed, and would have had no remedy under the statute. At all events, the Massachusetts rule has been in force too long now to be questioned. It has been repeated in many cases, and recently was acted on in the former decision of the case at bar. *Taft* v. *Commonwealth*, 158 Mass. 526, 548. *Drury* v. *Midland Railroad*, 127 Mass. 571, 583, 584. *Johnson* v. *Boston*, 130 Mass. 452, 454. *Pierce* v. *Drew*, 136 Mass. 75, 85. *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174, 178. *Wellington* v. *Boston & Maine Railroad*, 158 Mass. 185, 189. *Titus* v. *Boston*, 161 Mass. 209, 212.

The statute under which these proceedings took place requires the Commonwealth to pay "all damages that shall be sustained by any person or corporation by reason of such taking." St. 1889, c. 439, § 4 (amended after the present taking by St. 1890, c. 270). It is enough to say that these words certainly

do not look to any diminution of the liability for taking as it was construed by the decisions rendered before the passage of the act. The Commonwealth had nothing to complain of in the general tenor of the instructions to the jury.

The respondent suggests that harm anticipated from the future use of the sewer cannot be allowed for under the head of damages caused by the taking. Some of the difficulties hinted at in our former decision, 158 Mass. 549, are stated more at length by the Lord Chancellor in *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, but the discussion there brings out plainly what any one who considers the matter must see, that it is impossible to draw a sharp line between the present and anticipations of the future. All values are anticipations of the future. If a jury is of opinion that the proximity of a sewer has a detrimental effect similar to that of the proximity of the railroad in *Walker* v. *Old Colony & Newport Railway*, it may allow for it within the limits stated, on the same grounds as in Walker's case. It is true that a jury ought not to speculate on the mere possibility that land may be put to disagreeable uses. But when land is taken and must be used for a particular purpose, the reasonably probable consequences of a lawful use for that purpose must be taken into consideration. See *First Parish in Woburn* v. *Middlesex*, 7 Gray, 106, 109; *In re London, Tilbury, & Southend Railway*, 24 Q. B. D. 326, 330, 331; *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, 178.

The foregoing general considerations meet a part of the argument addressed to us on behalf of the Commonwealth. It remains for us to deal with the exceptions specifically so far as they need mention. The first ruling requested was that there was no evidence that the construction of an overflow on the land taken was necessary or reasonably probable. In connection with this may be mentioned an exception to the admission of the item for "sand sump and overflow, Shirley Gut," in the estimate of cost of the North Metropolitan Sewerage System by the engineer, Carson, in his report attached to the report of the State board of health, which latter is adopted and made the foundation of the act of 1889, under which these proceedings take place. St. 1889, c. 439, § 8. The report approves the estimate of Carson, and appends his report. We see no reason why

the document was not admissible. But the testimony was uncontradicted that the plan had been changed in this particular, and the truth of this testimony practically was assumed by the judge in his charge. If the jury were to find that the possibility of an overflow on the land taken was an element to be considered, they hardly could have done so except on the ground that in their opinion it was a probable or not improbable consequence of the general scheme as presented to them by the evidence and their view, whatever the engineers might say. They had a right to form their own opinion upon the matter, and if that was their opinion they had a right to act upon it, even if every expert assured them that nothing of the kind was to be expected, since such a use of the land was within the rights taken by the Commonwealth.

Nothing further needs to be said as to the second, third, fourth, fifth, and sixth requests. We do not see anything in the case calling for the seventh ruling asked, that there was no evidence that the uses for which the land was taken were inconsistent with the laying out of a way over the same "by the proper authorities." No doubt the Legislature could authorize such a way. The request did not require any more exact proposition. We perceive no advantage which the Commonwealth would have gained from having that statement made.

The eighth ruling asked was that the land on the opposite side of the public street could not be considered as part of the remaining land of the petitioner, for damages to which he could recover in this proceeding. No doubt there are many cases in which the court is able to see, from the way in which they are divided and used, that different parcels of land, even if they adjoin one another, are to be regarded as distinct. *Wellington* v. *Boston & Maine Railroad*, 158 Mass. 185. *Todd* v. *Kankakee & Illinois River Railroad*, 78 Ill. 530. But the question is a practical one, and the mere intervention of a way legally established, but not visible on the surface of the ground, is not conclusive. If, as here, the whole estate was practically one, the petitioner is entitled to have the damage to the whole of it considered. As was said by Dixon, C. J., we are to look at the land, and not at the map, to ascertain the plaintiff's damages. *Welch* v. *Milwaukee & St. Paul Railway*, 27 Wis. 108, 112.

Kansas City, Emporia, & Southern Railroad v. *Merrill*, 25 Kans. 421, 423. *Ham* v. *Wisconsin, Iowa, & Nebraska Railway*, 61 Iowa, 716. *St. Paul & Sioux City Railroad* v. *Murphy*, 19 Minn. 500. *Cowper Essex* v. *Local Board for Acton*, 14 App. Cas. 153, 162, 167. *Whitney* v. *Boston*, 98 Mass. 312, 316.

Nothing needs to be added concerning the ninth request, in view of the instructions given. The only other exception was to the admission of the testimony of Taft, the owner, as to the fair rental value of the property. As an owner, he was qualified to testify as to the value. *Blaney* v. *Salem*, 160 Mass. 303. And the rental value may be stated as a reason for, or as a means of, arriving at the value of the land. *Exceptions overruled.*

Justices KNOWLTON and MORTON agree to the result in this case, but dissent from some parts of the reasoning for reasons that appear in the dissenting opinion in *Rand* v. *Boston*, *ante*, 354.

JAMES E. WELLINGTON & others *vs.* BOSTON AND MAINE RAILROAD.

Middlesex. January 9, 10, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Land Damages — Railroad — Division of Tract into Lots.

At the trial of a petition for an assessment of damages sustained by the taking, for the purposes of a railroad, of a portion of a large tract of land, if it appears that the other land of the petitioner not taken had been made separate and distinct parcels by transforming the locality into a village with wrought and travelled streets, and making all the land not included in the streets into exactly defined house lots, some of which had been sold to other persons, and each of which then owned by the petitioner was held for separate sale, no special or peculiar damage to his land not taken, except to his lots immediately adjoining the parcels taken or abutting on the same street with the railroad, can be recovered.

PETITION to the county commissioners for a sheriff's jury, to assess the damages sustained by the taking by the respondent of the petitioners' land in that part of Medford called

Wellington. After the former decision, reported 158 Mass. 185, a new jury was summoned, and returned verdicts for the petitioners. From the sheriff's return, it appeared that four parcels of land were taken, all of which adjoined the respondent's railroad location, and one of which was one hundred feet wide; and that each parcel so taken was a part of the whole tract belonging to some one of the petitioners. The verdicts were accepted by the Superior Court; and the respondent alleged exceptions. The facts material to the decision appear in the opinion.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

S. Lincoln & S. Butler, for the respondent.

A. Hemenway & R. G. McClung, for the petitioners.

BARKER, J. When this case was first here we saw nothing to indicate that any recoverable damages were caused to lands of the petitioners not taken, save to their lots immediately adjoining the parcels taken or abutting on the same street with the railroad. *Wellington* v. *Boston & Maine Railroad*, 158 Mass. 185. In the opinion of a majority of the court, no reason to change this intimation is shown by the present bill of exceptions, and we think the respondent was entitled to the ruling requested to that effect.* Upon the evidence, all the other lands of the petitioners had been made separate and distinct parcels by transforming the locality into a village with wrought and travelled streets, and making all the land not included in the streets into exactly defined house lots, some of which had been sold to other persons and each of which then owned by the petitioners was held for the distinct purpose of independent sale.

Whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by fences; nor can it

* The ruling requested was as follows: "There is no evidence which would warrant the jury in finding that any special or peculiar damage was caused to the land from which the hundred feet strip was taken, nor to any of the remaining lands of the petitioners, except the lots immediately adjoining the land taken or upon the same street with the railroad."

be determined in the negative by the mere fact that it is all in one ownership and is not divided by streets or by paper lines. But when, as in the present case, the evidence shows that there is an actual division by streets wrought and in use for travel, and by recorded paper lines, and there is no evidence that any two of the lots are used together, or held for sale as one parcel, and the only use shown is a separate and distinct use and holding of each lot by itself, we think each lot is a separate and distinct parcel.

Exceptions sustained. Verdicts set aside.

GEORGE W. HARNDEN *vs.* MILWAUKEE MECHANICS' INSURANCE COMPANY.

Essex. January 16, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Fire Insurance — Proof of Loss — "Forthwith rendered" — Law and Fact — Trial — Delivery — Agency — Custom.

In an action upon a policy of insurance against loss by fire, which provides that, in case of any such loss, a proof of loss shall be forthwith rendered by the insured to the company, it is a question for the jury, under all the circumstances of the case, whether such a proof rendered two months after a loss under the policy was "forthwith rendered."

A policy of insurance against loss by fire provided that, in case of any such loss, a proof of loss should be forthwith rendered by the insured to the company. In an action upon the policy, it appeared that the property insured was situated in a large city, and was destroyed in an extensive fire; and that the proof of loss was not rendered until two months after the fire. There was evidence tending to show that the plaintiff, by reason of impaired health, was unable to enter upon an examination of his affairs for upwards of three weeks; that he could not get at his books for a week; that he had to take an account of stock for three years, and it took two weeks to get at the footings; that it was customary to wait for the committee of adjusters to finish their work; and that after the proofs of loss were prepared they were printed, and he then swore to them and gave them to the broker through whom the insurance was effected, who testified that he gave them when ready to the defendant's local agent. *Held*, that the jury were justified in finding that the proof of loss was "forthwith rendered."

A policy of insurance against loss by fire provided that, in case of any such loss, a proof of loss should be forthwith rendered by the insured to the company. At the trial of an action upon the policy, certain evidence was admitted, subject to

the defendant's exception, on the question of the plaintiff's diligence in rendering the proof of loss. Subsequently, the defendant, reserving its rights only as to certain rulings which it had requested and which had been refused, agreed that, if the proof of loss was delivered to the defendant's local agent with a promise on his part that he would forward it, the jury might find for the plaintiff; which they did. *Held*, that the effect of this agreement and of the finding was to render immaterial the exceptions to the admissibility of the evidence.

If a local agent of an insurance company has apparent authority, by custom or otherwise, to receive proofs of loss, a delivery to him of such proofs will constitute a delivery to the company, even if he has not authority, from the nature of his agency, to receive them, or if also, in the absence of custom, a delivery to him under the circumstances of the case would not have been a reasonable mode of sending the proofs to the company.

Apparent authority on the part of a local agent of an insurance company to receive proofs of loss may be implied from a universal custom among insurance companies for local agents to prepare proofs of loss and send them to the companies when it is not done by the adjusters.

CONTRACT, upon a policy of insurance for $1000, issued by the defendant, against loss by fire on the plaintiff's property in Lynn. At the trial in the Superior Court, before *Sherman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

H. F. Hurlburt & E. T. McCarthy, for the defendant.

W. H. Niles, for the plaintiff.

MORTON, J. The policy in this case provided that, "in case of any loss or damage under this policy, a statement in writing signed and sworn to by the insured shall be forthwith rendered to the company, setting forth the value of the property insured," etc. The fire occurred on the 26th of November, 1889. The first statement under the above provision was rendered in the latter part of January, 1890. It is contended that it was not rendered "forthwith." But we think that it was rightly left to the jury, with instructions to which we see no objection, to say whether under all the circumstances that was or was not done.

The property described in the policy was situated in Lynn, and was destroyed in a great fire which occurred on the date above stated. The fire was so extensive that it fairly may be presumed to have caused confusion, not only in the affairs of the plaintiff, but in those of the entire community. In such a state

of things delay would naturally arise in relation to matters affecting insurance losses, and would make it impossible to render a statement forthwith in the sense of at once. Besides these considerations, there was testimony tending to show, amongst other things, that the plaintiff, by reason of impaired health, was unable to enter upon an examination of his affairs for upwards of three weeks; that he could not get at his books for a week; that he had to take an account of stock for three years, and it took two weeks to get at the footings; that it was customary to wait for the committee of adjusters to finish their work; and that after the proofs of loss were prepared they had to be or were printed, and he then swore to them and gave them to the broker through whom the insurance was effected, who testified that he gave them when ready to Pitman and Breed, the defendant's local agents.

Whether the statement was "forthwith rendered" depended on whether, taking all of these circumstances and considerations into account, the plaintiff used due and reasonable diligence. If he did, then it was "forthwith rendered," within the fair meaning of the policy; and whether he did or did not was a question of fact for the jury. *Carpenter* v. *German American Ins. Co.* 135 N. Y. 298, 302. *Home Ins. Co.* v. *Davis*, 98 Penn. St. 280. *Edwards* v. *Baltimore Ins. Co.* 3 Gill, (Md.) 176. *Donahue* v. *Windsor County Ins. Co.* 56 Vt. 374. We think that there was testimony which justified the jury in finding, as they must have found, that the statement was "forthwith rendered."

Certain evidence was admitted, subject to the defendant's exception, on the question of the plaintiff's diligence in rendering the statement. Subsequently the defendant, reserving its rights only as to certain rulings which it had requested and which the court had refused, agreed that, if the first proof of loss was delivered to Breed with a promise on his part that he would forward it, the jury might find for the plaintiff. Since the jury returned a verdict for the plaintiff, they must have found that the first proof of loss was delivered to Breed with a promise by him to forward it; and we think that the effect of this agreement and of the finding was to render immaterial the exceptions which had been taken regarding the admissibility of the evidence. It would seem as though counsel for the defendant did

not care to argue that, under the circumstances, due diligence had not been used by the plaintiff in rendering the statement, if one was rendered the last of January, but preferred to rest on the contention that the first proof was not delivered to Breed at all.

The remaining question is whether the delivery of the statement or proof of loss in the latter part of January, 1890, to Pitman and Breed constituted a delivery to the company. Under the instructions, it is possible that, notwithstanding the testimony of Walton,* the jury may have found that the proof was not only received by Breed, but was forwarded by him to the company and actually received by it. But the request of the defendant asked for a ruling that delivery of the proof of loss to the local agents which was not forwarded to the defendant was not a delivery to the defendant of the statement in writing required by the policy, unless the plaintiff showed that the local agents were authorized by the company to receive the proof. This was refused by the court, and the jury were permitted to find that a delivery to the local agents would constitute a delivery to the company; and it thus becomes necessary to consider the ruling requested by the defendant.

The commission issued to Pitman and Breed by the defendant gave them "full power to receive proposals for insurance against loss or damage by fire in Lynn and vicinity, to receive moneys and countersign, issue, renew, and consent to the transfer of policies . . . subject to the rules and regulations of said company, and to such instructions as may from time to time be given by its officers." The policy contained no notice of this limitation of authority on the part of Pitman and Breed, and this case is thus distinguishable from many of those relied on by the defendant, some in stock companies, and some in mutual, where the policy on its face gave notice of the scope of the agent's authority. The only reference in this policy to the matter of agency is in the last line, where it is provided that

* Walton, who was an adjuster in the employ of the defendant, testified that he learned that there was a policy of insurance upon the plaintiff's property, but no notice was given to him of a loss under the policy; and that no statement in writing in relation to the loss was received by the defendant until June, 1890.

"this policy shall not be valid until countersigned by the duly authorized agent of the company at Lynn, Mass.," which, so far as it signifies anything, implies that the agent at Lynn is a general agent. At any rate, it does not notify the policy holder that he is an agent with limited powers. Neither does the policy contain any provision as to the manner in which the proofs of loss shall be delivered to the company. If, therefore, the local agents had apparent authority by custom, or otherwise, to receive the proofs of loss, we think that a delivery to them would constitute a delivery to the company, even if they had not authority from the nature of their agency to receive them, or if also, in the absence of custom, a delivery to them under the circumstances would not have been a reasonable mode of sending the proofs of loss to the company, neither of which do we pass upon. See *Bishop* v. *Eaton*, 161 Mass. 496, 500; *Wheeler* v. *Watertown Ins. Co.* 131 Mass. 1; *Eastern Railroad* v. *Relief Ins. Co.* 105 Mass. 570; *Markey* v. *Mutual Benefit Ins. Co.* 103 Mass. 78, 92; *Fogg* v. *Griffin*, 2 Allen, 1; *Gloucester Manuf. Co.* v. *Howard Ins. Co.* 5 Gray, 497; *Arff* v. *Star Ins. Co.* 125 N. Y. 57.

The instruction requested omitted any reference to this element of the case, but rested on the proposition that a delivery to the local agents was not effectual unless they were actually authorized by the company to receive proofs of loss. There was testimony tending to show that it was the universal custom amongst insurance companies for local agents to prepare proofs of loss and send them to the company when it was not done by the adjusters, which was the case here. Apparent authority on the part of the local agents to receive proofs of loss would be implied from such a custom. A considerable portion of the instructions as reported seem to have been directed to the consideration of the meaning of "forthwith," and to the question whether the proof was delivered to Breed. But we think that it sufficiently appears from the charge, and from the colloquy between the court and the counsel for the defendant, that the effect of custom upon the matter of delivery was called to the attention of the jury. No exception was saved to this portion of the charge for insufficiency or otherwise, counsel for the defendant apparently being con-

tent to rest upon the refusal of the court to give the request in the precise form in which it was made.

A majority of the court think that the exceptions should be overruled, and it is so ordered. *Exceptions overruled.*

JOHN O'NEIL *vs.* THOMAS O'LEARY.
WILLIAM EARLEY *vs.* SAME.

Suffolk. March 19, 20, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ

Personal Injuries — Master and Servant — Negligence — Employers' Liability Act.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by an explosion of dynamite used in blasting rock, it appeared that the defendant was engaged in blasting a ledge of rock on his premises by means of dynamite exploded by electricity in deep holes drilled by a steam drill in the top of the ledge, and employed A. as superintendent of the blasting; and that B. had charge of the work at the base of the ledge, which consisted of breaking up the large pieces of rock into small stones, either by hand drilling and blasts of powder or by sledge-hammers, and carting them away. No claim was made at the time that A. was incompetent. B. admitted, on cross-examination, that he had never done any wiring of holes which were loaded with dynamite, and had not had charge of deep drilling and dynamite blasting with electricity, but also testified that he knew how it ought to be done. *Held*, that it was error to refuse to instruct the jury that there was "no evidence of negligence on the part of the defendant in the selection and employment of a superintendent, or of workmen employed on this work, which contributed to cause the accident."

At the trial of two actions for personal injuries occasioned to the plaintiffs respectively, while in the defendant's employ, by an explosion of dynamite used in blasting rock, it appeared that the defendant was engaged in blasting a ledge of rock on his premises by means of dynamite exploded by electricity in deep holes drilled by a steam drill in the top of the ledge, and employed A. as superintendent of the blasting. The evidence showed that the defendant requested A. and one of the plaintiffs to begin the work of blasting at five o'clock in the morning; that he sent A., although the latter was unwilling to go, to sharpen drills when all concerned supposed that the charge in the hole where the explosion occurred, and from which A. and the plaintiff were removing the tamping, had been exploded; and that he sent the other plaintiff to assist in manipulating the churn drill which was used in removing the tamping, and which was too heavy for one man to work alone, and while they were so engaged the accident happened. *Held*, that it was error to refuse to instruct the jury that there

was "no evidence of personal negligence on the part of the defendant in reference to the accident, which contributed to cause it."

Evidence that a person, employed by another as superintendent of the blasting of a ledge of rock by means of dynamite exploded in drill holes by electricity, worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes and in clearing them out, and in other acts of manual labor, which occupied the most of his time, will not warrant a finding that his "principal duty is that of superintendence," within the meaning of the employers' liability act, St. 1887, c. 270. § 1, cl. 2.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs respectively, while in the defendant's employ; the declaration in each case containing counts under the employers' liability act, St. 1887, c. 270, and also at common law. The cases were tried together in the Superior Court, before *Richardson*, J., and it appeared that the defendant was engaged in blasting a ledge of rock on his premises by means of dynamite exploded by electricity in deep holes drilled by a steam drill in the top of the ledge, and employed one McDonald as superintendent of the blasting; that one Lyons had charge of the work at the base of the ledge, which consisted of breaking up the large pieces of rock into small stones, either by hand drilling and blasts of powder or by sledge-hammers, loading them on teams, and carting them away; and that, while the plaintiffs were engaged, by means of a churn drill, in removing the tamping from one of the deep holes, an explosion of dynamite occurred therein, and caused the injuries complained of.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions, which appear in the opinion.

The case was argued at the bar in March, 1895, and afterwards was submitted on the briefs to all the judges.

R. M. Morse, (*C. G. Keyes & C. D. Keyes* with him,) for the defendant.

W. H. Brown, for O'Neil.

F. N. Nay, for Earley.

LATHROP, J. The first request for instructions we pass for the present, as it depends in part upon other requests which we shall consider at length.*

* The instructions requested and refused were as follows: "1. There is no evidence which will authorize a verdict for the plaintiff in either case. . . .

The third request, we are of opinion, should have been given. An examination of the evidence shows no negligence on the part of the defendant in the selection or employment of a superintendent or workmen which contributed to the accident. There was no evidence of negligence in employing McDonald, and it is now conceded that no claim was made at the trial that he was incompetent. As to the employment of Lyons there was no evidence that he was incompetent to have charge of any part of the work. The testimony as to his competency comes from the cross-examination of himself, in which, while he admitted that he had never done any wiring of holes which were loaded with dynamite, and had not had charge of deep drilling and dynamite blasting with electricity, he also testified that he knew how it ought to be done.

The fourth request should also have been given. We find no evidence of personal negligence on the part of the defendant in reference to the accident. It was not negligence to request McDonald and Earley to begin the work of blasting at five o'clock in the morning, nor to send McDonald to sharpen drills when all concerned supposed that the charge in the hole, from which he and Earley were removing the tamping had been exploded, the defendant having no knowledge which should have led him to suppose that it was possible that the hole had not been fired; nor was it negligent for him to send O'Neil to assist in manipulating the churn drill, which was too heavy for one man to work alone. In these matters he acted as any prudent man would act under the circumstances, there being nothing to indicate to him that any explosion could be caused by the removal of the tamping. McDonald's unwillingness to leave the work of removing the tamping which he was engaged on with Earley when the defendant asked him to sharpen drills does not appear to have

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3. There is no evidence of negligence on the part of the defendant in the selection and employment of a superintendent, or of workmen employed on this work, which contributed to cause the accident. 4. There is no evidence of personal negligence on the part of the defendant in reference to the accident which contributed to cause it. 5. There is no evidence that McDonald was employed as a superintendent, whose sole or principal duty was that of superintendence, so that the defendant can be held liable for the negligence of McDonald."

been for any reason except to get the special work of blasting these two holes finished as soon as possible, and there is nothing in the evidence to indicate that the defendant supposed, or ought to have known, that McDonald's remaining at the work of removing the tamping was of importance to the safety of any one.

While the fifth request does not follow the words of the statute, the question which has been argued, and which was doubtless intended to be covered by it, is covered by the first request, and we proceed to consider whether there was any evidence which would warrant the jury in finding that McDonald was a person in the service of the defendant intrusted with and exercising superintendence, whose sole or principal duty was that of superintendence, within the meaning of these words in the St. of 1887, c. 270, § 1, cl. 2. That he was intrusted with, and was exercising the duty of, superintending the blasting, might properly have been found by the jury. It clearly was not his sole duty. Can it be said that it was his principal duty? On the evidence in the case put in by the plaintiffs, it is clear that he worked with his own hands in attending to the fire under the steam boiler, in sharpening all the tools used by the workmen, in charging the drill holes and in clearing them out, and in other acts of manual labor. One of the witnesses testified: "Sharpening the tools occupied part of his time, and he attended to the fire to make the steam. He spent most of the time in sharpening the tools and keeping up steam. Whenever the steam drill was going he had to keep the steel sharp; and if the drill would not be running he would have leisure to come out on the ledge and talk, and see what was necessary to be done; but most of the time he was working, sharpening tools, keeping up steam, and coming out to place these holes." There was also other evidence that his manual labor occupied most of his time, and there was no contradiction as to this.

In a sense it is undoubtedly true that superintendence is more important than manual labor, and so, if superintendence is intrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow servant with a person injured, there would have been no need of the words "whose sole

or principal duty is that of superintendence." These words must have a reasonable interpretation given to them; and a majority of the court is of opinion that it cannot be said of a person who works at manual labor to the extent shown in this case that his principal duty is that of superintendence. See *Cashman* v. *Chase*, 156 Mass. 342; *Shepard* v. *Boston & Maine Railroad*, 158 Mass. 174; *O'Brien* v. *Rideout*, 161 Mass. 170; *Dowd* v. *Boston & Albany Railroad*, 162 Mass. 185.

In *Malcolm* v. *Fuller*, 152 Mass. 160, the evidence was conflicting as to the work done by the alleged superintendent, and the case therefore was left to the jury. In the cases at bar, we have considered only the evidence for the plaintiffs.

If the evidence in the case shows anything more than a pure accident, it shows negligence on the part of McDonald, who, as his principal duty was not that of superintendence, was but a fellow workman with the plaintiffs.

On these considerations it follows that the defendant was entitled to have the first instruction requested given, which was in substance that the jury would not be authorized to find a verdict for the plaintiff in either case. It is unnecessary to consider the other instructions requested.

Exceptions sustained.

GEORGE E. ROGERS *vs.* EMMA B. COY.

Suffolk. March 26, 1895. — October 17, 1895.

Present: FIELD, C. J., HOLMES, MORTON, LATHROP, & BARKER, JJ.

Use and Occupation — Action — Defence — Husband and Wife.

An action for use and occupation of a tenement does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter.

In an action against a married woman for use and occupation of a tenement, the fact that she was living there with her husband does not affect her liability, if the jury find that she was occupying as a tenant with his assent under an agreement to pay the rent herself.

CONTRACT, for use and occupation of a tenement in Boston. Trial in the Superior Court, before *Blodgett*, J., who ruled that

the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts sufficiently appear in the opinion.

F. Rogers, for the plaintiff.

J. W. Keith, for the defendant.

MORTON, J. This is an action for use and occupation by the defendant of a certain tenement belonging to the plaintiff. The defence is, that, at the time when the plaintiff testified that the defendant became his tenant, her husband was tenant at will of the premises, and that no termination of his tenancy was shown. The action, however, does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter. *Cobb* v. *Arnold*, 8 Met. 398, 402. *Lindsey* v. *Leighton*, 150 Mass. 285. *Henwood* v. *Cheeseman*, 3 S. & R. 500. *Barron* v. *Marsh*, 63 N. H. 107. *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50. *Dolby* v. *Iles*, 11 Ad. & El. 335. 2 Dane, Abr. 442, 446. Taylor, Land. & Ten. (7th ed.) §§ 641, 654. Wood, Land. & Ten. (2d ed.) § 546. The plea *nil habuit in tenementis* would not constitute a defence. Taylor, Land. & Ten. (7th ed.) § 654.

In the present case there was evidence of admissions on the part of the defendant from which the jury might have found that she was in occupation of the tenement during the time claimed by the plaintiff as his tenant with her husband's assent. The fact that she was a married woman and living there with her husband would not affect her liability, if the jury found that she was occupying as a tenant with her husband's assent under an agreement to pay the rent herself. If the defendant contended that her agreement was merely collateral to her husband's alleged liability, that was a question of fact for the jury, under suitable instructions.

Exceptions sustained.

JOHN H. MACK *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Berkshire. September 10, 1895. — October 17, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Defective Way at Grade Crossing — Action — Right of Railroad Corporation to Notice of Injury.

A person injured by a defect in a highway, where it is crossed by a railroad at grade, which the railroad corporation is bound, under the Pub. Sts. c. 112, § 124, to keep in repair, cannot maintain an action against the corporation without giving the notice required by the Pub. Sts. c. 52, §§ 19, 21, to be given to the "persons" obliged to keep the same in repair.

LATHROP, J. This is an action of tort, for personal injuries sustained by the plaintiff while travelling upon a public highway in the town of Adams, at a place where the highway crosses at grade a railroad operated by the defendant under a lease. The crossing was covered with planks. The plaintiff, who was driving at night in a carriage drawn by a span of horses, so guided his horses that the left forward wheel of his carriage did not touch the planks, but struck one of the rails of the railroad. This caused the wheel to break, the horses ran, and the plaintiff was thrown out and injured. We assume in his favor, without deciding, that there was evidence which would warrant a jury in finding that the planks did not correspond with the travelled part of the way, so that there was evidence of a defect in the way caused by the defendant.

We are of opinion, nevertheless, that the presiding justice of the Superior Court rightly ordered a verdict for the defendant. The declaration does not allege that any written notice of the time, place, and cause of the injury was given to the defendant, and the bill of exceptions states that no such notice was served upon it. By the Pub. Sts. c. 52, § 1, highways are to be kept in repair at the expense of the town, city, or place in which they are situated, "when other provision is not made therefor, so that the same may be reasonably safe and convenient for travellers, with their horses, teams, and carriages, at all seasons of the

year." Section 18 of the same chapter gives a right of action to a person injured through a defect or want of repair in a highway, town way, causeway, or bridge, against the county, town, place, or persons by law obliged to repair the same. Section 19 provides that "a person so injured shall, within thirty days thereafter, give to the county, town, place, or persons by law obliged to keep said highway, town way, causeway, or bridge in repair, notice of the time, place, and cause of the said injury or damage." And by § 21 such notice is required to be in writing. The duty of keeping a highway in repair, where it is crossed by a railroad, is imposed upon a railroad corporation by the Pub. Sts. c. 112, § 124, which provides that it shall "so guard or protect its rails by plank, timber, or otherwise, as to secure a safe and easy passage across its road." That the railroad corporation is entitled to a notice, under §§ 19 and 21, for an injury caused by a failure on its part to perform the obligation imposed upon it by law, is settled by the case of *Dickie* v. *Boston & Albany Railroad*, 131 Mass. 516. *Exceptions overruled.*

M. E. Couch, (*C. J. Parkhurst* with him,) for the plaintiff.

M. Wilcox, for the defendant.

BRICE W. McDOWELL *vs.* CONNECTICUT FIRE INSURANCE COMPANY.

Franklin. September 17, 1895. — October 17, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Fire Insurance — Offer of Proof.

At the trial of an action on a policy of insurance against loss by fire which occurred in 1893, the defendant has no ground of exception to the exclusion of an offer to show that two fires had before occurred, neither being connected with the fire in question, one in 1888 and the other in 1891, in which the plaintiff and his brother, who the jury might have found had some interest in the loss for which the suit was brought, had met with losses for which they had received insurance, and that nine other fires had also previously occurred, in each of which some relative or relatives of the plaintiff had met with losses covered by insurance, and for which they had received payment of insurance, there being no offer to show that any of these fires were set by the plaintiff or by his procurement.

CONTRACT, upon a policy of insurance, to recover for loss of the plaintiff's barn and shed and personal property, destroyed by fire at Conway, Massachusetts, on October 29, 1893. The answer alleged that the fire which caused the loss was set by the plaintiff, and by his procurement and with his consent.

Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

It appeared in evidence that in April, 1893, the plaintiff's brother, George R. McDowell, bargained for a farm in Conway, on which was a dwelling-house, the barn which was destroyed by fire, and a mill, and that he also bargained for the personal property. All of the negotiations with the seller were carried on by George R. McDowell, and the consideration therefor was delivered to the seller by said George. The conveyances were made out in the name of the plaintiff, who, it was claimed, furnished the consideration. After the purchase of the property, in April, 1893, the plaintiff and George lived together upon the farm. George R. McDowell testified that he and his brother, the plaintiff, were not partners, but that he helped his brother carry on the farm, helped in the harvesting of the hay which was destroyed by the fire, and helped in repairing the house and mill, and that no compensation had been paid him therefor, and none had been agreed upon, and he did not know as he should recover any, as it was a family matter and he wished to help his brother.

The defendant offered to show that on August 2, 1888, at Moores in New York, George and the plaintiff, while in business together, met with a loss by fire, against which they were insured, and that they were paid insurance money thereon; that on September 11, 1891, while associated in business together at the same place, they again met with a loss by fire, against which they were insured, and that they were paid insurance money on that loss. The judge excluded the evidence, and the defendant excepted.

The defendant further offered to prove other losses by fire by relatives of the plaintiff, in each of which losses there was insurance and a payment of insurance, namely: April 15, 1886, a loss at said Moores by George R. McDowell; January 27, 1888, a loss at the same place by David Bradford, father in law of George, a loss by the same fire by Anna L. McDowell, wife of

George; August 2, 1888, another loss by George at said Moores; May 5, 1891, a loss at the same place by R. J. McDowell, a brother of George; September 11, 1891, at the same place, another loss by George; March 21, 1893, at Boston, losses by a fire in which said George, Carrie L. McDowell, a sister of the plaintiff, Margaret L. McDowell, another sister, Sarah J. Taylor, another sister, and Hiram G. McDowell, a brother, were each insured and recovered insurance money; and September 1, 1893, at Conway, losses by fire in which Hiram D. Griggs, a brother in law of the plaintiff, and George W. Griggs, a nephew of the plaintiff, were each insured, and recovered insurance money.

The judge excluded the evidence; and the defendant alleged exceptions.

J. A. Aiken, for the defendant.

S. D. Conant, (*C. C. Conant* with him,) for the plaintiff.

BARKER, J. The issue upon which the excluded evidence was offered was raised by the defendant's allegation that the fire was set by the plaintiff, and by his procurement and with his consent. The offer was to show that two fires had before occurred in which the plaintiff and his brother, who the jury might have found had some interest in the loss for which this suit was brought, had met with losses for which they had received insurance, and that nine other fires had also previously occurred, in each of which some relative or relatives of the plaintiff had met with losses covered by insurance, and for which they had received payment of insurance. There was no offer to show that any of these fires were set by the plaintiff, or by his procurement.

All of these fires except the first two were occurrences in which the plaintiff had no interest, and all of them were plainly *res inter alios*. The first two fires were independent of each other, one occurring in the year 1888 and the other in the year 1891; and neither of them was connected with the fire now in question, which occurred in the year 1893. If all the fires were parts of attempted frauds, they were clearly independent frauds, and not parts of a system of fraud of which the fire in question was an essential step. None of the evidence excluded was admissible, upon the ground stated in *Fowle* v. *Child*, *ante*, 210, and the cases there cited.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM H. BROOKS.

Hampden. September 25, 1895. — October 17, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Indictment for Burning Dwelling-house — Evidence of Ownership.

A defendant is rightly convicted of burning a dwelling-house standing on land belonging to a woman with whom he is living but to whom he is not married, if there is evidence that the building was the property of the woman.

KNOWLTON, J. The building which the defendant was found guilty of burning, under Pub. Sts. c. 203, § 1, was a dwelling-house standing on land of Mary A. Burt. She and the defendant were not married, but they lived together in this house as husband and wife, with their children. The only exception in the case is to the refusal of the presiding justice to direct a verdict for the defendant on the ground that there was no evidence to sustain the allegation of property in Mary A. Burt.

The great weight of the evidence was in favor of the Commonwealth's contention that she owned the building, and it is doubtful whether there was any evidence which would have warranted a finding that the defendant owned it.* It is entirely clear that the judge could not properly give the instructions requested. *Webster* v. *Potter*, 105 Mass. 414. *Madigan* v. *McCarthy*, 108 Mass. 376. *Westgate* v. *Wixon*, 128 Mass. 304. *Howard* v. *Fessenden*, 14 Allen, 124. *Poor* v. *Oakman*, 104 Mass. 309.

Exceptions overruled.

D. E. Leary, for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

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* The bill of exceptions recited that the defendant built the house on the woman's land with her permission; that the lumber and other materials therefor were bought in the name of both, and paid for from the proceeds of a joint and several note signed by the defendant and Mary A. Burt under the name of Mary A. Brooks, which note was unpaid at the time of the fire, and that after completion the house was occupied by the defendant and Burt, although still unmarried, until the day of the fire.

COMMONWEALTH *vs.* VICTOR A. BOUVIER.

Worcester. September 30, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Allegations in an Indictment for Perjury.

If an indictment for perjury clearly alleges that the perjury was committed in the trial of a crime in a certain District Court, before the justice of that court, it is not necessary to allege that the court was then held for criminal business.

An allegation in an indictment for perjury that the defendant swore that he did not sign a complaint charging a person with keeping intoxicating liquor for sale without any license therefor, and that the name which was subscribed to it as complainant was not in his handwriting, includes an averment that he denied having signed the complaint as complainant.

INDICTMENT for perjury, the material portions of which are as follows: "That heretofore and at the time of the committing of the offence hereinafter mentioned, to wit, on the twenty-first day of February in the year of our Lord eighteen hundred and ninety-five, in the First District Court of Southern Worcester holden at Webster in said county of Worcester before Andrew J. Bartholomew, then and there being the justice of said First District Court of Southern Worcester, a certain complaint in which said complaint it was charged that George H. Dumas on the first day of July in the year eighteen hundred and ninety-four, at Charlton in said county, and on divers other days and times between that day and the third day of January in the year eighteen hundred and ninety-five, at Charlton in said county, without any license or authority therefor, did keep intoxicating liquor for sale, came on to be tried, and was then and there in due form of law heard and tried by and before the said Andrew J. Bartholomew, then and there being the justice of the said First District Court of Southern Worcester as aforesaid, upon which said hearing and trial . . . Victor A. Bouvier, . . . of Charlton in said county of Worcester, appeared and tendered himself as a witness in behalf of the Commonwealth, and was then and there sworn before the said Andrew J. Bartholomew, then and there being the justice of the said First District Court of Southern Worcester as aforesaid, and then and there having

sufficient and competent authority to administer the said oath to him the said Victor A. Bouvier . . . in that behalf that the evidence which the said Victor A. Bouvier . . . should give to the court then and there touching the matter then and there in question as to the said complaint, in which said complaint it was charged that the said George H. Dumas without any license or authority therefor did keep intoxicating liquor for sale as aforesaid should be the truth, the whole truth, and nothing but the truth; . . . that at and upon the hearing and trial of the said complaint as aforesaid, it then and there became and was a material question in said complaint whether he the said . . . Victor A. Bouvier . . . signed said complaint . . . as complainant; . . . that the said . . . Victor A. Bouvier, . . . being so duly sworn as aforesaid, and contriving and intending to prevent the due course of law and justice, and unjustly and unlawfully to cause and procure without right the acquittal and discharge of said George H. Dumas upon his said trial upon his said complaint, then and there on the said hearing and trial of the said complaint upon his oath aforesaid falsely, corruptly, knowingly, wilfully, and maliciously, before the said Andrew J. Bartholomew, then and there being such justice of the said First District Court of Southern Worcester as aforesaid, did depose and swear, among other things, in substance and to the effect following, that is to say, that he the said Victor A. Bouvier . . . did not sign said complaint . . . and that the name subscribed to said complaint as complainant was not his handwriting. Whereas in truth and in fact the said . . . Victor A. Bouvier . . . did, to wit, before John E. Kimball, a justice of the peace authorized to issue warrants and take bail, at Oxford in said county of Worcester on the second day of January in the year of our Lord one thousand eight hundred and ninety-five sign said complaint, in which said complaint it was charged that said George H. Dumas without any license or authority therefor did keep intoxicating liquor for sale as aforesaid, and then and there, before said John E. Kimball, justice of the peace as aforesaid, subscribe his name to said complaint as complainant in his own handwriting," etc.

In the Superior Court, before the jury were impanelled, the defendant filed a motion to quash the indictment, assigning

among other reasons therefor the following: "Because it does not affirmatively appear in said indictment that the offence, in the trial of which the perjury is alleged to have been committed, was an offence coming within the jurisdiction of the First District Court of Southern Worcester or of the justice thereof," and "because it is alleged in said indictment that it was a material question in said complaint whether said defendant did sign said complaint as complainant, also whether the signature to said complaint as complainant was in the handwriting of said defendant causing said indictment to be defective, in not clearly, plainly, and formally pointing out which question is material and relied upon by the Commonwealth as a basis for the assignment of perjury to a matter material to the issue in said court before said justice then and there being tried."

Dewey, J., overruled the motion, and the defendant excepted. The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. Haggerty, (*J. R. Kane* with him,) for the defendant.

H. Parker, District Attorney, for the Commonwealth.

ALLEN, J. 1. The act charged in the complaint against Dumas was a crime under the laws of this Commonwealth, and the indictment alleges that this complaint was tried in the First District Court of Southern Worcester, before the justice of that court. The indictment clearly alleges that the perjury was committed in the trial of a crime; and it was not necessary to allege that the court was then held for criminal business. Pub. Sts. c. 205, § 5. *Commonwealth* v. *Hatfield*, 107 Mass. 227, 230.

2. The indictment sets forth that the defendant swore that he did not sign said complaint, and that the name, which was subscribed to it as complainant was not in his handwriting. This includes an averment that he denied having signed the complaint as complainant.

Exceptions overruled.

ANDREW J. BANCROFT, trustee, *vs.* ANDREW L. FITCH & others.

Worcester. September 30, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Disposition of Vested Remainder.

A testator by his will gave the residue of his estate in trust for his son F., and provided that "anything remaining at his decease shall be equally divided among my three daughters." One of the daughters, B., died after the death of the testator, and F., the life tenant, died after the death of B. *Held*, that the remainder was vested, and that it should be distributed, one third each to the daughters, the third which would have gone to B. if living to go to her legal representatives so far as it was personal property, and to her heirs by the statute so far as it was real estate.

PETITION to the judge of probate of the county of Worcester, by the trustee under the will of Sophronia W. Fitch, to obtain the instructions of the court as to its construction. From the judge's decree, which appears in the opinion, Louisa M. Brigham and Harriet L. Wheeler appealed. Hearing before *Field*, C. J., who reserved the case for the determination of the full court. The material facts appear in the opinion.

W. S. B. Hopkins & F. B. Smith, (*C. G. Bancroft* with them,) for the appellants.

H. F. Harris & C. M. Thayer, for Bradbury M. Bailey.

BARKER, J. The testatrix died in the year 1884, leaving three daughters, Louisa M. Brigham, Harriet L. Wheeler, and Helen S. Bailey, the wife of Bradbury M. Bailey, and two sons, Francis G. Fitch and Andrew L. Fitch. Helen Bailey has died since the death of the testatrix, and Francis G. Fitch has died since the death of Helen S. Bailey. After making several bequests not now material, the testatrix disposed of the residue of her property in these terms: "I give, devise, and bequeath to my son Francis G. Fitch all the rest of my property that I die possessed of, both real and personal. The same to be held in trust by my said daughter Helen and her husband, Bradbury M. Bailey, for the support and maintenance of the said Francis G. Fitch, anything remaining at his decease shall be equally divided

among my three daughters." The decree appealed from ordered that the trust property not used for the support and maintenance of Francis G. Fitch should be distributed, one third each to the daughters, Louisa M. Brigham and Harriet L. Wheeler, and one third to the legal representatives of the deceased daughter, Helen S. Bailey.

The decree was right. The amount of the fund which might ultimately pass to the daughters of the testatrix was wholly uncertain, but such an uncertainty does not prevent the vesting of the right to share in the distribution. That the testatrix did not intend to treat her daughters as a class, the survivors only of which should share in the distribution, is evident not only from the words used, "shall be equally divided among my three daughters," which under the circumstances are equivalent to naming them, but also from the absence of any further disposition of the fund in case none of her daughters should survive the son for whose support the fund was first given.

We assume that the decree dealt only with personalty. If any portion of this residue was realty, the interest of Helen S. Bailey in it would of course go to her heirs by the statute.

Decree of Probate Court affirmed.

ELEANOR M. FORBES *vs.* AMERICAN INSURANCE COMPANY.

Worcester. September 30, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

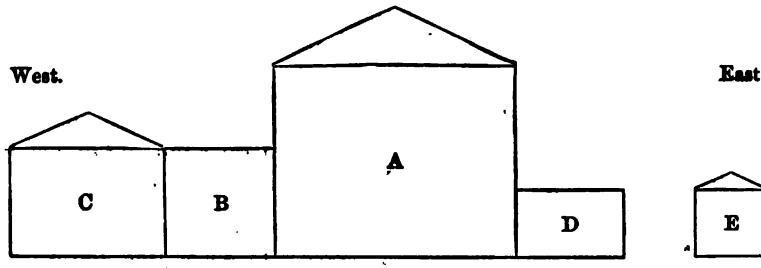
Fire Insurance — What included in Description of Structure insured.

At the trial of an action on a policy of insurance against loss by fire, in which the property insured is described as a "three-story brick building occupied as pottery, situate in E., known as the Pottery building," the contention of the plaintiff that another building subsequently built on the end of the Pottery building is covered by the policy cannot be maintained, if there is nothing in the policy to indicate that any other structure was intended to be covered than the one building explicitly designated.

CONTRACT, brought for the benefit of the Ware Savings Bank, the plaintiff's mortgagee, upon a policy of insurance against loss

by fire in which the property insured was described as a "three-story brick building, occupied as pottery, situate in East Brookfield, Mass., known as the Pottery Building." The case was submitted to the Superior Court, and, after judgment for the defendant to this court, on appeal, upon agreed facts, in substance as follows.

The main building was built in 1877, of brick, three stories high with slate roof, and about forty feet wide by sixty feet long. It was first used as a pottery about two years after it was completed. One or two years after its completion a boiler house of brick, one story high and about thirty feet wide by sixteen feet long, was built on the west end, and four or five years later this addition was extended sixteen feet farther west and built up another story, making it about thirty feet wide by thirty-two feet long and two stories high, all of brick. At or about the same time a two-story frame building was attached to the west end of this addition and sheathed on the outside with brick. The situation of the buildings is indicated on the following plan.



A, main building; B, two-story brick addition; C, box shop and yarn mill; D, kiln-house; E, storehouse.

At the time when the policy attached, and at the time of the fire, the three-story brick building was and for a long time had been leased to parties carrying on the business of manufacturing pottery and used for that purpose. They also used a frame kiln with iron roof attached to the east end of the three-story building, and for storage a frame building attached to or standing near the kiln.

The second floor of the brick addition on the westerly end of the main building was used to some extent by the pottery com-

pany and in its business for storage but not for manufacturing; and the first floor of the brick addition was used exclusively as an engine and boiler room.

The two-story building on the west of the brick addition was occupied by other tenants as a box shop on the first floor and as a yarn factory on the second floor. Power was furnished from the boiler room and the engine therein, to the box shop, the yarn factory, and the pottery, by the owner of the buildings. A door through the brick partition connected the box shop with the boiler room, through which shavings were passed to feed the boilers.

On December 11, 1891, a fire broke out in the box shop and consumed the same, and damaged the two-story brick addition and the three-story main building to the amount of $448.30. The damage was itemized by the appraisers as follows: "Boiler house, $440; main building, $8.30"; and it was agreed that the appraisal was to stand as the amount of damage done to said building and to the addition respectively.

There was other insurance on the property damaged by the fire to the amount of $4,500, so that the liability of the defendant company was one fourth of the total damage to the property insured by it.

The other policies of insurance described the property insured under them as follows. Two policies of $750 each, "On brick building, including all brick and frame additions to same, occupied as a pottery and situate in East Brookfield, Mass." One policy of $1,500, "On three-story brick and slate roof building, engine and boiler house and frame and iron roof kiln-house attached as a pottery, situate East Brookfield, Mass." One other policy of $1,500, "On three-story brick building occupied as a pottery situate in East Brookfield, Mass." All the policies were made payable in case of loss to the Ware Savings Bank, mortgagee, as its interests might appear, and they permitted other insurance.

At the time when the last named policy and the policy upon which the suit was brought were procured by the treasurer of the savings bank, neither he nor the agent of the companies had any knowledge of the other three policies above referred to. The mortgage of the bank covered all the buildings and additions mentioned in this statement.

It was agreed that the policy in question applied to the three-story brick building, called in the appraisers' report "main building," and the only controversy between the parties was whether the policy by its terms also covered the damages done to the two-story brick addition, called in the appraisers' report "boiler house."

It was further agreed, if competent, that a portion of the buildings, including the three-story building, for a long time before the issuing of the policy, had been known as the "Pottery building," and that the book of tariff rates of the Brookfield board of underwriters, which was in general use by insurance agents in that vicinity, and which fixed the rate upon the property, referred to the property damaged by fire as herein stated as follows: "Mrs. E. M. Forbes, 3 story Bk. & Fr. Mrs. E. M. Forbes, Boiler House adjoining Bk." But neither the treasurer nor the agent knew of the clause of the tariff above referred to.

If the policy covered the two-story brick addition, judgment was to be entered for the plaintiff for $112.12, with interest thereon from July 1, 1892; otherwise, judgment was to be entered for $2.08, and interest from July 1, 1892.

B. W. Potter, for the plaintiff.

H. E. Cottle, for the defendant.

BARKER, J. We are of opinion that the finding awarding damages for the loss on the three-story brick building only must stand, and that the judgment on the finding must be affirmed. The adjoining two-story brick building, which the plaintiff contends was also covered by the policy, was a building subsequently built on the end of the three-story building, with a separate roof, and it is not stated that there was access from one building to the other through the walls. The three-story brick building was exclusively occupied as a pottery, while one half of the other building was not so occupied. The policy purports to cover only one building, and the words "known as the Pottery building" do not of themselves, nor does anything in the policy, indicate that any other structure was intended to be covered by the risk than the one building explicitly designated. If the words "known as the Pottery building" would justify a finding that all which was so known was covered by the policy, there is

nothing which requires a finding that the two-story brick building was so known. The statement is merely that a portion of five buildings, including the three-story building, had been so known; and it is not stated that the portion so known included the two-story building. *Judgment affirmed.*

CALVIN H. HILL *vs.* COMMERCIAL UNION ASSURANCE COMPANY.

Worcester. September 30, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Fire Insurance — Authority of Agent — Permit for Repairs — Increase of Risk — Evidence — Waiver.

An agent of an insurance company, to whom the company had intrusted blank policies of the Massachusetts standard form signed by the proper officers, with authority to countersign and issue such policies, and also to grant permits for vacancies and for repairs by attaching written or printed permits to policies and sending copies thereof to the company, has no authority to bind the company by an oral agreement to grant such a permit.

If an agent of an insurance company, who has authority to grant permits for vacancies and for repairs by attaching written or printed permits to policies and sending copies thereof to the company, and who, having already granted such a permit for allowing insured premises to remain unoccupied, is told by the insured that he intends to make alterations in the premises and asked if the insurance is all right, and replies, "When the mechanics begin work we will put on a mechanic's permit," this implies that notice shall be given to the agent before the permit will be attached to the policy; and the fact that he, as the agent also of the insured in respect to caring for the property, had the policy in his hands, is immaterial.

In an action upon a policy of insurance, the assured cannot contend that, having obtained permission to do one of the things provided against in the policy, he may do another without permission, upon the assumption that it will not change the grade of risk.

Evidence of an unaccepted offer of compromise by an agent of an insurance company sent to adjust a loss is inadmissible, in an action upon the policy, for the purpose of showing a waiver of the defence that the risk was increased without the defendant's assent.

CONTRACT, upon a policy of insurance for $2,500, issued by the defendant on December 6, 1888, for the term of five years, against loss by fire on a building of the plaintiff in Gardner.

The answer set up an increase of risk without the assent of the defendant. Trial in the Superior Court, without a jury, before *Dewey*, J., who reported the case for the determination of this court, in substance as follows.

The building was totally destroyed by fire on February 10, 1893. Due proof of the loss was furnished to the defendants on October 3, 1893. The plaintiff, at the time of the fire, also held another policy on the same property issued by the Lancashire Insurance Company for the same amount.

The parties, failing to agree as to the amount of loss, by an instrument in writing submitted that question, pursuant to the terms of the policy, to three referees, who, after due proceedings had, made and published their award on June 27, 1893, wherein they determined the loss to be $5,551.

In 1892 and 1893, and prior thereto, the firm of Jewett and Chapin were engaged in Gardner in the business of insurance agents, and in that capacity during the period named acted for and represented the defendant.

They were intrusted by the defendant with blank policies, signed by the proper officers, which they countersigned and issued at their discretion, except that they did not fix the rates of premium.

They also had authority to give and attach to the policy written or printed permits, so called, in effect expressing the assent of the defendant that the building should stand unoccupied for a certain time, or that repairs, alterations, and changes be made therein, such as were going on in the building at the time of its destruction by fire, copies of the permits being always forwarded to the defendant.

In the course of business between the defendant and its said agents no distinction was made between vacancy permits and mechanic's permits, as to the authority of the agents, or as to charges to be made for the permits. It was the practice of Jewett and Chapin, known and assented to by the defendant, not to make any extra charge for vacancy permits or mechanic's permits when the rate of premium on the policy was one per cent or more, that is, as high as in the policy in suit.

Under the last vacancy permit, which had been issued and attached to the policy by Jewett and Chapin, the building had

stood unoccupied for some little time. It was a slate-roofed two-story wooden building, forty feet by fifty, with a basement and an attic, divided into rooms by wooden partitions. The rooms on the first and second story were few and large, and the partitions were of lath and plaster. Some time between January 1 and 10, 1893, the plaintiff made an oral contract with James Dean and another, contractors and builders, to change the building into a five-tenement dwelling-house, and to do all the work and provide the materials required therefor, the job to be completed by May 1, 1893. The work began about January 20. At the time of the fire the partitions had been torn out of the attic, some of the partitions had been taken down in the first and second stories, part of the floor on the first story was removed, and four holes for chimneys had been cut through the floors of the first and second stories. Much material derived from the work was piled in the basement or elsewhere in the building.

There was a stove in the basement with a fire in it for the benefit of the workmen laboring there. What had been done in and about the building by the contractors, including the accumulation of waste materials, was naturally and reasonably incident to the execution of the contract in the usual manner. It did not appear how or where in the building the fire which consumed it originated.

The judge found that, at the time of the fire, "by and with the knowledge, advice, agency, and consent of the insured the situation and circumstances affecting the risk had been so altered as to cause an increase of risk of injury or destruction of the building by fire, and this without any written or printed assent of the defendant, and without any assent by or in behalf of defendant, save as herein stated, if any."

In 1892 and 1893 Jewett and Chapin were also engaged in the real estate business, including the renting of property. They had acted and were acting for the plaintiff, in caring for and leasing the premises in question. Some six months before the fire the plaintiff had sent to Chapin his two insurance policies, and they continued to be in the hands of Jewett and Chapin at the time of the fire.

After the contract for changing the building was made, and before the work was begun, one Sawin, at the request of the

plaintiff, saw Chapin, and asked him if the insurance was all right, and told him they were thinking of changing or intending to change the building into tenements. Chapin replied that the policy was all right, that there was a vacancy permit on it, and further said, "When the mechanics begin work we will put on a mechanic's permit." Jewett and Chapin then had and retained the policy.

No notice was given to Jewett and Chapin that the work was begun. Chapin, in riding by the building, looked at it with the view of ascertaining the fact, but did not discover it, and there was no mechanic's permit, either written or printed, attached to the policy or otherwise issued. The agents did not know, at the time of the fire, that the work of repair or alteration had been begun.

One Brush, who was the special agent of the defendant, and one Berry, who was the special agent of the Lancashire Insurance Company, were sent to Gardner to adjust this loss.

The plaintiff offered to prove by one Heywood, for the purpose of showing a waiver by the defendant that Brush and Berry, while in Gardner soon after the fire, after having been informed by him in regard to the changes made in the building before the fire, made a proposition to pay to him as the attorney of the plaintiff $2,500 in settlement of the loss. This evidence was excluded, and the plaintiff excepted.

Upon these facts, the judge ruled that the plaintiff was not entitled to recover, and found for the defendant. If the ruling was wrong, the finding was to be set aside, and judgment entered for the plaintiff; otherwise, judgment was to be entered for the defendant.

T. B. Dunn, for the plaintiff.

F. P. Goulding, (*F. L. Dean* with him,) for the defendant.

ALLEN, J. The risk was increased under circumstances which would avoid the policy unless this defence is cut off by the acts of the defendant's agents. The agents had authority to grant permits for vacancies, and also for repairs, by attaching written or printed permits to policies and sending copies thereof to the defendant. They had already granted such a permit for allowing the building to remain unoccupied; and one of them had said to the plaintiff, "When the mechanics begin work we

will put on [to the policy] a mechanic's permit." But it was never in fact done, and the agents had not been informed and did not know that the mechanics had begun work. There is nothing to show that the agents had authority to bind the defendant by an oral agreement to grant a permit; *Parker* v. *Rochester German Ins. Co.* 162 Mass. 479, and cases cited; and moreover their promise as made implied that notice should be given to them before the permit should be attached to the policy. It was no present permit, and no agreement for a future permit, unless upon further notice. The fact that the defendant's agents, who were also agents of the plaintiff in respect to caring for and leasing the property, had the policy in their hands, is immaterial.

The plaintiff contends that adding the permit for repairs to the permit for vacancy would not change the grade of risk, and that the permit for vacancy therefore includes the permit for repairs, and that the assent of the defendant thereto is to be presumed. According to this argument, the plaintiff, on getting leave to do one of the things provided against in the policy, might do all the rest without permission. That cannot be.

The unaccepted offer of compromise creates no estoppel, and shows no waiver on the part of the defendant.

Judgment for the defendant.

THOMAS BROSNAN *vs.* HANS TRULSON.

Worcester. September 30, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Mechanic's Lien — Statute — Amendment of Statement.

If the petitioner to enforce a mechanic's lien, in filing his statement in the registry of deeds as required by statute, and in making his petition on which the hearing is had, alleges by a mistake that the contract under which he performed the labor for which the lien is claimed was made with the firm of H. & B., when in fact B. was not a partner and the contract was made with H. alone, the petition may be amended by striking out the name of B., and the error will not prove fatal to the claim.

PETITION, to enforce a mechanic's lien, under Pub. Sts. c. 191. Trial in the Superior Court, before *Aldrich*, J., who overruled the petitioner's motion to amend, and directed a verdict for the respondent; and the petitioner alleged exceptions, which were allowed by *Hopkins*, J. The facts appear in the opinion.

M. M. Taylor, for the petitioner.

C. W. Wood & C. H. Wood, for the respondent.

KNOWLTON, J. The petitioner in filing his statement in the registry of deeds, as required by the statute, for the purpose of preserving his lien, and in making his petition on which the hearing was had, alleged by a mistake that the contract under which he performed the labor for which he claimed the lien was made with the firm of Harris and Beford, when in fact Beford was not a partner, and the contract was made with Harris alone. The judge ruled that, if the petition were amended by striking out the name of Beford, the error in the statement would be fatal to his claim, and declined to allow the proposed amendment to the petition, not in the exercise of his discretion, but on the ground that such an amendment could do the petitioner no good. We think this ruling was erroneous. The Pub. Sts. c. 191, § 6, which require the filing of the statement, do not require that the particulars of the contract shall be set out except in those parts which are important in determining the rights of the parties, and the name of the person with whom the contract was made is not required to be stated. If it is stated, and if there is a mistake in it, innocently made, it does not affect the right of the petitioner to recover upon a petition which is correct in this particular.

Section 13 of this chapter of the Public Statutes provides that the petition shall contain a brief statement of the contract on which the petition is founded, with the amount due thereon. Under this section it may be necessary to set forth in the petition the name of the party with whom the contract was made. But the language differs materially from that of § 6.

Pub. Sts. c. 191, § 8, and St. 1892, c. 191, are intended to preserve the validity of the lien when the petitioner has made an innocent mistake in his statement in regard to any of the matters particularly specified which are required by the statute to be stated. It would be without warrant in the statute, and

contrary to the spirit of the law, to hold that an inaccuracy in stating a part of the contract not particularly required to be set out is fatal to the lien claimed. Practically, such a holding would often work great injustice, as apparently it would in the present case; for it is very proper to give the names of the contractors in the statement, and workmen often have no means of knowing the precise relations of the persons connected with the different departments of a business.

If the petitioner is permitted to amend his petition, the error in the statement will not preclude him from recovering.

Exceptions sustained.

PETER BAKER *vs.* HENRY L. TIBBETTS.

Worcester. October 1, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Evidence of Invitation to Place of Danger.

While, in an action for personal injuries, there may be contradiction in regard to the question whether the defendant's agent invited the plaintiff to the place of danger immediately before the accident, yet, if there is direct evidence to warrant answering the question in the affirmative, a verdict for the plaintiff will not be disturbed.

TORT for personal injuries occasioned to the plaintiff, on September 19, 1892, by the explosion of gas in the "Motor Building," in Lowell. At the trial in the Superior Court, before *Hopkins*, J., it appeared in evidence that on April 20, 1892, Warren Aldrich made a conveyance of various tracts of land including the "Motor Building," together with "all the fixed and movable machinery now in or about said building, including shafting, engines, and boilers, and all other articles fixed or movable now therein and connected therewith," to the defendant, as trustee for Aldrich. At the time of these conveyances there were in the basement two large boilers in which were stored "bisulphide of carbon," two steam engines, one of which was a Fitchburg engine, shafting, and a pit lined with brick or cement, about eight feet deep and about eighteen or twenty feet square,

through and around which ran a large number of iron pipes which were connected with the boilers, said boilers extending from the bottom of the pit to several inches above the surface of the floor of the basement, and forming a portion of one of the sides of the pit. There were also two condensers, one of which was about eight feet square, and extended from the bottom of the pit to a few inches above the surface of the floor of the basement, and formed a part of one of the sides of the pit.

The bisulphide of carbon in the boilers was drawn therefrom by means of valves situated about a foot above the bottom of the pit.

The plaintiffs introduced in evidence a lease of the "Motor Building" from the defendant by his agent, one Stearns, to one Sherman, and it was undisputed that Stearns rightly acted as agent for the defendant in making this lease, which was dated September 1, 1892, and was ratified by the defendant.

Sherman testified that, about the date on which the lease was executed and afterwards, he learned that bisulphide of carbon was stored in the boilers; that he was told by Stearns that it was dangerous to have any fire near it, and not to allow any smoking there; that in the talk he had with Stearns about removing the boilers, condensers, etc., it was settled that Stearns was to remove all he wished him to remove; that on September 19 Stearns was at work removing some of the machinery; that he noticed, several days before the accident, that the bisulphide of carbon was leaking from the boiler; that he said nothing to any one about seeing the bisulphide leaking until after the accident had occurred; that he would not state that anything was done in the way of moving the machinery from the Thursday prior to the accident until the following Monday, when the accident occurred; that on the date of the accident the plaintiff and one Ryan came into his office in the building in question to see him; that there was a staircase leading from his place down into the basement; that they started out of his office, went into the hallway and down the stairs into another hallway, and down another short flight of stairs into the basement; that there was a door connecting the stairs with the basement below, and the door was unlocked that morning; that they went into the basement and found a man who worked there by the name of Kelley, of whom

they inquired where Stearns was, and was informed that Stearns was outside in the yard; that they went out there and inquired of Stearns what part of the machinery he desired to leave in the basement, and Stearns said to them, "You come in and I will show you"; that thereupon all four went into the basement and along to the railing about the pit, and while standing on the condenser there was an explosion; that there was an agreement executed between Ryan and himself, on or before August 30, for a lease of the basement in question, to take effect on October 1 following; that at the time of making the agreement he informed Ryan that he could have the privilege of moving in any time before October 1, if the room was vacant and suitable to move into; that Stearns had nothing to say about their going into the basement on September 19; that he understood that there would be danger from having gas arising from the bisulphide come in contact with fire; that he said nothing to Baker or Ryan about the danger that would be likely to result, because they were talking about other matters, and he did not think anything about it; that he did not know whether the key retained by Stearns was a skeleton key or not; that he also himself had a key to the basement, and thought the key was left with Stearns to keep Warren Aldrich, who was a feeble old gentleman, out of the basement, and to keep other people out; that Stearns did not want anybody there interfering in his proceedings and taking the machinery out; that on the morning when he came down into the basement he did not suppose that he was included among the number that Stearns did not want in there, because he supposed that he had a right in there, and he did not care anything about what Stearns said, as he supposed that he had a right in the basement, and it was in the exercise of that right and that authority which he understood he enjoyed that he went down there that morning, and it was in the exercise of that right and authority that he allowed Baker and Ryan to go there.

Ryan testified that he went to Lowell some time in August, 1892, on the occasion on which the agreement was executed between himself and Sherman; that on that occasion he saw Stearns in front of the building and afterwards inside; that they arrived in the building between nine and ten o'clock in the morning; that he first saw Sherman and Stearns; that he met Sher-

man in the shop, and he mentioned that Stearns had something he wanted to leave in the pit there; that they went down stairs, through the door, and into the basement, and passed through the room out to the rear; that he thought Sherman spoke to some one working in the shop; that then they went out into the yard and saw Stearns there, who was working upon some pipes about twenty-five feet away; that they inquired of Stearns what he wanted to leave in the pit in the place, and he said some heavy pieces on account of the expense; that he was willing to floor it all over, and he would put them in one corner; that he said, "If you will come in, I will show you what I want left"; that he started in, and they followed over to the pit over the condenser, and while they were talking there was a flash; and that he went there again some time in October, and one Dobbins and his men were taking out the large condenser, and Stearns was helping move some pipes at the time, and heard Stearns give orders.

The plaintiff testified substantially as Ryan did with reference to what occurred on the date of the accident, and, further, that when he went into the building he had a lighted cigar in his mouth, but took it out and held it in his hand until he finished his business, and until the explosion occurred; and that he did not think that the cigar was lighted at that time.

Stearns testified that on the day of the accident there was bisulphide of carbon in the boilers, and that it had been there since 1885; that he saw Ryan and the plaintiff on September 19; that before the explosion he knew that the bisulphide of carbon, if mixed with air and a certain amount of heat, was dangerous, and if mixed with air would generate gas; that the liquid itself was not dangerous; that on the Saturday before the accident he thought he moved some iron from the basement, and on the Thursday before the accident he asked two men to go there and make arrangements to draw the bisulphide from the boilers; that he did not do anything about it himself, but was around there; that they quit on Thursday night after they had worked a part of the day, and that they drew one cask, or tank; that there was none spilled on the floor to his knowledge; that he did not look down in there; that he did what work was done on Saturday and Monday with the help of a man whom he em-

ployed; that at the time the accident occurred he was removing the pony brake, and was at work in the room taking the pony brake off the shaft when Sherman and Ryan came into the basement; that when he went in that morning both inside doors were locked; that Sherman had a key to the door; that he kept a skeleton key that unlocked all the doors to the building; that when he went into the basement that morning through the door, he locked it after him because he did not want anybody else coming in there while he was at work; that the door was locked when Sherman came in with the other man, and Sherman unlocked the door; that he did not make any agreement with Sherman with reference to removing any of the articles in the basement; that he had a talk with him, but made no agreement whatever; that the agreement was made between Sherman and another man, — not with himself; that he told Sherman before the accident to keep fire away from the basement, and not to smoke there or to allow any smoking, as he understood from what he had been told that, if any fire came anywhere within range of any gas, it would explode, and that he knew that a spark from a cigar, if it came in contact with this gas, was liable to cause an explosion; that he had no talk with Sherman about the moving of the articles except when he first came to him before August 30; that Sherman then asked him if the articles would be removed if they got a chance to let the building, and he told him whatever trade he made with Loren Aldrich, the son of Warren Aldrich, would be carried out in full; that the trade with reference to the removal of the property was, that they should remove whatever Sherman needed taken out in case he sublet the basement; that he did not have any other trade or talk with Sherman; that he worked for Warren Aldrich, and that he never worked for the defendant either as trustee or personally at any time in his life; that the defendant knew nothing of the material to be removed, and never did anything in the way of assuming control over it, and that he, Stearns, made the arrangement as to the men drawing off the bisulphide from the boilers at the request and under the direction of Loren Aldrich; that after Thursday evening there was nothing done until the work that he did on the morning in the removal of the pony brake; that he did not know anything about there being any

leak in the boilers down to the time or soon after the accident; that he did not know of any leak from the tank; that after the accident occurred he examined the tank to see whether any bisulphide that had been put into the tank had leaked out, and found that the tank was perfectly tight, and that none of the bisulphide sealed up by the parties had escaped; that Sherman never said anything to him about noticing any leak from the boilers, and on the morning of the accident he knew nothing about any leak from the boilers, and knew nothing of the existence of any gas in the pit; that after the accident he had nothing to do, directly or indirectly, with the removal of the bisulphide or machinery; that Dobbins and his men had charge of that, and the defendant did not have anything to do with it; that he was at work inside of the building, in the basement, when Sherman, Ryan, and the plaintiff came in; that he was not at work on the outside of the building, and had no work to do there; that he had a man there at work with him, one Kelley; that he did not observe any of them smoking when they came into the basement, and did not see either of them have a pipe or cigar; that he did not invite them, or either of them, to come into the building that morning; and that he did not speak to any of them in the back yard.

The defendant introduced in evidence a deed of the property from Warren Aldrich to the Marseilles Cotton Manufacturing Company, dated July 25, 1890, as evidence tending to show that the defendant Tibbetts did not have title to the property, and did not assume any control of it, but there was no evidence that the company ever took possession of the property or exercised any control over it; and also introduced as a witness Thomas Kelley, who testified that he was the Kelley who was at work in the basement assisting Stearns on the morning of the accident; that he saw Ryan, Sherman, and the plaintiff come down stairs into the basement; that Baker had a lighted cigar in his hand; that he saw the smoke as it issued from the end of it; that Stearns was inside in the basement when they came in, and was at work with him in the room; and that from the time when they came in until the explosion they did not go outside at all.

At the close of the evidence the defendant requested the judge to rule that there was no evidence tending to show any liability

on the part of the defendant, and to direct a verdict for the defendant.

The judge refused so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. F. Corbett, for the defendant.

W. Thayer, (*H. W. Cobb* with him,) for the plaintiff.

KNOWLTON, J. At a former hearing of this case it was held that there was evidence tending to charge the defendant with liability for the accident which happened to the plaintiff. *Baker* v. *Tibbetts*, 162 Mass. 468. At a second trial, before a jury, at which these exceptions were taken, there was evidence for the plaintiff upon each of the points referred to in the opinion of this court as grounds of recovery against the defendant. While there was much contradiction in regard to the question whether Stearns, the defendant's agent, invited the plaintiff to the place of danger immediately before the accident, there was direct evidence to warrant answering it in the affirmative. It was undisputed that Stearns rightly acted as agent for the defendant in making the lease, and there was evidence tending to show, on the grounds stated in our former opinion, that in a legal sense he represented the defendant in what he said and did in regard to the removal of the bisulphide of carbon.

The evidence of his conduct subsequently to the accident, as well as before it, taken in connection with his admitted authority to execute the lease, and with the evidence of ratification by the defendant, and with his denial that he made an agreement with Sherman to remove any articles from the basement, was competent as tending to show his relation to the business of removing the bisulphide of carbon.

Exceptions overruled.

CALVIN FOSTER & others *vs.* CITY OF WORCESTER.

Worcester. October 1, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Eminent Domain — Authority by Statute to build a City Hall upon a City Common.

Leave to build a city hall upon the common in Worcester was impliedly given by St. 1885, c. 139, authorizing the city to take the interest of the First Parish in the common, and such leave was not affected by the use of the site of the meeting-house as part of the common after the removal of the building, nor by leave granted to the city to withdraw a subsequent petition for express authority.

PETITION IN EQUITY, under Pub. Sts. c. 27, § 129, filed July 20, 1895, by ten taxable inhabitants of the city of Worcester, to restrain the city council, the mayor, treasurer, and all other officers of the city, from carrying out the orders of the city council as to erecting a city hall upon the "Old Common," so called, without leave of the Legislature.

Hearing on the pleadings and agreed facts before *Allen*, J., who entered a decree dismissing the bill, and reported the case for the determination of the full court. The facts appear in the opinion.

F. P. Goulding & T. G. Kent, (*H. F. Harris* with them,) for the petitioners.

W. S. B. Hopkins, for the respondent.

BARKER, J. The erection of the proposed city hall is forbidden by the provisions of Pub. Sts. c. 54, § 16, unless the Legislature has given leave to place it upon the common. The respondent contends that St. 1885, c. 139, gives such leave, and the case turns upon the construction to be given to that statute.

The common is oblong, nearly rectangular, containing about seven acres of land, with a frontage upon Main Street of about three hundred and forty-four feet. Nearly in the centre of this frontage and some fifty feet back from the street formerly stood the Old South Meeting-house, which in the year 1885 was the place of worship of the First Parish of Worcester. This building was about fifty-five feet wide and about one hundred and twenty

feet long. In the corner of the common, between the meeting-house and Front Street, was the present city hall, a brick building of about the same size as the meeting-house and about sixty feet from it, and quite near to Front Street, and nearer to Main Street than the meeting-house. The city hall and the meeting-house were so placed that the longer axis of the former was at a right angle to Main Street and that of the latter parallel with it.

The St. 1885, c. 139, gave no express leave in terms to build a city hall upon the common, but authorized the city to acquire by purchase or to take all the title and interest of the First Parish in the common "for the purposes of a public park, or for the purposes of a city hall." In the exercise of this authority, all the title and interest of the First Parish were taken by the city in the year 1886, "for the purposes of a public park and for the purposes of a city hall," some $115,000 were paid to the parish as compensation for its title and interest in the common, and the meeting-house was sold by the city to a purchaser, who removed it the next year, after which the city removed the foundation walls. Since the year 1882 the common has been under the supervision and control of the city's park commissioners, and since the meeting-house has been removed the land taken from the parish has been under the control of the commissioners, and has been graded and turned into greensward on a level with the surrounding common, and it so remains.

So far as leave from the General Court was necessary, the St. 1885, c. 139, must be held to have given permission to use the common for any purpose for which the statute gave authority to take the title and interest of the First Parish. If the words "or for the purposes of a city hall" in the first section of the statute mean the erection of a new city hall, leave to place it upon the common is included in the enactment. A city hall must have an area upon the ground of more than six hundred square feet, and leave to erect the building is an essential accompaniment of the authority to take the title and interest of the parish, without which the authority to take for the purposes of a city hall would be useless, if not invalid. It is clear from the plan, the pleadings, and the agreed facts, that the Legislature did not authorize the city to take the old meeting-house in order to use the build-

ing for a city hall, and that neither the old meeting-house nor the land under it, nor the interest of the parish in the old common, were in any way essential to the use of the present city hall. Yet the statute was one which authorized the exercise by the city of the right of eminent domain, and for each of the purposes specified the Legislature must have found a public necessity sufficient to call for the passage of such a statute. The erection of a new city hall upon ground which was at once an old common and a public park would be such a public use as would justify the passage of the statute.

In our opinion, the reasonable construction of St. 1885, c. 139, is that by it the Legislature gave to the city authority to acquire the title and interest of the parish in the common for the purpose of building there, in a public park, a new city hall, suitable in size, location, and construction for the needs of the city, and in so doing, by a necessary implication, gave the leave contemplated in Pub. Sts. c. 54, § 16.

The statute contains no limit of time within which the leave thus impliedly given must be availed of, and we see nothing in the control of the common by the park commissioners of the city, nor in the removal of the meeting-house and its foundations and the grading of the ground and using it as part of the common or park, to require the granting of a new leave. The giving leave to withdraw when the city asked express leave of the Legislature may well have been upon the theory that no further permission was required, and cannot be treated as a withdrawal of leave previously given.*

Decree affirmed.

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* The bill alleged: "The General Court has never granted leave to said city, as required by Pub. Sts. c. 54, § 16, so to place said building upon said Old Common, but on the contrary, on a petition duly presented to said General Court within one year prior to the filing of this petition, refused to give said leave."

JAMES MELANEFY vs. MARGARET M. O'DRISCOLL.

Worcester. October 1, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Reasonableness of Payments by Guardian to Ward's Mother.

The reasonableness of payments by a guardian to the mother of the ward, who is a minor, for board furnished the ward, and for the kitchen fire, which was the only fire furnished the ward, may be determined on the guardian's accounting, and a finding in his favor will not be disturbed if it was warranted by the evidence.

APPEAL from a decree of the Probate Court, allowing the first account of James Melanefy, guardian of Margaret M. O'Driscoll, a minor. The case was heard by *Barker*, J., who affirmed the decree of the Probate Court. The appellant by her next friend appealed therefrom, and the justice at her request reported the case to the full court for its determination upon the following questions.

The allowance of item 4 of the account was objected to. This item was a charge for $122.25, paid to the mother of the ward for thirty-five weeks' board. It appeared that the accountant was, on July 5, 1889, appointed guardian of the ward, who was about twelve years of age; that her only property was an undivided one-sixth interest in some real estate, which was afterwards sold for $2,602.65; that the income of the whole estate belonged for life to one Mary O'Driscoll, who died on May 17, 1889, and that the ward's estate was a vested remainder after this life estate; that the board was furnished the minor, with the exception of six weeks before the appointment of the guardian, and that the larger portion of the bill accrued before the death of the life tenant; that the payment was made without any order of the Probate Court, or any request from anybody save the mother; that, if the accountant had the right under these circumstances to reimburse the mother, her payment was reasonable in amount, and that the real estate was sold on July 31, 1889, and the bills charged in the account were paid from the proceeds of the sale of the ward's interest therein.

The appellant also objected to the allowance of the following items.

Number.	Date.		
7	1889, Oct. 2,	Cash, board, and coal,	$31.50
39	1891, June 6,	Wellington, coal,	6.75
40	" July 1,	Board and coal,	35.00
48	1892, Feb. 1,	Coal,	18.75
63	1893, Feb.,	Coal and board,	40.00

It appeared that these items, which were paid without any order of the Probate Court, were payments made by the guardian to the mother of the ward, for coal for the kitchen fire, that being the only fire kept by the mother, and no other fire being furnished for the ward. In the opinion of the presiding justice, all the charges for payments by the accountant to the mother were reasonable, when considered together.

If the rulings allowing items 4, 7, 39, 40, 48, and 63, or any of them, or any portion of them, were not warranted, the decree of the Probate Court was to be modified, and such of said items as should be disallowed stricken out; otherwise, the account was to stand in its present form, and the case was to be remanded to the Probate Court for further proceedings.

F. M. Morrison, for the appellant.

J. E. Sullivan, for the guardian.

ALLEN, J. Even if it were assumed that a widowed mother is under the same obligation to support her minor children as a father would be, an allowance may nevertheless be made to her towards such support from the estate of a child who has property; and if she herself were the guardian, such allowance might be made in the settlement of her accounts. *Dawes* v. *Howard*, 4 Mass. 97. In this instance, another person was appointed guardian; and the reasonableness of his payments to his ward's mother may be determined on his accounting. It is a question of fact, and has been found in his favor, provided such finding was warranted upon the evidence. It was not necessary to obtain an order of court before making the payments. The amount of property of the mother is not stated. Upon the facts reported, we cannot say that the allowance was unreasonable. The appellant suggests that the mother did not originally intend to charge anything against her daughter. But this does not so appear by the report. *Decree affirmed.*

HUGH HICKS *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

HUGH HICKS, administrator, *vs.* SAME.

Worcester. October 1, 1895. — October 17, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Personal Injuries — Railroad — Grade Crossing — Due Care — Negligence — Trial — Action — Exceptions — Evidence.

If a person riding in a large covered gypsy wagon having windows in the sides, and drawn by two horses at the rate of four or five miles an hour along a highway in a town crossed at grade by a railroad, stops his team about one hundred and fifty feet from the crossing to look and listen for a coming train, the view of the railroad being obstructed for a part of the way, and sees and hears none, and knows that the crossing is equipped with electric bells to warn travellers of the approach of trains, which on this occasion were not ringing, and then enters upon the railroad and is struck by a train and injured, although if he had continued to look after starting onward he could have seen the train before reaching the crossing, in an action against the railroad corporation for his injury the question of his due care is properly submitted to the jury

In an action against a railroad corporation for injuries caused by a collision with a train at the crossing at grade of a highway by the railroad, if the evidence shows that the crossing was very dangerous, being in a thickly settled town and a view of the railroad being obstructed for a part of the way in approaching the crossing, and that the train was running at the rate of over forty miles an hour, and ran three or four hundred feet beyond the crossing before it was stopped, the jury may find that the defendant was negligent in running the train at an unreasonable speed at that place, and in not placing a flag, gates, or other guards there.

The failure of electric bells at the crossing at grade of a highway by a railroad to ring at the approach of a train is evidence of negligence of the railroad corporation in an action against it for injuries caused by a collision with the train at the crossing.

Whether a boy ten years old, who was driving a pony team immediately behind a large wagon drawn by two horses driven by his grandfather, who, as he approached the crossing at grade of the highway by a railroad, stopped his team when his grandfather stopped the other team for the purpose of looking and listening for a coming train, and who then followed that team upon the track and was struck by a train, was in the exercise of due care, is a question of fact for the jury in an action against the railroad corporation.

If the judge presiding at a trial gives full and sufficient instructions, which enable the jury to understand the law applicable to all branches of the case, it is not a ground of objection that he declines to take each fragment of the testimony and to state a conclusion of law applicable to a possible finding founded upon it.

An action against a railroad corporation, under Pub. Sts. c. 112, § 212, for causing the death of a person, cannot be maintained upon proof of negligence of the defendant's servants, without proof that the negligence was gross.

A point not taken at the trial is not open upon a bill of exceptions.

Although the counts of a declaration in an action against a railroad corporation for causing the death of a person are imperfect, the action must be deemed to have been brought under Pub. Sts. c. 112, § 212, and not at common law.

If evidence, which is admitted at a trial in the expectation that it will be followed by other evidence which is not subsequently offered, is withdrawn from the jury, and both parties are informed of such withdrawal, and make their arguments upon that understanding, its admission affords no ground of objection.

TWO ACTIONS OF TORT. The first case was an action to recover for personal injuries to the plaintiff, and for injuries to his property, by a collision with a train on the defendant's railroad at the crossing at grade of a highway in Northbridge by the railroad. The second case was an action to recover, as administrator of her estate, for the death of the plaintiff's wife, who was killed by the same accident. The cases were tried together in the Superior Court, before *Aldrich*, J.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions, which were allowed by *Sherman*, J., after the death of *Aldrich*, J., and which appear in the opinion.

F. P. Goulding & C. F. Choate, Jr., for the defendant.

W. S. B. Hopkins & W. Thayer, (*H. W. Cobb* with them,) for the plaintiff.

KNOWLTON, J. The presiding justice could not properly direct a verdict for the defendant in either of these cases. There was evidence in favor of the plaintiff upon the question whether he was in the exercise of due care. The evidence tended to show that the crossing on which he was injured was very dangerous. As the highway and the railroad approach each other going northward toward the crossing, they run for a considerable distance almost in the same direction, and a part of the way a house and other objects make it impossible for a traveller on the highway to see a coming train. The civil engineer called by the defendant testified that at a point southerly on the highway one hundred feet from the nearest rail as you approach the crossing, you can see down the track to the southward five hundred feet, and that at a point fifty feet farther from the crossing for a distance of three hundred feet

the view of the track is obstructed by the house and a hill. The plaintiff testified that he stopped about one hundred and fifty feet from the crossing, and looked to see if a train was approaching and saw none, and listened and heard none; that he then drove on and was struck by the locomotive. It appeared that he knew that the crossing was equipped with electric bells to warn travellers of the approach of trains, and he testified that the bells were not ringing. His testimony upon the question whether he looked after starting onward was indefinite, and somewhat contradictory. It appeared that, if he had continued looking, he could have seen the train before reaching the crossing. The locomotive engineer testified that the train was then running at the rate of a little more than forty miles an hour. The plaintiff and his wife, sitting on chairs, were riding in a large covered gypsy wagon with a leather top which extended forward to the front of the wagon, and which had in it large windows of clear glass in the sides, right opposite the chairs, and another window in the rear. He testified that he was driving at about four or five miles an hour. Under these circumstances it cannot be said, as matter of law, that the plaintiff was not in the exercise of due care. He was quite near the crossing when he stopped and looked and listened. His conduct after he started forward might properly be affected to some degree by the fact that the electric bells were not ringing. There was more or less difficulty in seeing from his seat in the wagon, as he drove along, whether a train was coming on his left from behind him, and the care of his horses necessarily occupied some of his attention. We think the case was properly left to the jury to determine whether he exercised such care as ordinarily persons are accustomed to exercise under like circumstances.

The speed at which a train may be run without negligence depends upon the dangers attendant upon running it. Upon a good road with proper equipments, over which there are no crossings where persons are liable to be in peril, it may safely be run very fast; but in a thickly settled town where there are frequent grade crossings of streets at which the view of the track on each side is obstructed by houses, it would be negligent to run rapidly. In view of the nature of this crossing and the

amount of travel over the highway, of which the jury could judge somewhat from their view, we cannot say that the circumstances of the accident, the distance which the train went before it was stopped,* and the testimony of the engineer, did not furnish evidence from which the jury might have found that the train was running faster than was reasonable at that place. For the same reasons, in view of the evidence indicating the rate of speed at which the defendant was accustomed to run trains there, we are unable to say that there was no evidence from which the jury might have found that it was the duty of the defendant to place a flag, gates, or other guards at the crossing. *Hubbard* v. *Boston & Albany Railroad*, 162 Mass. 132. *Eaton* v. *Fitchburg Railroad*, 129 Mass. 364. If trains are to be run at great speed, proper precautions must be taken for the protection of travellers at peculiarly dangerous crossings of highways. With such precautions, the rapidity of passing trains will not alone constitute negligence.

It cannot be said that the failure of the electric bells to ring at the approach of the train was not evidence of negligence of the corporation. The request to rule to that effect was made in the case of the plaintiff suing personally, and in that action the defendant was liable for the negligence of its servants, to the same extent as for its own. The evidence tended to show that, if the apparatus had been kept in proper condition, the bells would have rung as the train approached. Their unexplained failure to ring was therefore some evidence of negligence on the part of the corporation or its servants. *White* v. *Boston & Albany Railroad*, 144 Mass. 404. *Mahoney* v. *New York & New England Railroad*, 160 Mass. 573. *Hennessy* v. *Boston*, 161 Mass. 502.

The evidence in regard to the care of the boy of ten years of age, who was the plaintiff's grandson and was driving the pony team immediately behind the plaintiff's wagon, is very slight, but we are unable to say that there was nothing to submit to the jury on that point. It appears that he was close behind the plaintiff's wagon, and the circumstances warrant an inference that he was expected to be governed in his conduct to some

* The engineer testified that the train ran three or four hundred feet beyond the crossing before it was stopped.

extent by the management of the team just before him. If the pony had been hitched to the hind part of the plaintiff's wagon it would not be contended that the boy was to be judged as if he had been driving with no other team in his company. There was evidence that the pony team stopped when the plaintiff stopped. If the jury found that the plaintiff was in the exercise of due care in his management of the team which he was driving, and that the boy ten years old was a suitable person to be intrusted with the pony team just behind the other, as we think they might, we are of opinion that they might also find that the boy exercised such care in driving as ordinarily careful boys of his age are accustomed to exercise under like circumstances.

All the rest of the defendant's requests for instructions which were refused by the court, so far as they were correct in law, called for specific directions in regard to possible findings from particular parts of the testimony upon a single issue. It is largely a matter of discretion for the presiding judge as to how far he will discuss different phases of the testimony upon a particular subject and give specific instructions, each founded upon only a part of the testimony bearing upon the subject. If he gives full and sufficient instructions, which enable the jury to understand the law applicable to all branches of the case, it is not a ground of objection that he declines to take each fragment of the testimony and to state a conclusion of law applicable to a possible finding founded upon it. *McDonough* v. *Miller*, 114 Mass. 94. *Tatterson* v. *Suffolk Manuf. Co.* 106 Mass. 56. *Gunnison* v. *Langley*, 3 Allen, 337. *Murray* v. *Knight*, 156 Mass. 518. *Neff* v. *Wellesley*, 148 Mass. 487. In this case the instructions upon these subjects were full and clear, and the defendant has no reason to complain of them.

In the action by Hicks as administrator the defendant requested the court to instruct the jury as follows: "There is no allegation in the first count on which a verdict can be rendered for the plaintiff. The count does not allege any carelessness or negligence of the corporation, nor any unfitness or gross carelessness of its servants or agents." The stenographer's report of the charge upon this part of the case leaves us in doubt as to what was said by the judge in regard to it. The exceptions

were allowed by another justice after the death of the judge who presided at the trial, and if the report of the charge was imperfect, there was apparently no correction of it. This instruction could not properly be given, for the count charges negligence of the corporation in failing to furnish proper signals or bells at the crossing, and in failing to protect the crossing, by proper guards or a flagman. In reference to the other negligence alleged in it the count was defective in failing to charge that there was unfitness or gross carelessness of the servants or agents of the corporation. We have a report of the whole charge upon the question of liability, and as we understand it the judge submitted both actions to the jury under the same rules in regard to the liability of the defendant for the carelessness of its servants. They were permitted in this action, as well as in the other to find for the plaintiff upon the first count, if there was negligence of the defendant's servants, without proof that the negligence was gross. This was error. Pub. Sts. c. 112, § 212. The defendant excepted to this part of the charge, and its exception must be sustained.

It is contended that the declaration in this action is defective in not alleging that the plaintiff's wife left next of kin for whose benefit there might be recovery under the statute. See *Commonwealth* v. *Eastern Railroad*, 5 Gray, 473. But this exception is not open to the defendant in this court, inasmuch as it was not taken in the court below.

It is also contended that this action must be treated as not brought under the statute, but at the common law, inasmuch as neither count of the declaration contains allegations which ought to be found in an action under the statute. But the common law recognizes no right of action in a case of this kind, and, although the counts are imperfect, we think the action must be deemed to have been brought under the statute.

We are of opinion that the withdrawal from the jury of the evidence of the action of the selectmen in writing a letter to the defendant about seven months before the accident, requesting it to maintain a flagman and lights at the crossing, leaves the defendant without a legal ground of objection to the admission of it. It appears from the charge, that at the time of its admission the court expected that it would be followed by other

evidence which was not subsequently offered, and both parties were informed that it was withdrawn from the jury, and they made their arguments with the understanding that it was not in the case. We do not see that it was so prejudicial to the defendant in its effect as to require us to grant a new trial.

If there was error in the original instructions in regard to gross negligence the error was corrected, and the jury were properly instructed soon afterwards. In the first case, the exceptions must be overruled, and in the second case, they must be sustained. *So ordered.*

ELIZA C. MILLARD, administratrix, *vs.* INHABITANTS OF EGREMONT.

Berkshire. September 10, 1895. — October 18, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Town — Withdrawal by School Committee of Approval of Attendance of Resident at High School in another Town — Right of Parent of Pupil to Notice of Withdrawal — Action for Tuition — Statute — Damages.

The school committee of a town not required by law to maintain a high school may withdraw its approval, given under St. 1891, c. 263, of the attendance of a child residing in that town at the high school in another town, and the child's parent is entitled to due notice of such withdrawal.

A person residing in a town not required by law to maintain a high school, who, having obtained the approval of the school committee of that town, sends his child to the high school in another town, may, after the withdrawal of such approval, the withdrawal not being for misconduct of the child, maintain an action against the former town, under St. 1891, c. 263, to recover the sum paid by him to the latter town for the tuition of the child before he has been notified by the committee of such withdrawal. If the tuition is payable by the term, he is entitled to recover the amount paid for the whole term during which he is notified of the withdrawal; but if the tuition is payable by the day, he is entitled to recover only the sum payable at that rate from the time when the approval is withdrawn to the time when he is notified by the committee of that fact.

MORTON, J. This is an action brought by the plaintiff under St. 1891, c. 263, to recover of the defendant money paid by her intestate to the town of Great Barrington for tuition for his daughter in its high school after March 22, 1892, when the school committee of the defendant town passed a vote withdraw-

ing the approval which it had previously given to the attendance of the intestate's daughter at said school. It is agreed that there was no misconduct on the part of the daughter.

The plaintiff contends that the school committee, having once given its approval, could not withdraw it except for misconduct on the part of the pupil, and that the daughter of the intestate was entitled to pursue the studies on which she had entered until her graduation in due course, which it is said in the plaintiff's brief would have been in June, 1895. She further contends that, if this is not so, the defendant is liable for the amount paid for tuition for the term on which the daughter had entered at the time when her intestate first learned of the action of the school committee, or at least that it is liable for the amount paid down to such time.

The object of the statute appears to be to provide a way in which a child living in a town which is not obliged to maintain, and which presumably does not maintain, a high school, may attend one in a neighboring city or town at the expense of the town where he resides, and it seems to be an extension of Pub. Sts. c. 47, §§ 6, 8. There is nothing in the act of 1891 or in the substituted act of 1894, c. 436, which obliges a town that is not required by law to maintain a high school to provide for the attendance of children living in it at a high school in another city or town, or which obliges any city or town to receive into its high school upon the payment of reasonable tuition children living in a town where there is no high school. There is no such provision elsewhere. Cities and towns are bound to furnish within their respective limits "schools for the instruction of all the children who may legally attend public school therein," (Pub. Sts. c. 44, § 1,) but they are not obliged to provide for the attendance of such children at schools elsewhere. In certain cases two adjacent towns, or two or more contiguous districts in adjoining towns, may unite and maintain a school for the common benefit of children in said towns or districts, or children living remote from any public school in the town where they reside may be allowed to attend school in an adjoining town under such regulations and on such terms as the school committees of said towns agree upon, or they may, with the consent of the school committee, attend schools in towns or cities other

than those in which their parents or guardians reside. Pub. Sts. c. 44, §§ 8, 10; c. 45, §§ 51, 52; c. 47, §§ 6, 8. But these matters are left to the decision of the school committees or of the towns and districts interested. The St. 1894, c. 436, remedies an omission in St. 1891, c. 263, by providing that no member of a school committee, except in a certain case, shall refuse his approval if a child is qualified to enter the high school in another city or town, and that if a school committee unreasonably refuses to grant its approval the town shall be liable to the same extent that it would have been if the approval had been obtained. But, as already observed, neither this statute nor that of 1891 imposes on a town where there is no high school an obligation to provide for the attendance in a high school elsewhere of such of its children as are qualified to attend a high school. To hold, therefore, even though St. 1891, c. 263, made no provision for the withdrawal of an approval, that the town would be obliged, when the approval was once given, to pay for the attendance of the pupil until the course on which he or she had entered was completed, would be giving to the statute, we think, a construction which could not have been intended by the Legislature. The approval would be presumed, no doubt, to continue till withdrawn. Although the members of the board might change, the board itself from the manner in which it was constituted, one member being elected annually, would be a continuing body, and its approval might well be assumed by all interested to continue till revoked by subsequent action. *Fairbanks* v. *Fitchburg*, 132 Mass. 42, 44. *Collins* v. *Holyoke*, 146 Mass. 298. It manifestly would be for the school committee, under the general powers vested in it by statute, and not for the town, to say whether the approval should or should not be withdrawn, or whether any further approval should be given. Pub. Sts. c. 44, § 21. *Kimball* v. *Salem*, 111 Mass. 87.

When, in case of the withdrawal of the approval, the withdrawal should take effect, and when and to whom notice of it should be given, are matters in regard to which there is no provision either in St. 1891 or in that of 1894. In the present case notice was given, immediately by the school committee of Egremont to that of Great Barrington; but no notice was given to the plaintiff's intestate till a few weeks later, and, as we infer,

not until after his daughter had entered upon a term in the Great Barrington high school. It was reasonable that notice of its action should be given by the school committee of Egremont not only to the school committee of Great Barrington, but also to the parent of the scholar. It was only upon his application that the approval originally was granted. Under his application and the approval given in consequence of it, the town became liable for the tuition. There was no liability resting upon him. Before he could be held liable for tuition, it should appear that he had had due notice of the withdrawal of the approval, and an opportunity, if he saw fit, to discontinue the attendance of his daughter. We also think that, if the tuition was payable by the term, the notice should have been given so as to take effect either at the end of a term or before the beginning of one, and that if it was given after the daughter of the plaintiff's intestate had begun a term's attendance the plaintiff can recover the amount paid for tuition for such term. If the tuition was payable at a *per diem* rate, then we think that the amount to be recovered would be the sum payable at that rate from the time when the approval was withdrawn to the time when the plaintiff's intestate received due notice from the committee of its withdrawal.

The agreed facts are somewhat ambiguous as to the disposition to be made of the case. But we construe them as meaning that, if the plaintiff is entitled to recover at all, though for a less amount than that found due by the court, she is to have judgment accordingly.

The finding of the court, which was for the whole amount claimed, will, therefore, be set aside, and the case stand for hearing on the question of damages to ascertain the amount due according to the rule above stated, and when duly found judgment will be entered therefor.

H. C. Joyner, for the defendant.

A. C. Collins, for the plaintiff.

ISAAC R. CLARK *vs.* BOSTON AND MAINE RAILROAD.

Hampshire. September 17, 1895. — October 18, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Railroad — Grade Crossing — Due Care — Negligence — Law and Fact — Trial.

There is no absolute rule of law that a traveller approaching the crossing at grade of a highway by a railroad must, under all circumstances, stop to look and listen for a train before entering upon the railroad.

The fact that a traveller approaches with a team the crossing at grade of a highway by a railroad at a trot with a heavy load does not of itself render his conduct negligent, it not appearing, in an action by him against the railroad corporation for personal injuries occasioned by being struck by a train, that he could not have stopped if he had had reasonable notice of the coming train.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff by being struck by a train at the crossing at grade of a highway by the railroad, it is for the jury to say what was the object of a flag suspended over the railroad track from the gate tower, and whether its presence had or should have had any effect upon the conduct of those in control of the train, or of the gateman.

In an action against a railroad corporation for personal injuries, if the plaintiff puts in evidence a rule of the corporation relating to danger signals, and the defendant afterwards puts in a later rule which was in force at the time of the accident, it is competent for the judge to allow the plaintiff to withdraw the rule put in by him, and to direct the evidence relating to it to be stricken out and to be disregarded by the jury.

TORT, for personal injuries occasioned to the plaintiff, by being struck by a train at the crossing at grade of a highway by the defendant's railroad in Northampton, through the alleged negligence of the defendant. Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff contended that the defendant was negligent because the gates at the crossing were not closed when a train was about to cross the highway, because the engineer gave no seasonable warning signals, because the gate-keeper nodded to him, which he took to be an invitation to cross, and because the defendant had by its employees put out a red flag on the easterly side of the gate-keeper's tower at a point about nine feet from the ground, and by the side of and over the track on which the

train passed, which flag was a signal to the engineer of the incoming train to proceed slowly or stop his train, and this signal was not observed and obeyed, but the train approached the crossing at a rapid rate of speed, and at the same time the gateman, relying upon this flag to stop the train, did not attempt to put down the gates.

The plaintiff offered evidence tending to show that he was approaching this crossing from the west, with a load of hay weighing about one ton and drawn by a pair of farm horses; and that he approached at a moderate speed, and watched and listened for any approaching train, and did not see or hear any until he was upon the tracks, when he was struck by a passing train and received the injuries complained of. The train was going south on the track next east of the gate-tender's tower. The gates were up when the plaintiff approached and entered upon the crossing. The evidence was conflicting on the question whether the gate-keeper made any attempt to close the gates.

There was evidence tending to show that the gates were partly lowered as the plaintiff drove under the westerly gate. The gate-keeper testified that he started to lower the gates as soon as he saw or learned of the approach of the train, and as soon as its approach could be known from the tower where he watched; and that the only reason he did not lower the gates clear down was because the plaintiff's team was under the westerly gate before there was time to get them down.

The defendant offered evidence tending to show that the gate-keeper from his tower could see the approaching train eleven hundred feet away; that a traveller on the highway approaching as the plaintiff did could see the train when it was twelve hundred and seven feet away; that for a distance of one hundred feet from the track, where the street is descending, the plaintiff approached with his horses trotting at a rate of from four to six miles per hour; that he approached the crossing without listening or looking up the tracks until after he was on them; that he was familiar with this crossing and knew of this train, which was due about noon, but which was that day about five or six minutes late; and that he supposed that the train had not passed.

The plaintiff's evidence tended to show that freight cars stood on intervening tracks, so that a train approaching from the north could not be seen; and that at a very short distance back a brick structure three stories high prevented one from seeing the train. The plaintiff testified that he looked and listened as carefully as he could; that he had his team under control; that he heard no signals and saw no train approaching until he had driven on the westerly tracks; that he got the gate-tender's nod when he was about one hundred feet west of the crossing, where he started on a slow trot which he continued until he was struck; and that, just as he saw that the train was upon him, he tried to turn to the right to avoid the train and hastened his horses by swinging a pitchfork. The gate-tender denied that he gave a nod or signal to the plaintiff.

The defendant's evidence tended to show that the plaintiff's view when he was west of the crossing was entirely unobstructed by cars or otherwise.

There was also evidence tending to show that the train, consisting of an engine, truck, and two passenger cars, stopped after the rear car had passed the crossing only a few feet; that the bell had sounded continuously for a distance of eighty rods or more; that the fireman and engineer did not see the red flag, and did not see the plaintiff's team until they were within about three hundred feet of the crossing; and that no danger signals were given by the whistle, and no special effort made to stop the train, until it was within one hundred and fifty feet of the crossing.

The engineer testified that he saw the plaintiff when he was approaching, but had not entered upon the crossing, and, in watching him and trying to save him after he saw that he was going on to the track, he did not see the flag; and that, if he had seen it, it would not have made any difference with his speed at the crossing as the flag had no reference to the crossing but to the freight yard south of the passenger station, where there was a freight train. The fireman's station was such that he could not see the flag.

The defendant introduced testimony tending to show that the red flag was put out because there was a freight train in the yard southerly of the passenger depot. The plaintiff relied upon

the rules of the corporation, which were in evidence, as tending to show that an approaching train should reduce its speed or stop at the signal of a red flag upon the track. He did not see the red flag, or know that it was there.

The plaintiff called John Mulligan, President of the Connecticut River Railroad Company, which operated the road in question until a short time before the accident, who produced the rules of that company promulgated on November 29, 1891; and he testified that they were the rules under which the road was operated at the time the defendant took possession. He also called the local agent of the defendant, who testified that, at the time of the accident, the road was operated under the rules which were in force before the defendant took possession.

From the rules produced by Mulligan the plaintiff offered and read to the jury the following sections: "Red flags by day or red lights by night displayed on the tracks are signals of immediate danger, and not to be disregarded, and the train must be brought to a stop as soon as possible. Two flags, one red and one white, placed by the side of the track, is a caution signal, and trains must proceed with care until the obstruction is passed."

The defendant offered evidence tending to show that an edition of the rules later than the one produced by Mulligan was in force at the time of the injury, and offered in evidence the following rules: "A red flag or a red light displayed on the track signifies danger, and is a signal to stop. A stationary red flag, red light, or slow board by the side of the track, denotes that the track is imperfect, and the train must proceed with great caution, not exceeding eight miles per hour."

The plaintiff's counsel thereupon stated that, the book of rules last offered now appearing to be the rules in force at the time of the accident, he desired to withdraw the evidence of the rules produced by Mulligan. The judge, in the exercise of his discretion, allowed the evidence to be withdrawn, and ordered it stricken out, and directed the jury to disregard the evidence of the book of rules dated November 29, 1891, and to disregard Mulligan's testimony in relation thereto. The defendant excepted. The defendant asked the judge to rule that, if a plaintiff drove down a highway descending upon the tracks from a point

more than one hundred feet back from the crossing with a heavy load of hay, and upon a trot, without stopping to look or listen, his conduct would be negligent, even if the gates were up as he approached the crossing. The judge declined so to rule; and the defendant excepted.

The judge, among other things, instructed the jury as follows: "A person who should approach a railroad crossing without looking to see or listening to hear if a train were coming, if that was all there was to it, could not be said to be in the exercise of due care, because a crossing is a place of danger, and that person who approaches it without listening or watching, unless there was some circumstance to justify him in not doing it, is not in the exercise of due care. Was there anything of this kind in this case to justify this man in crossing? Did this man look? Did he listen? If he did not do one or both, was there anything to justify him in not doing either one or both? Did he have any invitation to cross? Did the railroad corporation by its servant or servants invite him to cross, or did it invite him in such a way that, acting as a reasonable and prudent man, he would be justified in attempting to cross without listening or looking? Was there any notice of that sort which would cause him to attempt to cross without taking such precaution as a man of reasonable care and prudence would do? If not, if he entered upon that road without taking this precaution, he would not be in the exercise of due care."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. G. Bassett, for the defendant.

J. C. Hammond, for the plaintiff.

MORTON, J. The instruction requested by the defendant, that if the plaintiff, without stopping to look or listen, approached the crossing at a trot, with a heavy load, on a highway descending for more than a hundred feet from the tracks, he would be negligent even if the gates were up, was properly refused.

A railroad crossing is a place of danger, and a traveller approaching one is bound to exercise that degree of care which the dangerous character of the place requires of a person of ordinary prudence. But there is no absolute rule of law which obliges him under all circumstances to stop to look and listen. Gener-

ally he must look and listen, and in such a manner that the looking and listening will enable him to see or hear an approaching train with reasonable certainty if one is within the range of his sight or hearing. *Fletcher* v. *Fitchburg Railroad*, 149 Mass. 127. *Tyler* v. *Old Colony Railroad*, 157 Mass. 336. *Connolly* v. *New York & New England Railroad*, 158 Mass. 8. But it cannot be said, as matter of law, that there may not be circumstances which will excuse him from looking and listening, and especially from stopping to look and listen. In the present case there was evidence tending to show an invitation on the part of the gateman to the plaintiff to cross. The fact that the plaintiff approached the crossing at a trot with a heavy load on a descending grade, if it was a fact that he did so, would not of itself render his conduct negligent, there being nothing to show that he could not have stopped if he had had reasonable notice of the coming train.

It was for the jury to say what the object of the flag was, and whether its presence had or should have had any effect upon the conduct of those in control of the train, or of the gateman. It appearing that the rule in force at the time of the accident was the one put in by the defendant, it was competent for the court to permit the plaintiff to withdraw the one put in by him, and to direct the evidence in relation to it to be stricken out and to be disregarded by the jury. *Costello* v. *Crowell*, 133 Mass. 352. *Smith* v. *Whitman*, 6 Allen, 562. It is to be presumed that the jury followed the instructions of the court, and it does not appear that the defendant was harmed by the course which the trial took.

Exceptions overruled.

ALPHEUS MERRITT *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Hampshire. September 17, 1895. — October 18, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trial — Reading by Stenographer of Testimony of Witness at former Trial in Answer to Question by Jury to Judge after Retirement.

If the jury, while deliberating upon their verdict in a case, send a question to the judge as to the evidence upon a material point in the cross-examination of a witness at a former trial of the case, whose testimony had been taken stenographically at that trial, and, by agreement of the parties, had been presented to the jury at this trial, his attendance not having been secured, by reading a typewritten copy of it, and the judge, having recalled the jury into court, directs the official stenographer to read to them the whole cross-examination of the witness, which is done without comment by any one, such course is not open to objection.

TORT, for personal injuries occasioned to the plaintiff by being thrown to a station platform while alighting from the defendant's train at Port Chester, New York. After the former decision, reported 162 Mass. 326, the case was tried in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

The plaintiff was a passenger on a way train from South Norwalk, Connecticut, to Port Chester, on the evening of December 20, 1892, and rode with his nephew in a seat facing forward, near the middle of the car. As the train approached Port Chester the brakeman called the station, and passed out at the rear of the car the plaintiff was in, leaving the door open. The plaintiff introduced evidence tending to show that he left his seat just as the car came to a stop at the station; and that he proceeded rapidly to the rear door and to the platform of the car to alight, when, as he was stepping off to the platform of the station, the car started suddenly with a jerk, and without warning to him, and threw him violently to the platform of the station, and he received the injuries complained of.

The defendant introduced evidence tending to show that the plaintiff did not rise from his seat until the train started to leave

the station, after having stopped a reasonable time to allow passengers to get off and others to get on; and that he then passed to the platform of the car and got off the train while it was in motion and against the warning of the brakeman, and in so doing fell and was hurt. One issue in the case was as to the due care of the plaintiff, and the evidence was conflicting as to whether he started to descend from the platform of the car to the station platform when the train was at rest or after it had started.

Before the trial commenced, the defendant moved to continue the case on the ground of the absence of two of its material witnesses, Jacob Heil and James F. Cushion, residents of Connecticut. The motion to continue was not in writing, but the defendant's counsel stated the facts with reference to the absence of these witnesses, the materiality of their testimony, and the efforts of the defendant to secure their attendance; that they had promised to attend this trial, and the defendant, relying on such promise, had not taken their depositions; that they would have attended had not their employer told them they would be discharged by him if they did so; that they had testified at the previous trial of the case; and that he had a type-written copy of their testimony then given, made by the official stenographer of the court. The judge ruled that the defendant made out a case for continuance; and that, upon putting the motion in the form of an affidavit, the motion would be allowed and the case continued, unless the plaintiff admitted that the witnesses would testify, if present, as stated, and would agree that their testimony should be received and considered as evidence on the trial in like manner as if the witnesses were present and had so testified. The plaintiff agreed to admit all this, and, to save the defendant's counsel the trouble of putting the motion in form, that the testimony of Heil and Cushion, as given at the former trial, might be used with the same effect in all respects as if given in this trial, and that he might read the same from the type-written copy. Upon the trial, the testimony in full of Heil and Cushion was read by the defendant's counsel while putting in the defendant's case, and no objection was made thereto by the plaintiff.

In the charge to the jury the judge said: "It is further con-

tended by the defendant that there were other persons in the car who observed what happened, and that comes before you in the shape of testimony delivered at a former trial. The circumstances under which that has been put before you have been stated by counsel, and you must take that testimony precisely as though the persons were here upon the witness stand, and the claim so far as their testimony is concerned is this: that they observed the fact that the train had come to a stand-still, and that this man was sitting in his seat, and as the train began to move this man rose from his seat and started out while the car was in motion, and that the train continued on and made no stop until the next station."

After the jury had been out deliberating upon their verdict, the following question in writing was sent by the jury to the judge: "Was the testimony of Cushion and Heil that they saw Merritt standing in the aisle of the car when the car started in their cross-examination?" Whereupon the judge sent for the jury, and upon their coming into court directed the stenographer, in the absence of counsel of both parties, to read to the jury the cross-examination in full of Heil and Cushion from the same copy from which the defendant's counsel had read in open court the testimony of the witnesses upon the trial; which the stenographer did. The judge made no comment thereon, and gave no further instructions in the case. The jury again retired, and returned a verdict for the defendant. The plaintiff seasonably filed a motion for a new trial. Upon the hearing of the motion, the plaintiff requested the judge to rule, that it was erroneous to have the cross-examination of the witnesses Cushion and Heil read to the jury in response to their inquiry while they were deliberating on their verdict, and a new trial should be granted by reason thereof; which ruling the judge declined to give, and overruled the motion for a new trial. The plaintiff alleged exceptions.

W. G. Bassett, for the plaintiff.

G. D. Robinson, for the defendant.

KNOWLTON, J. Under Pub. Sts. c. 170, § 42, "When a jury, after due and thorough deliberation upon a cause, return into court without having agreed on a verdict, the court may state anew the evidence, or any part of it, and explain to them anew the law applicable to the case." See also Pub. Sts. c. 153, § 5.

The jury asked the judge this question: "Was the testimony of Cushion and Heil that they saw Merritt standing in the aisle of the car when the car started in their cross-examination?" An answer to the question might aid the jury in their deliberations, and it was proper for the judge to bring them into court and give them an answer by stating anew that part of the testimony to which the question referred. See *Kullberg* v. *O'Donnell*, 158 Mass. 405. This testimony had been taken stenographically at a former trial, and by agreement of the parties had been presented to the jury at this trial by reading a type-written copy of it. Inasmuch as the evidence to which the question of the jury related was all in writing, the best way of stating it was to read it. The judge, therefore, directed the official stenographer to read the whole cross-examination of each of the two witnesses, which was done without comment by any one. There was no fairer or better way of giving a perfect answer to the question than by reading the whole cross-examination of each witness, which was not very long. It was immaterial whether the reading was by the judge or by some one else appointed by him to do it. While the judge might, in his discretion, have adopted some other way of answering the question, or have refused to answer it, the plaintiff has no legal ground of objection to what was done. Considering the nature of the inquiry and of the evidence to which it related, we hardly see how the judge could have acted more discreetly. See *Alexander* v. *Gardiner*, 14 R. I. 15. *Atchison* v. *State*, 13 Lea, (Tenn.) 275. The reading of stenographic notes in open court by an official stenographer at the request of the judge is expressly authorized by St. 1892, c. 133.

It is not contended that the absence of the counsel in any way affected the right of the judge to answer the question in open court. *Kullberg* v. *O'Donnell*, 158 Mass. 405.

Exceptions overruled.

BRICE W. McDOWELL *vs.* ÆTNA INSURANCE COMPANY.
SAME *vs.* ROYAL INSURANCE COMPANY.
SAME *vs.* PHŒNIX INSURANCE COMPANY.

Franklin. September 17, 1895. — October 18, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Fire Insurance — Arbitration — Admission of Press Copies of Letters in Evidence — Notice to Produce.

It is no defence to an action on a policy of insurance against loss by fire that copies of letters sent to the defendant company and its attorney requesting the appointment of arbitrators were admitted in evidence, if none of the originals were presented by the company and there was nothing to show that they were not in fact received by it or were not in its possession at the time of the trial, and if the notice to produce sufficiently described the letters by the subject to which they related.

The defence to an action on a policy of insurance against loss by fire that there was no sufficient evidence that before the action was begun the company had, under St. 1891, c. 291, § 1, waived the provisions in the policy requiring the amount of the loss to be determined by arbitration, cannot avail if it appears that the plaintiff made a sufficient request of the defendant in writing, to which the defendant paid no attention, and that the action was not brought until the expiration of a certain period after making the request, as required by the statute.

THREE ACTIONS OF CONTRACT, upon policies of insurance in the standard form, against loss by fire, on January 1, 1894, on certain property in Conway. Trial in the Superior Court, without a jury, before *Richardson*, J., who found for the plaintiff in each case; and the defendants alleged exceptions, in substance as follows.

Each policy contained the regular provision as to submission to arbitration in the case of loss. In none of the cases was there any reference, or any arbitrators appointed, or any step taken by any of the defendants with regard thereto. The only evidence as to any attempt by the plaintiff or in his behalf to secure arbitration was as follows. The plaintiff's counsel read from a copy-book what purported to be and what he stated to be letter-press copies of letters he had sent to the defendants by mail, in which each of them was requested to appoint arbitrators under the provision for arbitration in the policies issued to the plaintiff, and under which claim was made for payment of loss,

and naming as arbitrators three individuals under the Ætna policy, and three others, who were suggested under both the Royal and Phœnix policies. The letter to the Ætna company was dated October 9, 1894, and the letters to the Royal and Phœnix companies were each dated December 5, 1894. The defendants admitted that the plaintiff's counsel would, if testifying, swear that the several letters were sent by mail to the companies therein mentioned on the dates mentioned in the copies postage paid, and the judge so found. The defendants objected to the admission of the copies as evidence of the contents, or as evidence that the defendants had received the letters. The plaintiff's counsel also read from a copy-book what purported to be press copies of two letters to Mr. W. H. Brooks, who was counsel of record in the cases, but who was not present at the trial, which copies stated that the companies acknowledged receipt of the letters requesting a submission to arbitration, and referred the plaintiff's counsel to him as their attorney. It was admitted by the defendants that the plaintiff's counsel would testify that the letters of which these were copies were duly sent, postage prepaid, and the judge so found.

The plaintiff's counsel also read from a copy-book what purported to be a press copy of a letter addressed to Brooks, Hamilton, and Guyott, Holyoke, Massachusetts, who were counsel of record for the defendants, but were not present at the trial, which press copy was as follows: "Greenfield, Mass., April 13, 1895. Gentlemen, — You are hereby notified to produce at the coming trial of the cases of *Brice W. McDowell* v. *Ætna Ins. Co.*, *Royal Ins. Co.*, *Phœnix Ins. Co.*, in our Superior Court the present term here, all proofs of loss, written schedules, letters and communications or written memorandum of every kind, received by the above named companies defendant or by you as their attys., each and all of them, received from the said plaintiff or from his attys., at any time since the fire mentioned in the several declarations in said suits. Very truly, Conant & Conant, Atty's."

It was admitted that the plaintiff's counsel would testify that the original was sent postage paid, and the judge found that it was received by Brooks, Hamilton, and Guyott in the regular course of mail. None of the original letters were produced at the trial. The action against the Ætna company was begun October 29, 1894. The actions against the Royal and Phœnix

companies were begun January 9, 1895. The defendants asked the court to rule that the several actions could not be maintained, because there was no sufficient evidence that arbitration as a condition precedent to beginning the actions had been waived by the defendants. The judge declined so to rule; and the defendants alleged exceptions.

W. G. Bassett, for the defendants.

S. D. Conant, (*C. C. Conant* with him,) for the plaintiff.

MORTON, J. The principal question in these cases relates to the admission of secondary evidence of the contents of certain letters which the court found were duly sent, postage paid, by the counsel for the plaintiff to the defendants, and their attorneys of record in these suits, and which according to the well settled rule in such cases were *prima facie* received by the persons to whom they were sent. *Huntley* v. *Whittier*, 105 Mass. 391. *Briggs* v. *Hervey*, 130 Mass. 186. *Marston* v. *Bigelow*, 150 Mass. 45.

None of the originals were produced by the defendants. But there is nothing tending to show that they were not in fact received by them, or were not in their possession at the time of the trial.

The notice to produce, which was dated Greenfield, April 13, 1895, and which was received by the attorneys of record of the defendants in regular course of mail, notified them "to produce at the coming trial of the cases of *Brice W. McDowell* v. *Ætna Ins. Co.*, *Royal Ins. Co.*, *Phœnix Ins. Co.*, in our Superior Court the present term here, all proofs of loss, written schedules, letters and communications or written memorandum of every kind, received by the above named companies defendant or by you as their attys., each and all of them, received from the said plaintiff or from his attys., at any time since the fire mentioned in the several declarations in said suits." The notice required the production, therefore, among other things, of all letters relating to the subject matter of the suits received by the defendants or their attorneys from the plaintiff or his attorneys between January 1, 1894, and its date.

It is objected in substance that the letters called for were not described in the notice with sufficient particularity. But we think that they were sufficiently described by the subject to which they related. *Bogart* v. *Brown*, 5 Pick. 18. *Bemis* v. *Charles*, 1 Met. 440. *Jones* v. *Parker*, 20 N. H. 31. *Jacob* v. *Lee*, 2 Mood. &

Rob. 33. *Rogers* v. *Custance*, 2 Mood. & Rob. 179. *Morris* v. *Hauser*, 2 Mood. & Rob. 392. *Vasse* v. *Mifflin*, 4 Wash. C. C. 519.

The time covered by the notice was only about sixteen months. There is nothing to show that the correspondence between the parties and their counsel was so extensive as to render it reasonable that the notice should describe the portions of it that were wanted, or that the letters were so mingled with others as to render it difficult to separate them. The object of requiring notice to produce the original before secondary evidence of contents can be given is to afford an opportunity to the opposite party to produce it, and thereby secure, if he desires, the best evidence of its contents. *Dwyer* v. *Collins*, 7 Exch. 639. In the present cases the defendants did not object that they were taken by surprise or that they did not understand what letters were meant, or that they wanted delay in order to enable them to produce originals. See *Bogart* v. *Brown*, *ubi supra*. We think that the ruling admitting the letters from copies was right.

The defendants further contend that there was no sufficient evidence that before the actions were commenced they had waived the provisions in the policies requiring the amounts of the losses to be determined by arbitration. But by St. 1891, c. 291, § 1, it is expressly provided that an insurance company shall be deemed to have waived its right to arbitration under a policy in the standard form provided in this Commonwealth, (which these policies were,) if it does not within ten days after a written request to appoint referees under the provision for arbitration name three men, or if it does "not, within ten days after receiving the names of three men named by the insured under said provision, make known to the insured its choice of one of them to act as one of such referees." The copies of letters put in by the plaintiff show that a request was made in writing by him of each of the defendants to appoint referees to determine the loss under its policy, and that the names of three persons to act as such referees were submitted. Neither of the defendants appears to have paid any attention to the requests thus made, and these actions were not brought till more than ten days after the requests were made. The defendants must be held, therefore, to have waived their right to have the amounts of the losses determined by arbitration.

Exceptions overruled.

ELIZA HOGAN, administratrix, *vs.* METROPOLITAN LIFE INSURANCE COMPANY.

Hampden. September 25, 1895. — October 18, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Life Insurance — Truth of Statement in Application — Evidence.

An applicant for life insurance, in reply to the question, "Has the life proposed now or ever had disease of the kidneys?" answered, "No." In the proofs of death, furnished in accordance with the requirements of the policy subsequently issued, were this question and answer: "What sicknesses previous to the last one did the deceased have? Give particulars of each sickness, with dates." "Kidney trouble, two years ago." The application was made less than two years before the proofs of death were filed. In an action upon the policy, the answer set up that the answer to the question in the application was false. *Held*, that evidence was admissible to show that it was true.

CONTRACT, upon a policy of insurance for $150, issued by the defendant on July 11, 1892, upon the life of David W. Hogan, the plaintiff's intestate. At the trial in the Superior Court, before *Hopkins*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions to the admission of certain evidence, the nature of which appears in the opinion.

E. H. Lathrop, for the defendant.

J. B. Carroll, (*W. H. McClintock* with him,) for the plaintiff.

KNOWLTON, J. The defendant set up in its answer that the assured in his application, which was a part of the contract of insurance, in reply to the question, "Has the life proposed now or ever had disease of the kidneys?" answered, "No," and that this answer was guaranteed by the assured to be true, when in fact it was false. Upon the issue thus presented, the plaintiff introduced the testimony of witnesses tending to show that the answer was true. The defendant objected, and excepted to the introduction of the testimony, on the ground that in the proofs of death furnished in accordance with the requirements of the policy, and signed by the plaintiff, were this question and answer: "What sicknesses previous to the last one did the deceased have? Give particulars of each sickness, with dates." "Kidney trouble, two years ago." The defendant contended that by

this answer in the proofs of death the plaintiff was estopped to show that the deceased did not have kidney disease at the time of making the application, which was less than two years before the proofs were filed. Its counsel relies on *Campbell* v. *Charter Oak Ins. Co.* 10 Allen, 213, in which it is said that corrections of mistakes in proofs of death "are not for the first time to be made known to the insurers at the trial of the action to recover for the loss, by the introduction of evidence showing that the statements filed were not true in a material fact, which, if it existed as stated, was fatal to the right of the insured to recover." This case has not been generally followed in other jurisdictions. *Parmelee* v. *Hoffman Ins. Co.* 54 N. Y. 193. *McMaster* v. *Insurance Co. of North America*, 55 N. Y. 222. *Insurance Co.* v. *Rodel*, 95 U. S. 232. *Waldeck* v. *Springfield Ins. Co.* 53 Wis. 129. *Bentz* v. *Northwestern Aid Association*, 40 Minn. 202. *Smiley* v. *Citizens' Ins. Co.* 14 W. Va. 33. In this Commonwealth it has never been treated as enunciating a doctrine of universal application, nor extended to facts differing from its own. *Cluff* v. *Mutual Benefit Ins. Co.* 99 Mass. 317. *City Five Cents Savings Bank* v. *Pennsylvania Ins. Co.* 122 Mass. 165. *Little* v. *Phœnix Ins. Co.* 123 Mass. 380.

But if it is given full effect as an authority, the plaintiff was rightly permitted to introduce her testimony. In the first place, if the answer given in the proofs is true, it cannot be said, as matter of law, that the answer in the application is untrue. It is conceivable that there might have been a "kidney trouble" from accident or from some other temporary cause, such as to produce sickness, when it could not properly be said that there was "disease of the kidneys."

Even if the assured had had disease of the kidneys, and his answer was therefore untrue, it does not necessarily defeat the action upon the policy. If we treat the statements contained in the application as warranties, it is held that St. 1887, c. 214, § 21, re-enacted in St. 1894, c. 522, § 21, is applicable to them. *White* v. *Provident Savings Assurance Society*, 163 Mass. 108. *Levie* v. *Metropolitan Ins. Co.* 163 Mass. 117. This section is in these words: "No oral or written misrepresentation made in the negotiation of a contract or a policy of insurance, by the assured or in his behalf, shall be deemed material, or defeat or

avoid the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." However it may be in regard to warranties in terms fully written out on the face of the policy, it is held that the statute was intended to apply to statements in the application called warranties. Falsity of statement would therefore be a defence only if the matter misrepresented increased the risk, or if the statement was made with intent to deceive. In the present case, if the answer in the proofs of death were to be interpreted as the defendant contends, it would not show that the defendant was not liable. The jury might find that the matter misrepresented did not increase the risk, and that the statement was not made with intent to deceive. Apart from the questions of fact involved in this defence, the proofs showed that the plaintiff was entitled to be paid in accordance with the provisions of the policy. *Campbell* v. *Charter Oak Ins. Co.*, *ubi supra*, has never been extended to a case where the matter stated in the proofs did not, if true, show a valid defence to a claim under the policy. The evidence was rightly admitted. *Exceptions overruled.*

ROBERT MULLEN, administrator, *vs.* SPRINGFIELD STREET RAILWAY COMPANY.

Hampden. September 26, 1895. — October 18, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Loss of Life — Street Railway — Child — Negligence — Action.

If a boy nine years and seven months old, who has been sent to school by his parents, gets upon the rear end of a wagon for the purpose of stealing a ride, his presence being concealed from the driver of the team by the contents of the wagon, and, while so riding along a street through which an electric railway runs, although warned by a companion, who is riding in the same manner, to look out for an approaching car, suddenly jumps from the wagon when the car is nearly opposite the horse's head, and goes upon the track just forward of the car and is struck by the car and killed, he is guilty of such negligence as to preclude an action against the railway corporation for causing his death.

TORT, under St. 1886, c. 140, by the administrator of the estate of Robert J. Mullen, for causing his death. At the trial in the Superior Court, before *Hopkins*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

J. B. Carroll, (*W. H. McClintock* with him,) for the plaintiff.

KNOWLTON, J. The plaintiff's intestate, Robert J. Mullen, a boy nine years and seven months old, with Joseph Rivers, another boy a little older with whom he was not acquainted, was riding at the hind end of a grain dealer's business wagon along Chestnut Street in Springfield. A single track of the defendant's electric railway was laid through the middle of the street. The driver sat on a seat at the forward end of the wagon, driving a single horse, and he had no knowledge of the presence of the boys who got upon the wagon without the permission of anybody. The plaintiff's intestate was on the wagon when Rivers first saw it, and they afterwards sat with their backs to the driver and their feet hanging over the tailboard. Mullen was on the left hand side of the wagon next the track, and there were empty boxes between the boys and the driver. As the team was going at an ordinary rate of speed on the right hand side of the street it met an electric car. The distance between the curbstone and the nearest rail of the track is given by estimate as eight or ten feet. Both boys were intending to go up Franklin Street, Mullen to a school which he attended, and Rivers to the house of his uncle on that street. They met the car at Greenwood Street, which is the next street to Franklin Street and very near it. The horse, which was not much accustomed to electric cars, shied a little, but was easily controlled. Either because they were so near the place where they were to turn from Chestnut Street, or for some other reason, the boys jumped out, and the driver went on without knowing until long afterwards that they had been upon his wagon. When they jumped the electric car was very nearly opposite the horse's head. Rivers jumped on the right hand side of the wagon, and ran along to the right of the horse, on the sidewalk or between the curbstone and the wagon; Mullen jumped to the left of the wagon, went upon the track just forward of the car, and

was run over and killed. The action is brought under St. 1886, c. 140, and the plaintiff contends that his intestate's life was lost through the negligence of the defendant, or the gross negligence of its servants or agents.

There is hardly more than a scintilla of evidence to sustain this part of the case. To show negligence of the corporation, he relies upon the fact that there was no fender upon the car; but the accident happened on June 2, 1893, and the evidence tended to show that of the numerous corporations in the different parts of the State that had begun to run cars by electricity the West End Street Railway Company in Boston was the only one that had then used any fenders upon its cars, and the defendant offered to show that the use of fenders by that corporation was then only experimental. It is hard to see how the motorman was in fault. The great weight of evidence was that the car was going at about four to six miles an hour, and there was nothing to indicate that it was going very much faster than that. The testimony was that the motorman did not see Mullen while he was on the wagon, and there is nothing to indicate that he did. He certainly had no reason to expect that anybody would jump from the hind end of a wagon just as it was about to pass the car, and step upon the track. Even if he was negligent, the defendant is not liable for his conduct in this action unless he was grossly negligent.

But if we assume that there was evidence for the jury on this part of the case, we find no evidence of due care on the part of the plaintiff's intestate. Rivers testifies that just before they jumped off he told Mullen to look out for the car, and that Mullen heard him. If, being warned to look out for the car, he immediately stepped upon the track before it, he certainly was careless. He was a trespasser upon the wagon, and his conduct in stealing a ride and in getting on and off the wagon when it was in motion, gives color to his conduct in going upon the track immediately before the coming car. When he left his father's house he was sent to school, and when he was next seen riding with this team he was at a considerable distance from the line of travel to the schoolhouse, coming from a point farther off. In going upon the track at midday without looking to see whether a car was coming, when the view was unobstructed

and he could easily have heard the car, he was far more negligent than was the plaintiff in *Messenger* v. *Dennie*, 137 Mass. 197, and 141 Mass. 335. Messenger was a boy of about the same age as the deceased, and was riding upon a sleigh runner, and stepped off before an approaching team without looking, and it was held as matter of law that he was negligent. There are also other authorities which require us to hold that there was no evidence in the present case that the plaintiff's intestate was in the exercise of due care. *Hayes* v. *Norcross*, 162 Mass. 546. *Casey* v. *Malden*, 163 Mass. 507, 508. *Thompson* v. *Buffalo Railway*, 145 N. Y. 196. *Hestonville Passenger Railway* v. *Connell*, 88 Penn. St. 520. *Exceptions sustained.*

NORMAN J. DANE *vs.* COCHRANE CHEMICAL COMPANY.

Suffolk. November 22, 1894. — October 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Personal Injuries — Master and Servant — Employers' Liability Act — Action.

A. was employed by B. under a continuing contract to do from time to time such carpentry as was necessary to be done on the buildings occupied by B. for manufacturing purposes, usually receiving his orders from B.'s superintendent. A. furnished the tools and B. the materials required to do the work. A. hired the men to be employed in doing the work, superintended, paid, and discharged them. B. paid A. a certain sum a day for his work, and a further sum a day for each man employed by A. in addition to the amount of wages which A. agreed to pay the men. A. and B. settled the accounts between them monthly, and A. paid his workmen weekly, but their names never appeared on B.'s pay roll. C., while employed by A. on B.'s premises, was injured by the act of another of A.'s workmen, and brought an action against B. under the employers' liability act, St. 1887, c. 270. *Held*, that the relation of employer and employee did not exist between B. and C.; and that the action could not be maintained.

TORT, under the employers' liability act, St. 1887, c. 270, for personal injuries. The second count of the amended declaration, which is the only one material to be stated, was as follows: "And the plaintiff says that on or about the twenty-third day of November, 1891, he was in the employ of the defendant, at its factory in Everett, in this Commonwealth, as a carpenter, doing certain work on the buildings of said defendant; that he

was working under the superintendence and direction of one Fred Johnson, who was in the service of the defendant company, intrusted by it with and exercising superintendence of said work in which the plaintiff was employed; that the superintendence of said work for said defendant was, at that time, the principal duty of said Johnson. And the plaintiff says that said Johnson, in pursuance of his superintendence of said work, negligently and carelessly arranged certain ladders for a standing place, and required one McGregor, a workman in the employ of the defendant, to go upon the same and perform certain work with an iron bar, which was a tool unfit for the work which he was sent to do; that said ladders were unsafe, improper, and unfit for the purpose, and were so carelessly and negligently arranged and used by said Johnson, that said McGregor was unable to get a safe, proper, and fit standing place in which to perform said work; and that by reason of said McGregor being required to stand upon said improper and unfit place, and use said improper and unfit tool, as aforesaid, to do said work, he was thereby caused to drop, or let fall, said bar of iron, which struck upon the head of the plaintiff and severely injured him, while he was in the exercise of due care and diligence; and the plaintiff says said Johnson carelessly neglected to guard the place where the plaintiff was injured, and to warn him not to come to said place. And the plaintiff says that within thirty days of the time of said injury he gave written notice of the time, place, and cause thereof, as required by the statutes of this Commonwealth."

Trial in the Superior Court, before *Bond*, J., who ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

F. Hutchinson, for the plaintiff.

R. M. Saltonstall & R. F. Herrick, for the defendant.

FIELD, C. J. At the argument, no objection was made that the notice given was not sufficient, or might not have been found by the jury to be sufficient, and it was not contended by the plaintiff that the ladders used could have been found by the jury to be a part of the ways, works, or machinery of the defendant, within the meaning of St. 1887, c. 270, § 1. The plaintiff relied

upon the second count of the amended declaration, and the principal although not the only question argued is whether there was evidence for the jury that Fred Johnson was a servant of the defendant intrusted with and exercising superintendence, and whose sole or principal duty was that of superintendence over the performance of the carpentry work which the plaintiff, with others, was engaged in doing, or whether Johnson, in doing this work, was an independent contractor.

Johnson was employed by the defendant under a continuing contract to do from time to time such carpentry work as was necessary to be done on the buildings occupied by the defendant for the purpose of manufacturing chemicals. The works of the defendant covered an area of about a dozen acres, and were divided into two departments, and over each department was a superintendent. Johnson received his orders for the carpentry work to be done, usually from one of the superintendents. He hired the men to be employed in doing the work, superintended, paid, and discharged them. The defendant paid Johnson $2.50 a day for his work, and twenty-five cents a day for each man employed by Johnson, in addition to the amount of the wages which Johnson agreed to pay the man. So far as appears, Johnson furnished the tools and the defendant the materials required to do the work. Johnson drew money from time to time from the defendant on account of what was due to him, and at the end of each month the accounts between him and the defendant were usually settled. Johnson paid his workmen every Saturday, but their names never appeared on the pay roll of the defendant; they never were paid by the defendant, and the defendant kept no account with them. Apparently Johnson kept workmen in his employ whom he used in performing work for other persons as well as for the defendant.

We think that it was competent for the jury to infer, from all the testimony, that the defendant determined what repairs and alterations requiring carpentry work should be made from time to time, and when and how they should be made, although, when it decided upon what repairs and alterations were to be made, it usually left the manner of making them to the discretion of Johnson. When there are no specifications in advance of what is to be done, and no round price agreed upon, and a carpenter is

employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of work done by the carpenter and the men he employs, it would seem to be a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work. The principles which govern the liability of the employer toward strangers for injuries occasioned by the negligence of persons so employed were considered in *Linnehan* v. *Rollins*, 137 Mass. 123.

But the fundamental question in the present case seems to us not precisely that considered in *Linnehan* v. *Rollins*, nor whether Johnson was independent of the defendant in the manner of doing the work, but whether the relation between the plaintiff and defendant, as shown by the evidence, was that of employer and employee. Could the plaintiff have recovered his wages of the defendant if they had not been paid by Johnson? Did Johnson hire the plaintiff on his own account, or as agent for the defendant? At common law, the defendant on the evidence would not be liable to the plaintiff, because, if Johnson was a servant of the defendant in hiring the plaintiff and the other workmen, then the plaintiff, MacGregor, and Johnson were all servants of the defendant, and a master is not liable at common law for the injury to one servant occasioned by the negligence of his fellow servants; and if Johnson was an independent contractor and the plaintiff was his servant, then the defendant would not be liable for any injury occasioned by the negligence of Johnson or of one of his servants, to another of his servants. *Harkins* v. *Standard Sugar Refinery*, 122 Mass. 400. *Morgan* v. *Smith*, 159 Mass. 570.

We are of opinion that the only reasonable inference to be drawn from the evidence in the exceptions is that the plaintiff was an employee of Johnson, and not of the defendant, within the meaning of St. 1887, c. 270, and of the amendments to that statute. It does not appear that Johnson was authorized to hire workmen on account of the defendant, or that the workmen hired by Johnson ever understood that they were to be paid by the defendant, or that the defendant or Johnson so understood. The fact that the defendant retained the right to decide how work should be done on its premises does not of itself make the

workmen employed by Johnson employees of the defendant. Apparently Johnson employed whom he pleased, and directed the men employed by him in the performance of their work, whether upon the premises of the defendant, or upon other premises where he might be doing work. On the evidence, we do not think that the jury could properly find that the relation of employee and employer existed between the parties. See *Reagan* v. *Casey*, 160 Mass. 374.

If the relation of employer and employee did not exist between the parties, then the action cannot be maintained under St. 1887, c. 270, and the remaining exceptions become immaterial. The facts of the case do not bring it within § 4 of the statute, although that section may have some significance in favor of the construction we have here given to the statute.

Exceptions overruled.

HERMANN J. MEYER *vs.* DANA ESTES & others.

Suffolk. December 11, 12, 1894. — October 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & BARKER, JJ.

Contract — Construction — Breach — Parties — "Successor" — Validity — Restraint of Trade — Lex Loci Contractus — Damages — Penalty.

If a contract provides for the use by A. of certain articles to be ordered of B., and, while the contract is in force, B. forms a partnership with C. without A.'s knowledge, articles subsequently ordered by A. and furnished by the partnership must, as between the parties be regarded as furnished by B., acting through the partnership, to A. in pursuance of the contract.

A contract recited that "the undersigned, Messrs. A. & B. and Messrs. C. & D., . . . hereby agree to use all electrotypes ordered from E. . . . only for the purpose of illustrating works to be published by the said A. & B. and the said C. & D., or their heirs or successors in business," and was signed by the two firms named. The previous correspondence between the parties had informed E. that the two firms were jointly interested in a certain publication, which was an illustrated work in six volumes, of which each firm was to publish at its own expense three volumes; and it was agreed between the two firms that a part of the plates obtained from E. should be used in each of the volumes, that each firm should pay for the plates used in the volumes published by it, and that the plates should be the separate property of the firm which paid for them. E. did not

know of this agreement. *Held*, in an action by E. for breach of the contract, that the contract was a joint agreement by both firms.

Two firms executed an agreement to use all electrotypes ordered from a third person only for the purpose of illustrating works to be published by those firms, "or their heirs or successors in business," and not to sell the electrotypes to "any other parties." Afterwards one of the firms sold all its interest in the work in which the plates were to be used to the other firm, which subsequently dissolved, one of the members continuing to carry on the business. He afterwards sold the whole publication, including the electrotype plates, to A., who had no connection with either firm, and who used the plates only in the publication of the work in question. *Held*, that A. was not the "successor in business" of either firm, within the meaning of the agreement; and that the sale to him was a breach of the agreement, for which the damages recoverable were not necessarily nominal.

An agreement by the purchaser of electrotypes, to be used only for the purpose of illustrating works to be published by him, "not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them," is an agreement in restraint of trade, but, in view of the nature of the property, is reasonable, and will be enforced between the parties to it.

An agreement, dated and signed in this Commonwealth by A., an inhabitant of the Commonwealth, to use all electrotypes ordered from B. in a foreign country only for the purpose of illustrating works to be published by A. in this country, and sent to B., who cabled to A. his acceptance of it, is to be governed by the law of this Commonwealth in determining the measure of damages in an action for its breach.

If an agreement by A. to use all electrotypes ordered from B. only for the purpose of illustrating works to be published by A. provides that he is "to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to" B., "and to pay furthermore a fine to" B. "equal to the tenfold price of the wrongly used electrotypes," the fine is a penalty, which cannot be recovered, but B. is entitled to recover only the amount of damages which have been caused by a breach of the contract.

CONTRACT, for breach of the following agreement:

"The undersigned, Messrs. Estes and Lauriat and Messrs. S. E. Cassino & Co., of Boston, Mass., U. S. A., hereby agree to use all electrotypes ordered from the Bibliographical Institute Meyer, in Leipzig, only for the purpose of illustrating works to be published by the said Estes and Lauriat and the said S. E. Cassino & Co., or their heirs or successors in business, in the English language and in the United States of America.

"Estes and Lauriat and S. E. Cassino & Co. agree not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them, and to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to the Bibliographical Institute Meyer, and to pay, furthermore, a fine to the Biblio-

graphical Institute Meyer equal to the tenfold price of the wrongly used electrotypes. Estes & Lauriat. S. E. Cassino & Co. Boston, May 10th, 1883."

Trial in the Superior Court, before *Bond*, J., who directed the jury to return a verdict for the defendants; and reported the case for the determination of this court. The facts appear in the opinion.

W. Schofield, for the plaintiff.

S. J. Elder & W. C. Wait, for Estes and Lauriat.

H. Wardwell, for Cassino, submitted the case on a brief.

FIELD, C. J. The agreement sued on must be regarded as an agreement made by the partnerships of Estes and Lauriat and S. E. Cassino and Company with Hermann Julius Meyer, then doing business in Leipzig under the name of "The Bibliographical Institute Meyer." After this agreement had been entered into and some of the electrotype plates had been ordered and furnished through the English and Foreign Electrotype Agency, Hermann Julius Meyer took his two sons into partnership and proceeded to carry on the same business under the same name as before; and after this other plates were ordered by the defendants and furnished by the partnership. It appears by the report that "no notice was given by the plaintiff to the defendants or either of them, or by the defendants or either of them to the plaintiff, of any change in their business relations." So far as appears, the defendants did not know that the plaintiff had taken his sons into partnership, or that any other person than the plaintiff had any interest in the business carried on under the name of "The Bibliographical Institute Meyer." There is no evidence, therefore, that the defendants made any contract with the partnership composed of the plaintiff and his two sons, and the plates furnished after the formation of this partnership must, we think, as between the parties to this suit, be regarded as furnished by the plaintiff to the defendants, in pursuance of the contract. It is not a case where a stranger to a contract voluntarily undertakes to perform it. After the formation of the partnership the plates were furnished, in legal contemplation, by the plaintiff, acting through the partnership of which he was a member.

The form of the contract shows a joint agreement on the part

of Estes and Lauriat and S. E. Cassino and Company with the plaintiff. *Bartlett* v. *Robbins*, 5 Met. 184. *Donahoe* v. *Emery*, 9 Met. 63. *Boutelle* v. *Smith*, 116 Mass. 111. *White* v. *Tyndall*, 13 App. Cas. 263. There are no words in it that indicate a several liability of these two firms. The previous correspondence between the parties had informed the plaintiff that the two firms of Estes and Lauriat and Cassino and Company were jointly interested in certain publications, and the letter of Estes and Lauriat to the plaintiff, enclosing a copy of the agreement signed by the two firms, which the plaintiff was to accept or reject by telegraph, contained the following sentences, viz.: "You must understand that Messrs. S. E. Cassino & Co. have an equal interest in this publication with ourselves; and it is a physical impossibility for us to execute any agreement by which they shall not be equally bound, and since they join us in this agreement, you have all the protection which you would have in an agreement from us alone. . . . Should you decline to accept this agreement joining Messrs. Cassino & Co. to us in your form of agreement, please cable the following words, 'Estes, Boston, No, Meyer,' and by this we shall understand that the negotiation is entirely at an end, as it is impossible for us to make any agreement which does not connect Messrs. Cassino & Co. with us in ordering these cuts for this enterprise."

The enterprise referred to was the publication of an illustrated work of Natural History, in six volumes, of which each of the two firms was to publish at its own expense three volumes. Each firm was to engage in the sale of the entire work, and was to receive for its own use the wholesale price of that part of the work published by it. It was a part of the plan between the two firms that some of the plates used to illustrate the work should be obtained from the plaintiff; that a part of these plates should be used in each of the volumes; that each firm should pay for the plates used in the volumes published by it, and that the plates should be the separate property of the firm which paid for them; but it does not appear that this agreement between the two firms as to the separate property in the plates used by each firm was known to the plaintiff. As the volumes to be published were published as an entire work, although, as between themselves, the two firms owned

the separate volumes, the two firms may be said to be jointly interested in the publication.

The agreement sued on is that the defendants will use all the electrotype plates to be ordered through the plaintiff "only for the purpose of illustrating works to be published by the said Estes and Lauriat and the said S. E. Cassino & Co., or their heirs or successors in business, in the English language and in the United States of America," and they agree "not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them, and to be responsible for every and all wrong use of said electrotypes to the amount of any damages," etc. This language literally relates to a publication by the two firms jointly, or by their heirs or successors in business, but the agreement not to sell these electrotypes to any other parties must mean to any other parties than some of themselves, and as the two firms were separate partnerships and were known to be such, the agreement must be held to confer the right upon either of the firms, and its successor in business, to use the electrotype plates for the purpose of illustrating works to be published by either firm separately, as well as the right to use the plates for illustrating works to be published by the two firms jointly, although the intention of the parties existing at the time of the making of the contract was that the electrotype plates should be used in publishing the Natural History in six volumes in the manner hereinbefore set forth.

After making this contract, it was found impracticable for the two firms to publish the Natural History together, and on September 24, 1883, Estes and Lauriat sold to S. E. Cassino and Company all their interest in the work, and delivered to Cassino and Company all materials and other articles owned by them relating to the History, and after that time Estes and Lauriat had nothing to do with the publication. At the time of the execution of the agreement sued on, the firm of S. E. Cassino and Company was composed of Samuel E. Cassino and Bradlee Whidden. On December 31, 1885, this firm was dissolved, and Cassino sold all his interest in the firm assets to Whidden; Whidden continued to carry on the business under the old firm name until about December 31, 1886, and after that continued still in business as a publisher under his own

name. On July 5, 1887, Whidden sold and delivered to Houghton, Mifflin and Company, of Boston, the property known as the "Standard Natural History," which is the name adopted for the work; "said property consisting of all the electrotype plates of six volumes as published, all duplicate cuts ever made now owned by him, the dies for binding cloth books, all stock in sheets, flat or folded, all bound stock, whether in paper parts, cloth, sheep, or half or full morocco, and the copyright of the work," and he guaranteed that the property conveyed "is free from any and all encumbrances or liens on account of copyright, or on account of any other claim or indebtedness whatsoever."

At the time of this sale all of the History had been stereotyped, and the electrotype plates for the illustrations had been soldered into the stereotype plates, and sets of the History had been printed in six large octavo volumes. The report finds that the work was the most valuable part of the assets of S. E. Cassino and Company, and was the "principal live publication" of the firm. Houghton, Mifflin and Company, after the purchase, continued the publication of the work, using also with their own imprint the printed sheets purchased of Whidden; they made some revision of the text, and continued to publish and sell the work as revised down to the time of the trial, and were then publishing it. After the revision the work was called "The Riverside Natural History"; but few alterations had been made by the revision, and it was substantially the same work as that prepared and printed by Cassino and Company. Houghton, Mifflin and Company have never made any use of the electrotype plates except in the publication of this Natural History. They had no connection with the firm of Estes and Lauriat or with Cassino and Company, and they had no other rights in the plates derived from any one, except the rights derived from Whidden by the purchase. They sold at their place of business in Massachusetts one hundred copies of the History to one Trench, of the firm of Kegan, Paul, Trench and Company of London, England, which were bound by Houghton, Mifflin and Company with the imprint of the London firm as the publishers, and these were sent to London. Subsequently the London firm found that there was some trouble about the sale of the work in Great Britain, and thirty-

eight of the one hundred copies were returned to Houghton, Mifflin and Company. It is found in the report that Houghton, Mifflin and Company had no knowledge of any restriction as to the sale of said plates, and that there was no competent evidence at the trial of any damage to the plaintiff by reason of said sale of one hundred copies.

Some evidence was introduced at the trial by the defendants, "that, by the custom of the publishing trade in Boston, a firm which purchases all the plates, sheets, and rights of publication of a work is considered the 'successor in business' of the firm making the sale, so far as that work is concerned." There has been no finding of fact on this point. It is evident, we think, that Houghton, Mifflin and Company were not in any general sense the successor in business of either the firm of Estes and Lauriat, or of Cassino and Company, or of Whidden. The original agreement contemplated that Estes and Lauriat or Cassino and Company might use the plates in any of their publications, whether made by them jointly or separately, and that the successor in business of either firm should have the same right; but this probably means that the successor to the business generally of either firm should have the same right as the firm had, not that every purchaser of the right to continue any single publication of the firm should have the right to use the plates, while the firm continued in business, and might use the plates in other publications. The sale to Houghton, Mifflin and Company did not restrict them to the use of the plates in illustrating the Standard Natural History, and therefore this evidence became immaterial.

When the Natural History had been printed by means of the stereotype plates into which the electrotype plates had been soldered, and had been published by Cassino and Company, or by Whidden, who may be regarded as the successor in business of Cassino and Company, and when the publication had been sold with the plates to Houghton, Mifflin and Company, it may be that the continuance of this publication by Houghton, Mifflin and Company, even if it were a technical breach of the agreement, could not work anything more than nominal damages to the plaintiff. The agreement, however, is that Estes and Lauriat and Cassino and Company will not sell these electrotype plates

to any other parties, and they have been sold to Houghton, Mifflin and Company, who so far as appears must be regarded as another party than the defendants, "their heirs or successors in business," and the sale must be considered as a breach of the agreement. If the damages directly resulting from the publication of the History by Houghton, Mifflin and Company cannot be regarded as substantial, yet if by the sale Houghton, Mifflin and Company acquired the absolute property in the plates so that they can use them in any of their publications, and can multiply them and sell them to others to be used, the sale may be of substantial damage to the plaintiff.

It sufficiently appears that the plaintiff at the date of the agreement was the general owner of the plates, and of the right to multiply, sell, and use them, and that in his dealings with the defendants he required an agreement on their part that they would use them only in their own publications, and would not sell them or multiply them for the purpose of selling them, in order that he might have the opportunity of selling the plates to other persons who might wish to use them in their publications, or might be able to protect persons to whom he had already sold the right to use the plates.

It does not appear that the plates or the prints from them were protected or could have been protected by a copyright in the United States, but the plaintiff meant to accomplish much the same result, in requiring this agreement from the defendants, as could be reached under a copyright law by a license. It is not entirely clear from the agreement whether the plates were sold absolutely to the defendants, or were let to them to be used in a particular way. The prints after they had been published, unless protected by a copyright, could be copied by any one, and plates could be engraved and electrotype plates made, but this would be a costly process when compared with that of multiplying the plates. We think that it must be held that the plates were sold to the defendants so that the title passed to them. The agreement on their part not to sell them to other parties, nor to multiply them for the purpose of selling, is in the nature of an agreement in restraint of trade. Considering the nature of the property, we are of opinion that such an agreement is reasonable, and one which ought to be enforced between

the parties to it. See *Henry Bill Publishing Co.* v. *Smythe*, 27 Fed. Rep. 914; *Clemens* v. *Estes*, 22 Fed. Rep. 899; *Parton* v. *Prang*, 3 Cliff. 537. The price to be paid for the plates, if they were to become the absolute property of the purchaser, without any restriction upon the use to be made of them, might reasonably be more than if they were purchased under such an agreement as is the foundation of this suit. It must be considered that the title of Houghton, Mifflin and Company, and their right to use the plates, are unaffected by this agreement, and therefore it is impossible to say, on the facts and evidence reported, that the defendants are liable only in nominal damages.

In determining the measure of damages the first question is whether the contract is to be governed by the law of Massachusetts or by the law of the kingdom of Saxony. We think that it is to be governed by the law of Massachusetts. The contract was signed in Massachusetts and sent to the plaintiff at Leipzig, Saxony; it did not become a contract until the plaintiff accepted it and notified the defendants of such acceptance, which he did by telegram sent to them at Boston. *Lewis* v. *Browning*, 130 Mass. 173. *Pine* v. *Smith*, 11 Gray, 38. *Hill* v. *Chase*, 143 Mass. 129. The contract relates to what is to be done by the defendants in the United States of America; the defendants are described as "of Boston, Mass., U. S. A.," and the date of the contract is Boston. We think that it must be regarded as a contract to be performed in Massachusetts, and that the law of Massachusetts, which is also the law of the forum, must determine the damages to be recovered in the action.

The provisions of the contract are that the defendants are "to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to the Bibliographical Institute Meyer, and to pay, furthermore, a fine to the Bibliographical Institute Meyer equal to the tenfold price of the wrongly used electrotypes." The principal question in this part of the case is whether this fine is to be considered as a penalty. Some evidence has been introduced that by the law of the kingdom of Saxony the plaintiff, in the case of a wrong use of the electrotype plates, could recover both the damages and the fine, although there is the testimony of one jurisconsult that under that law the plaintiff is not entitled to

recover both, but can recover either one or the other, as he may elect. As by the terms of the contract the fine is in addition to the amount of any damages which may have been caused by the wrong use of the electrotype plates, it is impossible to hold that by our law the fine can be considered as liquidated damages. The amount of the fine is plainly intended as a penalty to be paid in addition to the amount of any actual damages suffered. *Higginson* v. *Weld*, 14 Gray, 165. The agreement does not provide that the damages suffered shall be considered to be tenfold the price of the wrongly used electrotype plates, but it leaves the damages to be assessed in the usual way, and provides that the fine shall be paid in addition to the damages, whatever they may be.

As under our law the fine must be considered as in the nature of a penalty, it cannot be recovered, and the plaintiff is entitled to recover only the amount of the damages which have been caused by the breach of the contract. There may be some question whether this fine was intended to cover a breach of the contract which consisted in selling the electrotype plates to other parties than the defendants, their heirs or successors in business, when the plates have not actually been used for any other purpose than that for which the defendants were authorized to use them. Whether the fine was intended to cover all breaches of the contract or not, is, however, immaterial, because as a fine it cannot be enforced. Damages are recoverable in the present suit for a breach of the agreement caused by the sale of the plates to Houghton, Mifflin and Company, and as by the purchase Houghton, Mifflin and Company have acquired the right to use the plates for any of their publications, as well as the right to multiply them and sell them to others to be used, the damages to the plaintiff cannot be said to be nominal. It appears in the copy of the papers from the Superior Court that a jury has already assessed the damages, but this is not mentioned in the report of the presiding judge, and if it is a fact we can take no notice of it. By the terms of that report the amount of the damages is to be determined by a jury, unless the parties agree to have it determined by an assessor.

So ordered.

WILLARD RICHMOND *vs.* SUSAN F. W. AMES.

Worcester. January 10, 1895. — October 19, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Deed — Breach of Covenant — Encumbrance — Easement — Finding — Principal and Agent — Notice to defend Action — Husband and Wife — Damages — Counsel Fees — Date of Assessment — Report — New Trial.

It is not within the ordinary scope of the duty of an agent, appointed to manage real estate, to appear for his principal in a suit between other persons relating to real estate not belonging to the principal, but which has been conveyed by the principal, and to take upon himself the defence of such suit.

A notice to a grantor of land, that the grantee has been sued by a third person claiming a right of way in the land upon which the grantee has encroached with a building, should be such as to give the grantor information that he is called upon to come in and defend the suit, if he desires, and that he is to be held responsible for the result of the suit.

Evidence that a husband, who acted as the agent of his wife in the management of her real estate, was informed orally by the grantee in a deed from her that such grantee had been sued by a third person claiming a right of way in the land conveyed upon which the grantee had encroached with a building, and that the husband might be needed as a witness in such suit, without any intimation that his wife should be informed of it and should take upon herself the defence of the suit, will not warrant a finding that the notice was intended as a notice to the wife to come in and defend the suit, or was so understood by the husband.

If it was reasonable for the grantee in a deed containing a covenant against encumbrances to buy off an encumbrance on the land conveyed, and the sum paid was reasonable, he can recover such sum in an action for breach of the covenant, with interest from the time of payment.

It seems, that the amount paid by the grantee in a deed containing a covenant against encumbrances for reasonable counsel fees, in defending, in good faith, a suit for encroaching on a right of way claimed in the land conveyed, may be recovered in an action by him against his grantor for breach of the covenant, if it was the grantor's duty to defend that suit, and he had an opportunity and declined so to do; but whether such fees can be recovered if no opportunity was given the grantor to defend the former suit, *quære*.

In an action for breach of the covenant against encumbrances in a deed, when the encumbrance is a right of way, and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the encumbrance; and such damages are to be assessed as of the date of the trial.

If an action for breach of the covenant against encumbrances in a deed is reported by the Superior Court for the determination of this court, which is to enter

such judgment "as shall be deemed proper," and it does not appear from the report upon what principles of law the damages were assessed, a new trial will be ordered upon the question of damages only.

CONTRACT, for breach of the covenants in a deed from the defendant to the plaintiff of land in Worcester. Writ dated June 12, 1893. Trial in the Superior Court, without a jury, before *Hopkins*, J., who reported the case for the determination of this court, in substance as follows.

On April 1, 1873, Isaac Davis conveyed to the defendant a tract of land described as follows: "A certain lot or parcel of land, with the buildings thereon, situated on the easterly side of Main Street in said city of Worcester, and with the privileges and appurtenances thereto belonging, bounded and described as follows: northerly on land of James Green, one hundred (100) feet; easterly on an open passageway twenty (20) feet wide, sixty-six (66) feet more or less to an open passageway nine (9) feet four (4) inches wide; southerly on said last named passageway one hundred (100) feet, westerly on Main Street sixty-six (66) feet more or less," and containing the usual covenants.

On October 11, 1877, the defendant conveyed to the plaintiff the land in question, the description of which was as follows: "A certain tract or parcel of land located on the easterly side of Main Street, in said Worcester, bounded and described as follows, to wit: beginning at the southwest corner of the estate hereby conveyed, which is also the southwest corner of the estate conveyed to me by Isaac Davis, by his deed bearing date April 1st, 1873, being recorded in Worcester County Registry of Deeds, book 892, page 519; thence northerly by line of said Main Street thirty-five feet, more or less, to a point in the easterly line of said Main Street, which said point would be intersected by a line running parallel to the southerly boundary line described in said Davis' deed, above referred to, and distant northerly sufficient to pass through a point four inches northerly from the southerly line of the southerly granite pilaster, now standing in front of the store now occupied by Hiram H. Ames; thence easterly, passing through said point, in said pilaster, and parallel to said southerly boundary line referred to in said Davis' deed, one hundred feet, to a passageway twenty feet wide; thence southerly by line of passageway thirty-five feet,

more or less, to a passageway nine feet four inches wide; thence westerly by line of said way one hundred feet, to the line of said Main Street and the place of beginning, meaning and intending to convey all of the southerly portion of said estate, as far northerly as said point on said pilaster, with same distance in the rear," and containing the usual covenants.

In 1834, the land through which the passageway described in the above deeds ran, and on both sides thereof, was owned by Isaac Davis, and the land on the northerly side of the passageway at the corner of Main Street was occupied by a block known as the Slater block, extending about thirty-six feet in depth and forming to that extent the northern boundary of the way. On the south side of the way a block called the Quinsigamond Bank block was built by him, and sold in 1863 to five grantees, with a right of way in Layard Place, so called, which was the way in question.* Beyond the southeasterly corner of the Slater block the northern line of the passageway was not marked or defined by any structure; but at that time, and for more than twenty years prior thereto, one Starkie as tenant, and the other persons who used the way and had rights of way therein as owners of real estate abutting on said way, as set forth in *Starkie* v. *Richmond*, and *Green* v. *Richmond*, 155 Mass. 188, had travelled over the open space which extended easterly from the rear of the Slater block in a northeasterly direction around the corner of the Slater block to some buildings in the rear. The Quinsigamond Bank block had an ornamental front, which, at the corner upon Main Street and the passageway above referred to, projected into the way beyond the main line of its wall, and at different intervals along the wall there were projections into the passageway, varying in width from one inch to two feet and a half.

In 1878 the plaintiff removed Slater block, and erected the building now standing on the northerly side of the passageway. While he was engaged in that work, the wife of Starkie, who owned buildings in the rear and was authorized to represent him, went to the defendant as soon as the work had progressed

* A plan of the premises is given in the cases herein referred to, namely, *Starkie* v. *Richmond*, and *Green* v. *Richmond*, 155 Mass. 188, 190.

enough to show where the walls were to be, and told him that he had gone over the passageway; to which the defendant replied "that his deeds were all right." Whereupon Starkie's wife said that "her husband's deeds were before his, and that her husband understood that he had nearly ten feet of the passageway." The plaintiff's new building extended easterly from Main Street eighty feet and two tenths, leaving the passageway between it and the Quinsigamond Bank block of a uniform width of nine feet and four inches, measuring from the northerly wall of the bank building.

After the notification by Starkie to the plaintiff, the latter took no steps, except as appears in the evidence below, to notify the defendant of the existence of an alleged claim of right in the land now covered by the front corner of his present building, or in the land subsequently enclosed by his fence, or of the suits of Starkie and Green against him. He took no steps to remove the encumbrance, if any existed.

He proceeded to build his building, and later to join in the concreting of a portion of the way, and to erect and maintain his fence, as described at the time of the trial reported 155 Mass. 188.

The defendant's husband, who acted as her agent in the management of her property, was present as a witness at that trial. The plaintiff testified as follows:

"*Q.* With whom did you treat when you were purchasing this land? *A.* Hiram Ames.

"*Q.* Mrs. Ames's husband? *A.* Yes.

"*Q.* When you were sued, in the equity suits of Green and Starkie against you, did you see Mr. Ames? did you give him any notice of it? *A.* I did.

"*Q.* And he was a witness here at the time of the trial? *A.* Yes."

The defendant testified as follows:

"*Q.* You are the defendant in this case? *A.* Yes, sir.

"*Q.* And Hiram Ames was your husband? *A.* Yes, sir.

"*Q.* This is the deed to you, and the deed to Mr. Richmond? (Deeds produced.) *A.* Yes.

"*Q.* Did you have a notification of the pendency of the Green and Starkie suits against Mr. Richmond? *A.* No, sir.

"*Q.* Or any notification that you were to be held responsible for them? *A.* I did not.

"*Q.* Up to the time this suit was brought against you? *A.* No.

"*Q.* What did Mr. Ames do, in connection with your real estate? *A.* He collected the rents and did the business for me."

On cross-examination, she testified as follows:

"*Q.* Your husband managed the real estate for you always? *A.* Yes.

"*Q.* You personally did not participate in the management of it at all? *A.* I allowed him to do it.

"*Q.* You allowed him to do it, he was your agent? *A.* Yes."

Within a short time after taking his deed from the defendant, and before he made any alteration in the property, the plaintiff discovered that other parties had rights to an open and unobstructed passage over the way which precluded him from a right to build over the way. Without resorting to his grantor, the plaintiff then made a claim of damage upon Davis, and was paid by him the sum of $2,000 for surrendering the right to build over the way mentioned in the deed from Davis.

Upon the above facts, the judge found as follows:

"1. That the southerly boundary line of the land conveyed by the defendant was a straight line running from the easterly line of Main Street in a southeasterly course to a twenty-foot passageway in the rear; that this line coincided with the northerly line of a tract of land, called a passageway, nine feet and four inches wide, throughout its whole extent; that this northerly line of passageway is parallel with and nine feet and four inches from the building on the south side of Layard Place; and that this passageway or tract of land and its northerly boundary line constitute a monument in the deed.

"2. That other persons had paramount rights in some portion of the area included in the defendant's deed to the plaintiff, with its southerly boundary line thus established.

"3. That in order to remove so much of the encumbrance as is affected by the cases of Starkie and Green against Richmond, the plaintiff had to pay in damages $2,587.86; for reasonable counsel fees, $677.46; and for witness fees, $51; making a total of $3,316.32.

"4. That by reason of said encumbrance upon a triangular piece of the plaintiff's land at the southeast corner, the plaintiff's estate was diminished in value, in 1892, to the extent of $232.54.

"5. That the plaintiff is entitled to recover the several sums aforesaid, with interest from October, 1892, to date."

Such judgment was to be entered "as shall be deemed proper."

The case was argued at the bar in January, 1895, and afterwards was submitted on the briefs to all the judges.

R. Hoar, for the defendant.

W. S. B. Hopkins, (*F. B. Smith* with him,) for the plaintiff.

FIELD, C. J. The report of this case is in some respects too meagre to present the questions of law involved in it in a satisfactory manner. We do not know from the report whether the $2,587.86 which the plaintiff "had to pay in damages" "in order to remove so much of the encumbrance as is affected by the cases of Starkie and Green against Richmond," was the sum of the damages assessed in those cases, if any damages were assessed, or whether it was a sum agreed upon by the parties to those suits. We do not know whether the court in the present case found that this was a reasonable sum to be paid, or whether the court held that, by reason of the notice of the pendency of those suits given to the husband of the present defendant, she became conclusively bound to pay to the present plaintiff the amount of the damages recovered in those suits, if any were recovered. We do not know why the court found that the plaintiff in the present suit was entitled to recover interest "from October, 1892." This may have been the date when the money was paid by the present plaintiff, but that does not appear in the report. The date of the writ in the present action is June 12, 1893. The report refers to the cases of *Starkie* v. *Richmond* and *Green* v. *Richmond*, found in 155 Mass. 188, and it may be considered that those cases as they are there reported are to be taken as a part of the report of the present case.

The original papers in those cases entered in this court show that it was a part of the final decree in each case that the plaintiff's damages should be assessed by a jury, but it does not appear, and we have no means of knowing that this was done, or

that the damages were assessed in any manner, although as it seems the briefs of both parties in the present suit assume that the damages were assessed, and also assume that the damages found in the present case to have been paid by the plaintiff are the sum of the damages assessed in those suits.

No specific questions of law are reported in the present case for the consideration of this court, but certain facts are reported, some of the evidence is reported verbatim, and there are certain findings of fact by the court, and this court is to enter such judgment "as shall be deemed proper." We see no reason to doubt that the Superior Court was warranted by the evidence in finding as it did in the first and second clauses of the findings of fact set out in the report.

The remaining questions of law relate to the measure of damages. The plaintiff's claim is, that the land conveyed to him by the defendant's deed was on its southerly boundary subject to a right of way in favor of other persons. The suit is maintained on the covenant against encumbrances. The suits of *Starkie* and *Green* v. *Richmond* were suits in equity to compel the defendant therein, who is the plaintiff in the present suit, to tear down a building which he had erected, and which was found to extend over a small part of the way, and also to remove a fence which enclosed a triangular piece in the rear of the lot, which was subject to this right of way. The court, under the facts found in those cases, refused to order the removal of the building, and appointed commissioners to run the line of the way. We understand that the fence was at some time removed, leaving the triangular piece thereafter open for the use of the persons entitled to use the way. Although the building encroached upon the way, yet the court permitted the building to stand, and decreed that the plaintiffs in those suits should be compensated in damages to be assessed for the destruction in part of their right of way. We do not know on what principles the damages were assessed in those suits, if they were assessed, or what issues were submitted to a jury, if any were submitted.

If the fair interpretation of the third clause of the findings of facts set out in the report is that the plaintiff bought off the encumbrance of the right of way so far as the building extended over the line of the way, and had to pay therefor $2,587.86, and

if it be assumed that these are the damages assessed in the suits of *Starkie* and *Green* v. *Richmond*, one question is whether the present defendant had notice of those suits, and was called upon to take upon herself the defence of them. Upon this question all of the evidence is reported. The evidence tends to show that the husband of the present defendant had notice of the bringing of those suits and was a witness at the trial of them, and that he managed his wife's real estate for her by her permission, but there is no evidence that the wife, who is the present defendant, had any notice. There is no evidence that the husband had notice in terms that his wife would be held responsible for the result of the suits, or that she was called upon or would be given an opportunity to defend them. There is no evidence that the notice was given with any such intention, or was understood by the husband to be a notice to his wife to come in and defend the suits. We doubt whether the fact that the husband was the agent of the wife in the management of her real estate made him her agent to receive any such notice for her. It is not within the ordinary scope of the duty of such an agent to appear for his principal in suits between other persons relating to real estate not belonging to his principal, and to take upon himself the defence of the suits. In giving such a notice, although the strict formalities of the ancient law are not now required, still, whatever its form, the notice should be such as to give the person notified information that he is called upon to come in and defend the suit if he chooses, and that he is to be held responsible for the result of the suit. *Boston* v. *Worthington*, 10 Gray, 496. *Chamberlain* v. *Preble*, 11 Allen, 370. *Elliott* v. *Hayden*, 104 Mass. 180. *Boyle* v. *Edwards*, 114 Mass. 373. The principal object of the suits of Starkie and Green was to compel the defendant therein to remove a building which he had erected. The assessment of damages was incidental only, and if it be assumed that the present defendant could properly be vouched in to defend such suits, there is no antecedent probability or presumption that the defendant in suits of this nature would be willing to intrust the defence to another person.

It may be that notice of the pendency of a suit, without more, given to the person who is responsible over, may, under some circumstances, imply that the person notified is called upon to

defend the suit, and it may be so understood by that person, but this is not the ordinary effect of such a notice. There is no evidence in the present case that the notice was anything more than information orally given to the husband that the suits had been brought and that he might be needed as a witness, without any intimation that his wife should be informed of it and should take upon herself the defence of the suits. We are of opinion that, on the evidence reported, it could not properly be found that the notice was intended as a notice to the wife to come in and defend the suits, or was so understood by the husband.

Still, if this defendant is not bound by the assessment of damages in the suits of Starkie and Green, yet if it was reasonable for the present plaintiff to buy off the encumbrance, so far as the building was concerned, and if the sum paid was reasonable, the plaintiff can recover such reasonable sum in the present suit, with interest from the time of payment. If it was a question reasonably doubtful whether the plaintiffs in the suits of Starkie and Green were right in their contention as to the right of way, the present plaintiff had the right to defend those suits, and it may be that he had the right to ask the present defendant to defend them, and that any expenses reasonably incurred in defending against the claim of a right of way made in those suits he can recover of the present defendant. *Bradshaw* v. *Crosby*, 151 Mass. 237. *Farnum* v. *Peterson*, 111 Mass. 148. Whether such expenses should include reasonable fees paid for counsel, in addition to the taxable costs, is on the authorities a question of some difficulty. If it was the duty of the present defendant to defend the suits, and she had an opportunity of defending them and declined to do so, then, if the present plaintiff in good faith defended them, it would seem that reasonable counsel fees should be recovered. *Westfield* v. *Mayo*, 122 Mass. 100. See *Leffingwell* v. *Elliott*, 10 Pick. 204. If no opportunity was given to the present defendant to defend the former suits, the law, perhaps, is more doubtful. See *Lindsey* v. *Parker*, 142 Mass. 582. *Boston & Albany Railroad* v. *Charlton*, 161 Mass. 32. We are unable to determine from the report precisely what the court found in these respects.

One contention is that the present plaintiff, after notice by Starkie's wife in 1878 that he was proceeding to build on

the passageway, persisted in going on with the erection of his building, and thus by his own fault increased the damages which he had to pay, and it is argued that the present defendant ought not to be compelled to pay damages occasioned by the fault of the plaintiff. If damages were assessed in the suits of Starkie and Green, we have said that we do not know on what principles they were assessed. We infer that the damages should have been assessed in those suits on the principles of a compulsory purchase of the encumbrance, so far as the erection of the building was concerned, and that this should have been done on the theory of paying compensation at a fair price for the encumbrance in view of all the circumstances. It is probable that the court, by refusing to compel the defendant in those suits, who is the present plaintiff, to take down his building, and, by ordering an assessment of damages, did not mean to give to the plaintiffs in those suits an opportunity to obtain an unreasonable price for a release or discharge of the encumbrance. It is entirely consistent with the facts reported, that the present plaintiff proceeded in good faith in erecting his building, even after the notice of Starkie's wife. The facts so far as they are reported are such that it might well require the judgment of a court in order to determine the boundaries and width of the passageway which Starkie and Green were entitled to use. If the damages assessed in the suits brought by them are not to be taken as conclusive upon the defendant in the present suit, it was for the court to determine whether the present plaintiff acted reasonably in contesting those suits and in buying off the encumbrance.

In regard to the triangular piece, we infer that the court in the present case estimated the diminished value of the plaintiff's estate by reason of the encumbrance, not as of the date of the deed or as of the time of the trial, but as of date when the encumbrance of the right of way under the building was extinguished by purchase. In an action on the covenant against encumbrances, when the encumbrance is a right of way, and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the encumbrance. *Wetherbee* v. *Bennett*, 2 Allen, 428. The general rule is stated in *Harlow* v. *Thomas*, 15 Pick.

66, 69, as follows: "The general rule in cases of this kind is plain and undisputed. If the covenantee has fairly extinguished the encumbrances, he ought to recover the expenses necessarily incurred in doing it. If they remain and consist of mortgages, attachments, and such liens on the estate conveyed as do not interfere with the enjoyment of it by the covenantee, he can recover only nominal damages. But if they are of a permanent nature, like the perpetual servitudes in this case, such as the covenantee cannot remove, he should recover a just compensation for the real injury resulting from their continuance. *Prescott* v. *Trueman*, 4 Mass. 630." See *Batchelder* v. *Sturgis*, 8 Cush. 201.

We think that these damages are usually assessed as of the date of the trial. If there have been special damages theretofore suffered by the plaintiff by reason of the exercise of the right of way, these may be shown up to the date of the trial, and, if the easement is of a permanent nature, the question is how much at the time of the trial is the plaintiff's estate diminished in value by reason of the existence of the encumbrance.

As it seems to a majority of the court that it does not appear upon what principles or rules of law the damages in the present case have been assessed, they are of opinion that there should be a new trial, but only upon the amount of the damages.

So ordered.

COMMONWEALTH *vs.* RICHARD E. FOLLETT.

Berkshire. September 10, 1895. — October 19, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Taking of Trout with a Net — Statute.

The provisions of Pub. Sts. c. 91, § 51, are intended to prohibit an owner of land on a stream not navigable from taking trout with a net from the stream on his own land, as well as to prohibit other persons from doing so.

Trout are not a class of animals which can become the absolute property of anybody while in an open unenclosed stream.

COMPLAINT charging that the defendant, on September 1, 1893, caught and took three hundred trout from the waters of

"Lee Brook," so called, in Sheffield, with and by means of a certain net.

Trial in the Superior Court, before *Maynard*, J., who allowed a bill of exceptions in substance as follows.

The stream from which the trout were taken was a brook made up of two or three tributaries, having its source in the town of Sheffield and known as Lee Brook. It flowed some three or four miles, to a stream known as Hubbard Brook, through which its waters discharged into the Housatonic River, all in the town of Sheffield. None of these streams were navigable.

The principal tributary to Lee Brook flowed about half a mile and entered land owned or leased by the defendant, there uniting with another tributary having two sources on the land of the defendant, one a spring upon which his hatchery was situated, and the other a spring the water from which flowed about half a mile and united with the stream flowing from the hatchery spring a short distance below. On the tributary thus formed, and before its union with said principal tributary, the defendant had erected a number of small dams forming artificial ponds in which he kept trout for culture. This brook thus made up flowed from the land so owned or leased by the defendant to and through land of another riparian proprietor, the distance on the last named land being about half a mile, and then entered again upon other land owned or leased by the defendant, through which it flowed about one mile and entered the land of another riparian proprietor. There were no obstructions in either of said brooks to interfere with the passage of fish up and down the stream, except the dams erected by the defendant, as stated, upon the tributary having its sources upon his land, and the vats and tanks erected upon the same tributary in connection with the defendant's hatchery, and there were trout in Lee Brook other than those which the defendant claimed to be owned by him, it having been on one or two occasions stocked by other parties, within two or three years before the erection of the defendant's hatchery.

The defendant testified that he was engaged in the business of artificially propagating and maintaining trout in Sheffield; that he had a trout hatchery, so called, on a small tributary of Lee Brook in Sheffield, where he artificially hatched nearly

three millions of "fry," or young trout, yearly; that he owned or leased land through which a portion of Lee Brook flowed, as above stated; that the sources of the small tributary brook which emptied into Lee Brook were in land so owned or leased by him, one of which was the spring within his hatchery building and the other the spring outside of said building, which the defendant had dug out and made into a series of small artificial ponds, wherein he kept trout artificially propagated or maintained by him in his said business; that the overflow from the hatchery and from the pond united, forming said small tributary of Lee Brook which flowed through the land owned or leased by the defendant, and to and through land of other riparian proprietors, finally emptying into a larger brook called the Hubbard Brook; that early in 1893 he purchased in Rhode Island fifteen hundred artificially propagated trout of the species called "Hoxie trout," for the purpose of obtaining their spawn for use in his business; that they were two years old and weighed on the average about half a pound each; that he brought them from Rhode Island and placed them in one of the artificial ponds; that in the following June, 1893, he noticed that they were becoming diseased, a fungus growth appearing on their fins and sides; that to check this disease he let them out of the pond into Lee Brook, on the land owned or leased by him; that on all the land so owned or leased by him through which the brook flowed were printed notices stuck up forbidding persons from fishing in the brook on the defendant's premises; that afterwards he fed the trout in the brook on those sections thereof which flowed through land so owned or leased by him by throwing chopped meat and other substances into the water, a portion of which floated down the stream with the current; that they were fed by him daily in the same manner as he fed those in the hatchway; that in the latter part of August or early part of September of the same year, to secure some of the spawn from the trout for use in his business of trout culture, he caught from the brook on his own premises, both on the land where his hatchery was located below the hatchery and on his lands below the half-mile strip of the intervening riparian proprietor, a number of trout, estimated at sixty, with a net; that nearly all of them were Hoxie trout, being a part of the number let into the

brook by him the June before; that they were very tame, easily netted and readily identified as the Hoxie trout; that he placed them when caught in his hatchery, kept them there until ripe, that is, until they were ready to be delivered of their spawn, some three or four weeks, then stripped the spawn from them and let them all back into the brook; and that all the fish so taken other than the Hoxie trout were thrown from the net back into the brook.

The defendant also called witnesses who claimed to be experts in trout culture, who testified that Hoxie trout could easily be distinguished from the ordinary brook trout. There was also evidence from the witnesses on both sides that the native or ordinary brook trout were of a deeper and richer shade than the Hoxie and other trout artificially propagated, but that after remaining in the brook for a period of time the latter came to look more like the native trout.

The judge stated that he should instruct the jury in regard to the Hoxie trout, "that if the defendant took the fish in a net in the manner and in that portion of the brook testified to by him, and took them away and kept them till ripe and then stripped them, as testified to by him, he was guilty of a violation of the statutes upon which the complaint is founded, although he was able and did identify each fish so taken and taken away as a fish which he had brought from Rhode Island and let loose in said brook, as testified to by him, and although he returned each of said fish to said brook as soon as stripped."

In view thereof, the defendant consented that the judge might direct a verdict of guilty; and the defendant alleged exceptions.

H. C. Joyner, (*C. E. Hibbard* with him,) for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

FIELD, C. J. The Pub. Sts. c. 91, § 51, prohibit the taking of trout with a net at any season of the year. Sections 25 and 26 of the same chapter are as follows: "Sect. 25. A riparian proprietor may, within the limits of his own premises, enclose the waters of a stream not navigable, for the cultivation of useful fishes: provided he furnishes a suitable passage for migratory fishes naturally frequenting such waters. Sect. 26. Fishes artificially propagated or maintained shall be the property of the person propagating or maintaining them; and a person legally

engaged in their culture and maintenance may take them in his own waters at pleasure, and may have them in his possession for purposes properly connected with said culture and maintenance, and may at all times sell them for these purposes, but shall not sell them for food at seasons when their capture is prohibited by law."

The construction we give to these sections, when applied to fish in the waters of a stream not navigable, is that the fish which are declared to be the property of the person propagating or maintaining them, and which such person may take "in his own waters at pleasure," are fish in waters which have been enclosed as provided by § 25. In *Commonwealth* v. *Perley*, 130 Mass. 469, 471, the court (speaking of St. 1869, c. 384, §§ 16, 18, and 20 of which were incorporated in §§ 25 and 26 of c. 91 of the Public Statutes) say: "The absolute ownership created by the statute necessarily exists only where and so long as he who propagates or cultivates the fish keeps them within a territory over which he has absolute control; as soon as he permits them to pass into territory where others have rights of fishery, equal to or greater than his, his ownership is gone, because they may then be rightfully taken by others without his consent," etc.

The contention of the defendant, that the Hoxie trout had become so tame as to become his absolute property wherever they might be found in an open stream, cannot be supported. Such fish are not of the class of animals which, without confining them in private waters, can become the absolute property of anybody. These trout in an open stream are like other trout, and Pub. Sts. c. 91, § 51, were intended to prohibit an owner of land on a stream not navigable from taking trout with a net from the stream on his own land, as well as to prohibit other persons from doing so.

Exceptions overruled.

HELEN L. RILEY *vs.* HAMPSHIRE COUNTY NATIONAL BANK.

Hampshire. September 17, 1895. — October 19, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Promissory Note — Husband and Wife — Pledge — Agency — Evidence — Estoppel — Equity — Practice.

If during the trial of a suit in equity exceptions are taken by the defendant to the admission of evidence, and after a decree in favor of the plaintiff, from which no appeal is taken, the case is reported for the determination of this court upon the questions of law presented by the report, the court will not revise the findings of fact necessarily involved in the decree, although all the evidence is reported.

If a married woman indorses a promissory note given by her husband to a bank for a loan to him, and pledges to the bank shares of stock owned by her as collateral security for the note, the fact that she subsequently indorsed other notes of her husband discounted at the same bank, without demanding the delivery to her of the certificate of stock, does not show an agreement on her part that the stock should be security for the general indebtedness of her husband to the bank.

If a married woman indorses a promissory note given by her husband to a bank for a loan to him, and pledges to the bank shares of stock owned by her as collateral security for the note, it is competent for her to show, upon a bill in equity to redeem the stock, that her husband had no express authority to write upon another note, given by him to the bank for the amount to which his account had been overdrawn, a statement that the stock is collateral security for that note also, and that the transaction was without her knowledge; and it is also competent for her to show that she never knew that he had overdrawn his account.

Oral evidence is admissible to show that an assignment of shares of stock, however absolute in form, is merely a pledge; and the consideration and purpose of the transaction may be shown in the same way.

That a married woman, who has indorsed a promissory note given by her husband to a bank for a loan to him and pledged to the bank shares of stock owned by her as collateral security for the note, subsequently indorses other notes of her husband discounted at the same bank, without demanding the delivery to her of the certificate of stock, the assignment of which is signed by her in blank and accompanied by a power of attorney to the bank to sell the stock, does not estop her to maintain a bill in equity against the bank to redeem the stock, without paying the amount of another note given without her knowledge by her husband to the bank for the amount to which his account had been overdrawn, and upon which he wrote a statement that the stock was collateral security for that note also, the fact of such overdraft being unknown to her.

LATHROP, J. This is a bill in equity, filed January 24, 1895, to redeem seventeen shares of the capital stock of the North-

ampton Emery Wheel Company. The bill alleges that these shares are held by the defendant as collateral security for two promissory notes signed by the plaintiff's husband and indorsed by her, one dated April 12, 1894, for $150, payable three months after date, and the other dated June 4, 1894, for $2,000, also payable three months after date. The bill also alleges that the plaintiff, on January 23, 1895, tendered to the defendant the full amount due on these notes, and demanded delivery of the shares, which was refused.

The answer admits the tender, and alleges that the defendant holds the shares as collateral security for a promissory note, dated June 21, 1894, for $165, payable three months after date, as well as for the two notes mentioned in the bill. The answer further alleges that the certificate of the shares of stock was signed in blank by the plaintiff; that a power of attorney authorizing a transfer of the shares was also signed by the plaintiff; and both instruments were delivered to the defendant for the purpose of arranging "a line of credit" to be given to the plaintiff's husband by the defendant; that the plaintiff made her husband her agent in the first transaction and in all the subsequent ones; and that the plaintiff has permitted and sanctioned such a course of dealing with regard to the credit the defendant was giving her husband on the strength of the collateral security, that she is not in a position to defeat the right of the defendant to hold the shares for the three notes.

The case was heard by a single justice of the Superior Court, who entered a decree for the plaintiff, with costs. The decree ordered the defendant to surrender and deliver to the plaintiff the certificate of seventeen shares described in the bill, on a renewed tender of the amount previously tendered. The decree also stated that the stock was not held for the note of $165. No appeal was taken from the decree, but the justice has reported the case. The reservation is in these words: "The questions of law presented by this report are reserved for the determination of the Supreme Judicial Court, who will make such order or decree in the case as justice and equity may require. All the evidence is reported." This is followed by a report of the evidence. Apparently this was done in this form because the only exceptions taken rendered it necessary to con-

sider the evidence for the purposes of the exceptions; but we are of opinion that we are not called upon to revise the facts which the judge must have found to have entered the decree which he did.

During the trial, the defendant asked the court to rule that the plaintiff was not, on the competent evidence, entitled to a decree permitting her to redeem said shares without paying the balance due on said note for $165, as well as the sum tendered by her. This ruling the court declined to give, and the defendant excepted. Exception was also taken by the defendant to the admission of certain testimony of the plaintiff and her husband, with reference to the arrangement with the defendant bank, and their dealing with it, and as to what the defendant did, understood, permitted and did not permit.

There are certain facts in the case which are not in dispute, as follows. In 1887, John E. Riley, the husband of the plaintiff, began business in Northampton, and borrowed the sum of $2,500, giving his promissory note therefor, indorsed by the plaintiff. At this time she pledged to the defendant the seventeen shares in question, and delivered to the bank an assignment of the shares, signed by her in blank, and also signed and delivered a power of attorney authorizing the cashier of the defendant bank to sell, assign, and transfer the shares above mentioned. The plaintiff's husband continued to keep an account with the defendant until June 26, 1894, when he filed a petition in insolvency. The first note was renewed from time to time, and sometimes other notes were given. Thirty-seven notes were given in all, and all of the notes, with the exception of the last one for $165, which is the one in controversy, had upon them the name of the plaintiff. At the time of the failure of the plaintiff's husband the bank held the two notes mentioned in the bill for which the plaintiff admits her liability, and the note for $165.

The circumstances attending the giving of this note were these. On June 21, 1894, Mr. Warner, the president of the defendant, knowing that the plaintiff's husband was "close pressed," called upon him at his shop, told him that his account was overdrawn to the amount of $165, and asked him to make a note to the bank for that amount, and to write upon

it the words, "Collateral 17 shares Northampton Emery Wheel Co." This was done. At this time the plaintiff was not present, she was not consulted, and knew nothing about it until after her husband's failure.

The question of fact in dispute between the parties is whether the shares of stock were pledged at the time of the first transaction for a general credit to be given to her husband, and included all notes to be thereafter given as well as the note then given. The testimony of the husband tends to show that the pledge was made for a specific purpose, namely, to enable him to buy out a local merchant, for which the note for $2,500 was discounted. The testimony in behalf of the defendant, in support of its proposition that the pledge was also for future indebtedness, came from its president and cashier, and is not very definite. Assuming that the evidence of the defendant tended to show that the pledge was for future indebtedness, and there was therefore contradictory evidence on this point, we cannot revise the finding of the judge in favor of the plaintiff.

There is no pretence of any subsequent agreement between the parties, except as it is shown by their actions. Undoubtedly, the fact that the plaintiff, by signing her name on other notes discounted at the same bank, without demanding the delivery to her of the certificate of stock, is strong evidence that, as each note was signed, she assented that the shares should be security for this note; but this does not show an agreement on her part that they should be security for the general indebtedness of her husband to the defendant.

The evidence objected to relates principally to the question whether the husband had express authority to bind his wife by putting on the note for $165 the words, "Collateral 17 shares Northampton Emery Wheel Co." The answer alleged that her husband was her agent in the matter of the note for $165, as well as in the first transaction. It was competent for the plaintiff to show that he had no express authority and that the transaction was without her knowledge. So, too, it was competent for her to show that she never knew that he had ever overdrawn his account, for the purpose of showing that she had not acquiesced in his so doing.

The effect of the form of the transfer of the shares of stock

and of the power of attorney remains to be considered. There is no doubt that oral evidence is admissible to show that such a transaction, however absolute in form, is merely a pledge; and the consideration and purpose of the transaction may be shown in the same way. *Newton* v. *Fay*, 10 Allen, 505. *Minchin* v. *Minchin*, 157 Mass. 265. As was said in *Boardman* v. *Holmes*, 124 Mass. 438, 442, "we must look to the whole transaction between the parties."

We find nothing in the conduct of the plaintiff which works an estoppel against her, or furnishes ground upon which a court of equity should not afford her relief. In each of her prior transactions with the bank she indorsed the note made by her husband. The note in controversy was not indorsed by her, and she knew nothing about it until after it was delivered. While it appears that her husband was frequently allowed to overdraw his account, it also appears that until the last transaction he borrowed money from third persons and paid his overdrafts, and that his wife was ignorant of these transactions.

It follows that the decree of the Superior Court must be

Affirmed.

W. G. Bassett, for the defendant.

J. C. Hammond & H. P. Field, for the plaintiff.

JAMES W. COLE *vs.* GEORGE TUCKER & others.

Hampshire. September 17, 1895. — October 19, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Constitutionality of Election Law — Statute not void as Partial and Unequal.

The St. of 1893, c. 417, entitled "An Act to codify and consolidate the laws relating to elections," so far as it relates to the use of an official ballot in the election of city officers, is constitutional; and the contention that the use of the official ballot is made compulsory in the election of city officers and optional in the election of town officers, and that therefore the statute is void as partial and unequal in its operation upon the rights of voters, cannot be maintained.

TORT, against the election officers of a ward in the city of Northampton, to recover damages for wrongfully refusing, as the

plaintiff alleges, to allow the ballot offered by him to be deposited in the ballot box at the time of the annual election of city officers on December 4, 1894.

The case was submitted to the Superior Court, and, after judgment for the defendants, to this court, on appeal, upon agreed facts, the material parts of which appear in the opinion.

C. G. Delano, for the plaintiff.

A. E. Addis, for the defendants.

FIELD, C. J. It is necessary in this case to determine the constitutionality of St. 1893, c. 417, so far as it relates to the use of an official ballot in the election of city officers. A question somewhat like this was discussed in *Miner* v. *Olin*, 159 Mass. 487, but the court there expressed no opinion upon it. The defendants in the present case were election officers at an annual election for city officers in the city of Northampton, and refused to allow the ballot offered by the plaintiff to be deposited in the ballot box, and the ballot was not deposited and was not counted in the election. It was a printed ballot, designated in print at the head of it as the Regular Prohibition Ticket. The official ballot provided for use at the election had on it the names of the candidates of the Republican and the Democratic parties for office, but no other names, and the plaintiff wished to vote for the candidates of the Prohibition party. The plaintiff was a duly qualified voter, whose name was upon the check list.

The qualifications of voters for town and city officers are not prescribed by the Constitution, but by statute; yet we do not think it necessary to consider whether, so far as the question in this case is concerned, a distinction can be made between the powers of the General Court to prescribe the manner of casting ballots at elections for city and town officers and at elections for State officers or for State representatives or senators.

Article IX. of the Declaration of Rights of the Constitution is as follows: "All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." This in terms relates to inhabitants having such qualifications as are established by the frame of government, but

we assume that the same principles apply to elections for city and town officers. In regard to the right of voting for State officers, where the qualifications are prescribed by the Constitution, the court, in *Capen* v. *Foster*, 12 Pick. 485, say: "And this court is of opinion, that in all cases where the Constitution has conferred a political right or privilege, and where the Constitution has not particularly designated the manner in which that right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right, in a prompt, orderly, and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power as, under the pretence and color of regulating, should subvert or injuriously restrain the right itself." See *Kinneen* v. *Wells*, 144 Mass. 497.

The principal question then is, whether St. 1893, c. 417, with respect to the use of an official ballot, is a reasonable regulation of the manner in which the right to vote shall be exercised, or whether it subverts or injuriously restrains the exercise of that right. The provisions of the statute requiring the use of an official ballot do not touch the qualifications of the voters, but they relate to the manner in which the election shall be held. In general, it may be said that the so called Australian Ballot Acts, in the various forms in which they have been enacted in many of the States of this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he pleases by leaving blank spaces on the official ballot in which he may write or insert in any other proper manner the names of such persons, and by giving him the means and a reasonable opportunity to write in or insert such names. *State* v. *McMillan*, 108 Mo. 153. *Bowers* v. *Smith*, 111 Mo. 45. *Detroit* v. *Rush*, 82 Mich. 532. *Attorney General* v. *May*, 99 Mich. 538. *De Walt* v. *Bartley*, 146 Penn. St. 529. *State* v. *Black*, 25 Vroom, 446. *State* v. *Dillon*, 32 Fla. 545. *Taylor* v. *Bleakley*, 39 Pac. Rep. 1045. *Slaymaker* v. *Phillips*, 40 Pac. Rep. 971. *People* v. *Wappingers Falls*, 144 N. Y. 616. *Sego* v. *Stoddard*, 136 Ind. 297. *Curran* v. *Clayton*, 86 Maine, 42. *Whittam* v. *Zahorik*, 59 N. W. Rep. 57.

Without reciting in detail the provisions of St. 1893, c. 417, the material portions of which relevant to the present case are referred to in the opinion in *Miner* v. *Olin*, *ubi supra*, we are of opinion that, for the reasons given in the cases cited above, the provisions of the statute requiring the use of an official ballot cannot be declared unconstitutional. These provisions, as well as the provisions which are incidental to the use of an official ballot, and which regulate the manner in which it shall be prepared and used, are such as may properly be deemed necessary by the Legislature in order to secure to the voters a full and fair election and an accurate and honest count of the ballots, and they do not impair the rights of the voters to such an extent as to warrant a court in holding them to be void on the ground that they are beyond the constitutional power of the General Court.

The remaining contention of the plaintiff is, that the use of the official ballot is made compulsory in the election of city officers and optional in the election of town officers, and that therefore the statute is void as partial and unequal in its operation upon the rights of voters. See St. 1893, c. 417, §§ 129, 143, 173. There is nothing in the Constitution which requires that the laws regulating elections for city and town officers shall be uniform throughout the Commonwealth, and in some respects the laws regulating elections in cities for city officers have always been different from those regulating elections in towns for town officers. See Pub. Sts. c. 7. As the provisions of the statute we are considering do not affect the qualifications of the voters, but merely regulate the form of voting by ballot, it may well be that in small towns it is not always desirable or necessary that all the precautions be taken against mistake, force, fraud, or intimidation in elections which ought to be taken in cities and large towns where there are many voters. There are many provisions of the statutes concerning elections which require cities to do certain things which towns are not required to do, and some provisions concerning cities and towns are made to take effect only upon a vote of the city council or of the inhabitants adopting the provisions. One or two illustrations are sufficient. By Article II. of the Amendments to the Constitution the General Court is empowered to constitute city governments,

and "to prescribe the manner of calling and holding public meetings of the inhabitants in wards or otherwise, for the election of officers under the Constitution, and the manner of returning the votes given at such meetings." Chapter 4 of the Revised Statutes contains the general provisions in force at the time these statutes took effect concerning the manner of conducting elections, but § 12 of the chapter is as follows: "In the city of Boston, the several elections provided for in this chapter shall be conducted according to the provisions of the act establishing the city of Boston, and of the several acts in addition thereto." Chapter 15, § 34, is as follows: "The election of town clerks, selectmen, assessors, school committees, and town treasurer, and also of the moderator of the meetings held for the choice of town officers, shall be by written ballots; and the election of all other town officers shall be in such mode as the meeting shall determine." See Pub. Sts. c. 27, § 80. In matters which concern the form of holding elections for city and town officers, in the absence of anything in the Constitution prescribing the manner in which such elections shall be held, we are of opinion that the provisions need not be the same for all the cities and towns of the Commonwealth.

Judgment for the defendants.

WILLIAM S. CLARK & others *vs.* DENNIS MURPHY.

Hampden. September 25, 1895. — October 19, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Payment — Burden of Proof — Agency — Ratification.

If the only issue in an action of contract for the price of goods sold and delivered is payment, the burden of proof is on the defendant.

An agent who merely solicits orders for goods, sending these orders to his principal to be filled, has no implied authority to receive payment for the goods; and a payment to him will not discharge the purchaser except on proof of some authority to the agent other than that of making sales.

CONTRACT, to recover the price of goods sold and delivered. Trial in the Superior Court, before *Dewey*, J., who directed the

jury to return a verdict for the plaintiffs; and the defendant alleged exceptions. The facts appear in the opinion.

W. W. McClench, for the defendant.

L. White, for the plaintiffs.

LATHROP, J. There being no dispute at the trial of this case that the goods for the price of which this action is brought were sold and delivered by the plaintiffs to the defendant, the remaining issue raised by the pleadings is payment. On this issue the burden of proof is upon the defendant. *Burnham* v. *Allen*, 1 Gray, 496. *Hilton* v. *Smith*, 5 Gray, 400. The exceptions on this point show the giving of a check upon a bank to one Marks, who purported to be an agent of the plaintiffs, for the amount of the bill of the goods sued for. The check was made payable to the order of the plaintiffs. Marks forged an indorsement of the plaintiffs' names, and obtained the money. The question then is as to the authority of Marks to receive payment. As the case was taken from the jury by the presiding judge, who directed a verdict for the plaintiffs, we must in considering this question lay aside the testimony put in by the plaintiffs, unless there is something in it favorable to the defendant.

The exceptions show that Marks was a travelling salesman for the plaintiffs, "whose business it was to solicit orders for the plaintiffs for their goods"; that Marks called upon the defendant and received an order for the goods, the price of which is sued for; that this order was transmitted to the plaintiffs, accepted by them, and the goods were duly forwarded to the defendant, and received and accepted by him.

There is no doubt, on these facts, that the plaintiffs are entitled to recover. An agent who merely solicits orders for goods, sending these orders to his principal to be filled, has no implied authority to receive payment for the goods; and a payment to him will not discharge the purchaser except on proof of some authority to the agent other than that of making sales. There was no evidence here that the goods were intrusted to the agent, or that the plaintiffs had in any way held out Marks as a person authorized to receive payment. The case is the simple one of a payment made to a person who has authority to make sales, and who is not shown to have any

other authority. In such a case, if the purchaser sees fit to make a payment to him, he does so at his own risk. *Clough* v. *Whitcomb*, 105 Mass. 482. *Seiple* v. *Irwin*, 30 Penn. St. 513. *Law* v. *Stokes*, 3 Vroom, 249. *Kornemann* v. *Monaghan*, 24 Mich. 36. *Hirshfield* v. *Waldron*, 54 Mich. 649. *McKindly* v. *Dunham*, 55 Wis. 515. *Butler* v. *Dorman*, 68 Mo. 298. *Chambers* v. *Short*, 79 Mo. 204. *Clark* v. *Smith*, 88 Ill. 298.

We find nothing in the evidence which would have warranted the jury in finding that the plaintiffs, by their subsequent conduct, had ratified the act of the defendant in giving his check to Marks. *Exceptions overruled.*

DENNIS J. GRIFFIN *vs.* UNITED ELECTRIC LIGHT COMPANY.

Hampden. September 25, 1895. — October 19, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ..

Personal Injuries — Electric Wire uninsulated — Law and Fact — Due Care — Negligence.

If a tinsmith, who, while engaged in placing an iron conductor on a building upon the side of which an electric wire runs, is injured by receiving a shock from the wire by reason of the pipe coming in contact with a place on the wire where the insulating material has become worn off, it cannot be said, as matter of law, in an action for his injury, that the condition of the wire was so apparent that he must or ought to have seen it, although the accident happened in the forenoon; but if there is evidence that he was not an expert, and did not know that an electric light wire would do any hurt, or that such wires ran on the sides of buildings, the question of his due care is for the jury.

If the insulation of an electric wire placed on premises by an electric light company is gone, and the wire has been in that condition for such a length of time that the company ought to have known of it, there is evidence of its negligence proper to be submitted to the jury in an action for injuries caused by the wire to a person rightfully using the premises for purposes of business.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff by receiving an electrical shock from a wire of the defendant company. The plaintiff was a tinsmith, and was at work with a fellow servant placing a galvanized iron conductor on the rear of a building called the American House. He was upon the ground and his fellow servant was on a lad-

der near the roof of the building, which was about twenty-two feet from the ground. The wire from which the plaintiff received the shock ran along the wall of another building until it reached a point about two feet from a corner formed by this building with the American House, and then ran diagonally across the corner to the wall of the American House at a point eight or ten feet from the same corner, where it entered a square iron block attached to the wall of the American House. This wire was about twelve feet from the ground. Six or eight inches higher than this wire, and about eight inches nearer to the building, another wire ran along and went into the same box. The conductor was to be placed in the corner formed by the two buildings, for the purpose of carrying off water from a gutter under the eaves of the American House.

We are of opinion that there was evidence for the jury that the plaintiff was in the exercise of due care. The jury might well have found, on the evidence, that the injury was caused by the pipe coming in contact with a place on the wire where the insulating material had become worn off. It cannot be said, as matter of law, that this condition was so apparent to the plaintiff that he must have seen it, or ought to have seen it, although the accident happened in the forenoon. While an expert may consider it dangerous to touch any wire, unless he knows it to be a harmless one, there was evidence that the plaintiff was not an expert, and did not know that an electric light wire would do any hurt, or that electric light wires ran on the sides of buildings. The question of his due care was for the jury. *Illingsworth* v. *Boston Electric Light Co.* 161 Mass. 583, 588.

We are of opinion also that there was evidence of the defendant's negligence proper to be considered by the jury. There was certainly evidence that the insulation of the wire was gone, and its condition was such that the jury might have found from the description given of it by the witnesses that it had been in that condition for such a length of time that the defendant ought to have known of it. The plaintiff was not a trespasser or a mere licensee, who must take the premises of another as he finds them. He was rightfully on the premises for purposes of business. On these premises the defendant had rightly placed, as the case finds, two electric wires. These were

a source of danger unless properly insulated. This fact was recognized by the defendant by insulating them. But it was negligent if it failed to use reasonable diligence in seeing that its wires were kept in a state of repair. This duty it owed at least to every person who, for purposes of business, was rightfully upon the premises. What its duty was in this respect as to other persons we have no occasion to inquire. See *Illingsworth* v. *Boston Electric Light Co.*, *ubi supra*.

The ruling of the justice of the Superior Court in favor of the defendant is stated, in the report upon which the case comes before us, to be based upon the case of *Hector* v. *Boston Electric Light Co.* 161 Mass. 558. But that case differs essentially from the one before us. There a lineman of a telegraph and telephone company was sent to attach a wire to a standard owned by the defendant on the roof of a building numbered 45 Temple Place in Boston. Instead of entering this building and going out upon the roof, he went up through the building numbered 29 Temple Place, passed over the roofs of several intervening buildings until he came to the roof of No. 41, which was next to, but higher than, the roof of No. 45. A bunch of wires ran from the standard on No. 45 over a small portion of the roof of No. 41. The plaintiff stooped under these wires to see how he could get on to the roof of No. 45, and was injured by reason of the insulation being worn off from one of these wires. The case was decided in favor of the defendant, upon the ground that the defendant owed no duty to the plaintiff to maintain an effectual insulation of its wires over other buildings than that on which its standard was placed, which was the only place to which the telegraph and telephone company sent the plaintiff, or where he had a right to be. In the case at bar, the plaintiff was rightfully where he was when injured. The question of the defendant's negligence was for the jury.

By the terms of the report, the order must be,

Case to stand for trial.

J. B. Carroll, for the plaintiff.

W. H. Brooks, (*W. Hamilton* with him,) for the defendant.

EDMUND FITZGERALD *vs.* JAMES H. LEWIS & another.
QUARTUS J. SMITH *vs.* SAME.
ANDREW J. PETERSEN *vs.* SAME.

Hampden. September 25, 1895. — October 19, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Statute — Effect of Amendment — Trespass on Land — Notice to Trespasser — Defence — Evidence.

If a statute recites that a previous statute "is hereby amended so as to read as follows," and then enacts a somewhat different provision from that contained in the prior statute, but upon the same subject matter, the effect of the amendment is to substitute the language of the new statute for that of the old one, and other statutory provisions relating to the old statute, and not inconsistent with the new one, apply to the latter after that statute takes effect.

The overseers of the poor of a city, if in control of its poor farm, have authority to post notices on the land forbidding trespass thereon.

The notice authorized by St. 1890, c. 410, to be posted on land, forbidding trespass thereon, need not be signed.

A belief on the part of a person entering upon land not in his control that the land is his is no defence to a complaint for a violation of St. 1890, c. 410, forbidding an entry without right upon the improved or enclosed land of another.

Where a notice forbidding trespass on land is posted by the person having the lawful control thereof, it is not necessary, in order to convict a person of a violation of St. 1890, c. 410, to prove that he actually saw such notice, if it was reasonably distinct, and was posted in a reasonably suitable place, so that by the exercise of due care it would be seen by him.

In an action for false imprisonment, evidence that the plaintiff was acquitted at the trial of the offence for which he was arrested is not admissible.

THREE ACTIONS OF TORT, for assault and false imprisonment. The cases were tried together in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

The defendants were police officers of the city of Springfield, and justified the arrest of the plaintiff under Pub. Sts. c. 203, §§ 99, 100, and St. 1890, c. 410.

The plaintiffs were arrested without warrants, and confined in the lock-up several hours until released on bail, and complaints and warrants were issued against them on the next day within twenty-four hours, upon which all were subsequently tried by the Police Court of Springfield. The plaintiff Fitz-

gerald was part owner of premises adjoining real estate of the city of Springfield, the last named land being a part of the poor farm on which the almshouse was situated; and for some time there had been a dispute between the city and Fitzgerald concerning the boundary line between his premises and that of the city.

The plaintiff Smith was a civil engineer, and the plaintiff Petersen was in the employ of Fitzgerald as a laborer. Upon the day of the arrest, all three plaintiffs were on the premises both of the plaintiff Fitzgerald and of the city of Springfield, Smith being there for the purpose of making a survey to determine the disputed line, and the other plaintiffs assisting him. Smith was employed by Fitzgerald to do the work.

The defendant Lewis was the legally appointed agent of the board of overseers of the poor of said city, and, by direction of the board prior to the arrests, caused to be posted in two places upon the land of the city, where they could have been seen, the following notice: "Trespassing on these grounds forbidden under penalty of the law." Lyman H. Sexton, employed by the overseers of the poor as master of the almshouse and the manager of the farm, by direction of Lewis, prior to the day of the arrests, had orally notified the plaintiff Fitzgerald not to come upon the land of the city.

Fitzgerald, on the day of and prior to the arrests, had seen one of the notices upon the land. The other two plaintiffs had had no oral notice, such as was given Fitzgerald, and testified that they had not seen the posted notices; but there was evidence tending to show that the notices were fastened to stakes driven in the ground, and were about four feet in height.

The defendants put in evidence the following provisions of the revised ordinances of the city:

"The overseers of the poor shall annually, on or before the 20th day of December, report to the city council their proceedings in the discharge of the duties of their office, with a statement of their expenditures, the expenses and income of the city farm, with the number of persons supported at the almshouse, and of those wholly or partially supported out of it, and the amount paid for the latter.

"The overseers of the poor shall annually, as soon after their

election as may be convenient, appoint some suitable person to be master of the city almshouse, who shall hold his office for one year, and until his successor is appointed, unless sooner removed by said overseers of the poor."

There was evidence tending to show that the overseers of the poor had been, and were in fact, in control of the farm.

There was also evidence tending to show that one Slocum, the present and past city engineer of Springfield, while such engineer, several years before this occasion, had made attempts to determine the disputed line, but there was no evidence of authority for him so to do.

The plaintiffs offered to show by the record of the Police Court of Springfield the acquittal of the plaintiffs Smith and Petersen on the complaint for the alleged trespass; but the judge excluded the evidence.

The plaintiffs asked the judge to rule as follows:

"1. The arrest having been made without a warrant, the plaintiffs are entitled to recover. 2. There is no evidence that the overseers of the poor had authority to post the notices. 3. The overseers of the poor, under said ordinance, had no authority to post said notices or to authorize the agent of the board to do it. 4. If the jury find that the only purpose of the plaintiffs in going upon the land of the city was to determine a disputed line, they were not guilty of trespass under this statute. 5. The plaintiffs must be proved to have had actual notice of the notices, or to have been on the land under such circumstances and conditions that the jury must find that they ought to have seen them. 6. The posted notices, being unsigned or unauthenticated by a name or signature of any party having the legal right to post them, were not such notices as the statute requires or contemplates, and were not sufficient to render the plaintiffs guilty of trespass, even if they were seen by them."

The judge refused so to rule, and instructed the jury, among other things, as follows:

"The defendants have offered evidence tending to show that two notices were posted upon these premises in this vicinity, upon this ten-acre lot, and near where these parties were arrested, or some of them. And so far as the forms of the notices are concerned, if they were like that which has been

introduced in evidence, in my judgment they were legal notices under the statute; that is, I propose to instruct you so for the purposes of this case. There is no serious dispute, as I understand it, that they were of the same terms with this one, — that this is one of the two. . . . The plaintiffs controvert the sufficiency of the notice; but for the purposes of the case these notices, if they were alike, and this is one of them, I think were sufficient in form to comply with the requirements of the statute.

"Then, in regard to posting, as to the authority by which they were posted, I will say something later; but now, how were they posted, and where? My judgment is that the law required that they should be posted in suitable places, where they could be seen by any person in the exercise of reasonable and ordinary care and attention. It would not be in compliance with the statute if a man were to go and post the notice in some obscure place behind some brush or other obstacles, with the idea that he would comply with the law, and yet put his notice in such a form that a person coming on the land would not see it. The idea and object of the statute are that good faith shall be used, that the notice shall be reasonably distinct and not a blind one, and that it shall be posted in a reasonably suitable place or places, so that it may be seen by persons who come upon the land, in the exercise of ordinary care and attention, and it will be the duty of the defendants to satisfy you that these notices were thus placed. If they were, then, for the purposes of this case so far as this matter of the notice is concerned, I instruct you that it is not necessary that the defendants should satisfy you that either of the parties saw the notices, although Fitzgerald, if I understand it, admits that he did see one of the notices. It is not necessary that any one of them should have seen them. But I propose to give such a construction of the statute as that, if these notices were properly posted, the plaintiffs are in the same legal position whether they saw the notices or not. In other words, for this case, I say to you that the statute does not require it to be proved that the plaintiffs saw the notices. They are affected by the notices, if they were sufficient in terms, as I have ruled that they were, and if they were properly posted by the proper authority.

"And now the remaining question is, Were they posted by some person having lawful control of said premises? . . . If you are satisfied by the fair preponderance of the evidence that the claim of these defendants in regard to the course that was pursued and the authority and direction given in regard to these notices was followed, — in other words, if you are satisfied that the claim of the defendants about that is correct in fact, — then it would be competent for you to find, and it would be your duty to find, that the notices were posted by a person in control within the meaning of the statute. Now, these things are necessary for the defendants to show, by a fair preponderance of the evidence, for their justification: ownership by the city of the land; the presence of the plaintiffs upon the land owned by the city; the proper, reasonable posting of the notices, in the sense in which I have explained, by a person in control, in the sense in which I have explained that. If the claims of the defendants in regard to these matters are established by a fair preponderance of the evidence, then the arrest was warranted in law."

The jury returned a verdict for the defendants in each case; and the plaintiffs alleged exceptions.

E. H. Lathrop, for the plaintiffs.

G. D. Robinson, for the defendants.

FIELD, C. J. The first contention of the plaintiffs is that St. 1890, c. 410, is in effect a repeal of Pub. Sts. c. 203, § 99, and a substitution therefor of a new statute, and that Pub. Sts. c. 203, § 100, does not apply to the new statute. St. 1890, c. 410, begins as follows: "Section ninety-nine of chapter two hundred and three of the Public Statutes is hereby amended so as to read as follows"; and then follows a somewhat different provision from that contained in Pub. Sts. c. 203, § 99, but upon the same subject matter. This form of amendment is one often adopted by the Legislature, and the effect of it is to put the language of the new statute in place of that of the old, and other provisions of statute relating to the old statute and not inconsistent with the new are held to apply to the new after that statute takes effect.

The next contention of the plaintiffs is that, on the evidence, "the overseers of the poor had no right to post the land." The argument is that, as the city of Springfield owned the land, the city council of the city alone had authority to order notices to be

posted. We think that the evidence was sufficient to warrant the jury in finding that the overseers of the poor had authority to order the notices to be posted, and that, if the evidence was believed by the jury, it was their duty so to find. By Pub. Sts. c. 33, § 3, when no directors are chosen the overseers of the poor have the inspection and government of the almshouse. Not only was there no evidence that any directors had been chosen, but the ordinances of the city put in evidence show that the overseers of the poor had the charge and direction of the almshouse or city farm. The exceptions also recite that "there was evidence tending to show that the overseers of the poor had been, and were in fact, in control of said farm." The overseers of the poor, if in control of the farm, were in control either as public officers or as agents of the city, (*Neff* v. *Wellesley*, 148 Mass. 487,) and were, we think, persons having lawful control under the laws and the ordinances of the city for the purpose of excluding trespassers.

The next contention of the plaintiffs is, that the notices posted were unauthenticated by any signatures, and did not express the authority by which they had been posted. But there is nothing in the statute requiring the notices posted to be signed. It is common knowledge that similar notices posted on land, such as guide posts, notices of private ways, and notices at railroad crossings, are not signed. It would be almost impossible to have them signed in the handwriting of the persons who ordered them posted, and a printed facsimile would afford no assurance of the genuineness of the signatures. The Legislature in enacting that persons may be forbidden from entering upon certain land by "notice posted thereon," without prescribing the form of the notice, must be held to have intended that the notices might be posted in a reasonable manner, according to the usual way in which similar notices are posted. The instruction upon this part of the case seems to us correct.

It is suggested in the brief of the plaintiffs, that an innocent entry by a person upon land under a claim of right cannot be an entry without right within the meaning of the statute, even although the land be found to belong to another person. The plaintiffs proved no right to enter upon the land of the city. The Pub. Sts. c. 203, § 99, forbade a wilful entry; St. 1890,

c. 410, changed this and forbids an entry without right. There is nothing in the last named statute which indicates that a belief on the part of the person entering upon land not in his control that the land is his, is to be regarded as a justification. He must be forbidden to enter by the person having lawful control of the premises in the manner prescribed by the statute, and this having been done, if he enters without right upon the improved or enclosed land of another person, the offence is committed. It is not necessary that the person entering should actually see the notices posted, if they were reasonably distinct and were posted in reasonably suitable places, so that by the exercise of due care they would be seen by persons who come upon the land. *Smith* v. *Lowell*, 139 Mass. 336.

The last point urged by the plaintiffs is the exception to the exclusion of evidence that Smith and Petersen were acquitted at the trial of the complaint against them for the alleged trespass. This evidence was rightly excluded. *Fowle* v. *Child*, *ante*, 210. *Commonwealth* v. *Cheney*, 141 Mass. 102. *Commonwealth* v. *Waters*, 11 Gray, 81.

These are all the questions argued by the plaintiffs, and we see no error in the exceptions. *Exceptions overruled.*

WILLIAM F. HERVEY *vs.* LUCIE A. RAWSON.

Worcester. September 30, 1895. — October 19, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Improper Investment of Guardian of Insane Person — Merger — Action — Probate Account — Bond — Statute of Limitations.

If the Probate Court adjudges that a loan was one which the former guardian of an insane person was not authorized to make, and charges him with the amount of it in his account, and an action is brought in this court against such guardian and his sureties upon his bond to obtain execution against them for the same amount, and the action is still pending, the contention that by the decree of the Probate Court the right of action against the borrower is merged therein, and that the only remedy of the plaintiff is by an action on the bond, cannot avail, and the fact that the borrower is one of the sureties on the bond is immate-

rial. The borrower may be compelled to pay so much of his indebtedness as he can to the plaintiff, and the balance may be recovered of the obligors on the bond.

An action by an insane ward by his guardian, brought more than six years after the date when the transaction in question occurred, is not barred by the statute of limitations, if it comes within the provisions of Pub. Sts. c. 197, § 9.

CONTRACT, for money had and received. Trial in the Superior Court, without a jury, before *Richardson*, J., who found for the plaintiff, and the defendant alleged exceptions. Writ dated December 17, 1894. The following facts were proved or admitted.

The plaintiff had been insane since 1877. Charles I. Rawson was his guardian from 1877 to March, 1894, when he was removed, and Francis H. Dewey was duly appointed guardian.

Charles I. Rawson, guardian, on April 7, 1885, loaned the money of the estate to the defendant, who was his wife, and who was a sister of the ward, and took therefor her note without security, payable to the plaintiff, she then knowing that this money belonged to the ward's estate. The amount of this money so loaned was the whole of the estate of the ward, but was never recognized or ratified as a lawful loan by the Probate Court, or by the new guardian.

In an account called "the final account of Charles I. Rawson as guardian," he was adjudged by the Probate Court to have in his hands due the estate $8,821.14, and interest from September 1, 1894, being the money loaned to the defendant, no part of which sum has been paid to the new guardian, Francis H. Dewey, or for the benefit of the estate. No part of the loan to the defendant has been paid by her, though demand was made on her for the money before the action was brought.

The defendant was one of the sureties on the bond of Charles I. Rawson, guardian. On or about the date of the writ in this action, the bond was put in suit in the name of the judge of probate, and the action is still pending. The defendant asked the judge to rule that on these facts the plaintiff could not recover. The judge declined so to rule, and found for the plaintiff in the same sum found due in the Probate Court on the account, the plaintiff claiming no larger sum.

W. A. Gile & C. T. Tatman, for the defendant.

T. G. Kent, (*G. T. Dewey* with him,) for the plaintiff.

FIELD, C. J. The money lent to the defendant was the money of the plaintiff. The note taken was payable to the plaintiff. It does not appear that the note was on time or was negotiable, and if it was negotiable, the plaintiff while insane and under guardianship could not negotiate it, and it does not appear that his former guardian had indorsed it, and he could not indorse it after he was removed from the office of guardian. There is nothing in the exceptions which shows that the note is now outstanding as a valid note in the hands of some other person than the plaintiff or his former guardian. It is not contended that the plaintiff is not the proper party to bring the suit; there is no objection to the form of the pleadings, and the plaintiff through his present guardian could repudiate the note.

The objection of the defendant is that the action cannot be maintained, because the Probate Court, in passing upon the account of the former guardian, has adjudged that this loan was one which the guardian was not authorized to make, and has charged him with the amount of it in his account, and a suit has been brought in this court against the guardian and his sureties upon the bond of the guardian for the purpose of obtaining execution against them for the amount of the loan, and this suit is still pending. The fact that the present defendant is one of the sureties on the bond seems to us immaterial. The contention is that, by the judgment or decree of the Probate Court charging the former guardian, the right of action against this defendant is merged in that judgment or decree, and that the only remedy of the plaintiff is by an action on the bond. The plaintiff cannot, of course, have more than one satisfaction, but the general rule in cases of trust is that, when the trust property has been misappropriated or misapplied by investing it in an unauthorized manner, the beneficiary may pursue and recover the trust property so far as it can be traced, unless the purchaser or holder of it has obtained a good title against the beneficiary, and can also recover of the trustee any damages which the beneficiary has sustained by reason of the misappropriation or misapplication. We think that this rule applies to guardians of insane wards. This defendant should be compelled to pay her indebtedness, if she can, to somebody, and it is a simpler pro-

ceeding to compel her to pay so much of it as she can to the plaintiff, and leave the rest to be recovered of the obligors on the bond, than to collect the whole of them and leave them to collect what they can of her, although the plaintiff through his present guardian is at liberty to proceed in either way, as he chooses. *State* v. *Murray*, 24 Md. 310. *Hill* v. *McIntire*, 39 N. H. 410. *Beam* v. *Froneberger*, 75 N. C. 540. *Branch* v. *Du Bose*, 55 Ga. 21. *Edmonds* v. *Morrison*, 5 Dana, (Ky.) 223.

There is no merger of the claim against the defendant in the decree in the Probate Court charging the former guardian. That decree cannot be enforced directly against her. It is only by reason of her contract in signing the bond as surety that she is affected by that decree, and her liability upon the bond is not in every event which might have happened necessarily the same as the amount of her indebtedness to the plaintiff. That indebtedness arose after the bond was given, and the bond was not given for the indebtedness.

The statute of limitations seems to us no defence to the action. Pub. Sts. c. 197, § 9. *Exceptions overruled.*

NATHANIEL E. TAFT *vs.* HERBERT B. CHURCH & another.

Worcester. October 1, 1895. — October 19, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Power of Superior Court after Rescript to allow Discontinuance against one Defendant, and to order Judgment against the other Defendant, without amending Joint Finding.

It is within the power of the Superior Court, after a rescript has been sent down by this court overruling the exceptions of one defendant and sustaining the exceptions of the other defendant, in an action pending in the Superior Court against them as partners, wherein the court found for the plaintiff, to allow the plaintiff to discontinue as to the latter defendant, and to order judgment against the former without amending the finding.

CONTRACT, against Herbert B. Church and Fred D. Goode, copartners under the name of Herbert B. Church and Com-

pany, upon a written agreement signed by Church in the firm name. After the former decision, reported 162 Mass. 527, overruling the exceptions of the defendant Church, and sustaining the exceptions of the defendant Goode, the defendants filed in the Superior Court motions for a new trial and in arrest of judgment. These motions came on to be heard before *Bishop*, J., who overruled them. The plaintiff thereupon, by leave of court, discontinued as to the defendant Goode; and the judge, without further hearing or finding, ordered judgment to be entered against the defendant Church. The defendants alleged exceptions.

W. O. Kyle, for the defendants.

C. M. Thayer, for the plaintiff, was not called upon.

FIELD, C. J. It was within the power of the Superior Court to allow the plaintiff to discontinue the action as to the defendant Goode. *Gray* v. *Cook*, 135 Mass. 189.

The contention of the defendants is that the finding should have been amended so as to show a finding against Church alone. In this case, as reported 162 Mass. 527, 533, it is said in the opinion: "Although the action is against two persons as partners, and one only is held liable, judgment may be entered against him alone, under the Pub. Sts. c. 171, § 5, and no amendment of the declaration is necessary." See *Wiggin* v. *Lewis*, 12 Cush. 486; *Downing* v. *Coyne*, 121 Mass. 347; *Merchants' Ins. Co.* v. *Abbott*, 131 Mass. 397, 407.

We see no necessity of amending the finding. On the whole record, it sufficiently appears that the finding stands against Church alone.

Exceptions overruled.

CITY OF NORTHAMPTON *vs.* INHABITANTS OF PLAINFIELD.

Hampshire. September 17, 1895. — November 2, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Pauper — Support of Lunatic — Action — Damages.

A city, having given the notice required by the Pub. Sts. c. 84, § 14, is entitled to recover from the town of a pauper's settlement the full amount paid by the city for the support of the pauper in a State lunatic hospital, from three months prior to the notice down to the date of the writ, provided the writ is brought within two years from the date of the notice.

CONTRACT, to recover the expenses incurred by the plaintiff for the support in the Northampton lunatic asylum of a pauper, whose settlement was alleged to be in the defendant town. Writ dated June 21, 1894.

Trial in the Superior Court, without a jury, before *Hopkins*, J., who found that the person committed to the hospital was a lunatic pauper; that she was thus committed on October 11, 1892; that she then resided in the plaintiff city; that she had been confined in the hospital continuously from that time to the time of the trial; that her legal settlement was during all that time in the defendant town; that the treasurer of the hospital had duly demanded of the plaintiff payment of the charges for the support of the pauper, and the plaintiff had paid every three months since the commitment the legal charges due therefor; that the amount thus paid prior to the commencement of this action was $249.32; that on November 18, 1892, the plaintiff gave due notice to the defendant of the fact of commitment and the date thereof, and that it had incurred and paid the legal charges on account thereof, and requested the defendant to provide for the pauper, and notified the defendant that it would seek reimbursement for such charges as had been paid and that might thereafter become due; and that this was the only notice given by the plaintiff to the defendant.

The plaintiff asked the judge to rule that it could recover the entire amount paid by it from the time of the commitment to the date of the writ.

The judge refused so to rule, and ruled that the plaintiff could recover only for the expenses incurred within three months next before the notice of November 18, 1892, and interest thereon; and found for the plaintiff in the sum of $20.40.

The plaintiff alleged exceptions.

A. E. Addis, for the plaintiff.

F. R. Shaw, for the defendant.

LATHROP, J. The question in this case is whether the plaintiff is entitled to recover the full amount expended by it for the support of the lunatic pauper from the date of her commitment to the Northampton lunatic hospital on October 11, 1892, to the date of the writ, June 21, 1894, or whether it is entitled to recover only for the expenses incurred within three months next before the notice given by the plaintiff to the defendant, which was on November 18, 1892.

By the Pub. Sts. c. 87, § 34, "Every city or town paying expenses for the support or removal of a lunatic committed to either hospital shall have like rights and remedies to recover the full amount thereof, with interest and costs, of the place of his settlement, as if such expenses had been incurred in the ordinary support of the lunatic."

This statute had its origin in the St. of 1834, c. 150, § 7, which related to the State lunatic hospital at Worcester. Section 7 gave a right of action to the trustees for the support of a patient committed to the hospital, and for his removal, against the town or city where the patient resided at the time of the application for commitment, and further provided as follows: "And such town or city shall have the same rights and remedies against all corporations and persons, to recover such expense of supporting and removing any pauper lunatic, as if such expense had been incurred by said town or city, in the ordinary support of such lunatic." This was incorporated in the Rev. Sts. c. 48, § 10.

By the St. of 1841, c. 77, it was enacted as follows: "Whenever any lunatic or insane person shall be committed to the State lunatic hospital at Worcester from any town wherein he has not a legal settlement, and such town shall pay the expense of his support at said hospital, such town may recover from the town in which he has a legal settlement the full amount of all the expense so paid to said hospital."

This statute was combined with the Rev. Sts. c. 48, § 10, in the Gen. Sts. c. 73, § 25, where the language is the same as now appears in the Pub. Sts. c. 87, § 34, the St. of 1841 being expressly repealed by the Gen. Sts. c. 182.

In *Taunton* v. *Wareham*, 153 Mass. 192, 195, this court, speaking of the Pub. Sts. c. 87, § 34, said: "It was intended by the Legislature to give to towns paying the expenses of a lunatic committed to either State hospital the same rights and remedies against the place of his settlement as if the expenses had been incurred in the ordinary support of a pauper, and the same rules of law apply as if this had been a suit to recover the expense of the ordinary support of a pauper." We have no doubt of the correctness of this statement of the law, which is supported by abundant authority. See *Waltham* v. *Brookline*, 119 Mass. 479, and cases cited.

The precise point involved in the case at bar was also decided in *Taunton* v. *Wareham*, in favor of the defendant, without any discussion, relying upon the case of *Amherst* v. *Shelburne*, 11 Gray, 107, as a precedent, and the plaintiff asks us to review these cases on this point. The importance of the question involved to the towns of this Commonwealth has induced us to yield to this request, and to examine the statutes and authorities bearing upon the question anew.

By the Pub. Sts. c. 84, § 14, "The overseers of the poor, in their respective places, shall provide for the immediate comfort and relief of all persons residing or found therein, having lawful settlements in other places, when they fall into distress and stand in need of immediate relief, and until they are removed to the places of their lawful settlements; the expense whereof, incurred within three months next before notice given to the place to be charged, as also of their removal, or burial in case of their decease, may be recovered by the place incurring the same against the place liable therefor, in an action at law to be instituted within two years after the cause of action arises, but not otherwise." This section, in substantially its present form, has been in force since the St. of 1793, c. 59, § 9. See Rev. Sts. c. 46, § 13; Gen. Sts. c. 70, § 12.

Further provisions as to notice are contained in the Pub. Sts. c. 84, §§ 28, 29, but they throw no light on the question involved,

and they need not be stated. These provisions also have been in force since the St. of 1793 took effect. St. 1793, c. 59, § 12. Rev. Sts. c. 46, §§ 19, 20. Gen. Sts. c. 70, §§ 17, 18.

It thus appears that the statutory provisions having any bearing upon the question before us have been the same since the enactment of the St. of 1793.

In the earlier cases in this Commonwealth, it was assumed, without discussion, that where a pauper having a settlement in one town became a charge on another town, if the town furnishing support duly notified the town of settlement, and the pauper continued to be a charge, only one notice was necessary to hold the town where the pauper had his settlement for the proper expenses incurred, from three months before the delivery of the notice down to the date of the writ, provided the action was brought within two years after the date of the notice. *Marlborough* v. *Rutland*, 11 Mass. 483, 485. *Harwich* v. *Hallowell*, 14 Mass. 184. *Uxbridge* v. *Seekonk*, 10 Pick. 150.

In *Attleborough* v. *Mansfield*, 15 Pick. 19, the expenses were incurred from October 10, 1826, to the last of June, 1827. Notice was given on October 18, 1826. The defendant contended that it was not liable for any expense incurred after the notice of October 18, 1826, for the reason that the aid furnished was not continuous, and it had received no subsequent notice. It was held, however, that the plaintiff was entitled to recover the full amount claimed. The St. of 1793, c. 59, § 9, was construed as limiting the right to recover "to a period commencing three months before and continuing two years after notice given."

Before this case was decided, it had been held that, if the town furnishing the supplies had brought an action to recover them, it could not, without a new notice, recover for any expenses incurred after the bringing of the first action. *Hallowell* v. *Harwich*, 14 Mass. 186. And it was so held in *Walpole* v. *Hopkinton*, 4 Pick. 358, where the second action was brought while the first one was pending. So, too, it had been previously held that if, after notice given, the town of the pauper's settlement provided for him, it was not further liable for subsequent expenses incurred by the town giving the notice, without a new notice. *Sidney* v. *Augusta*, 12 Mass. 315. See also *Palmer* v. *Dana*, 9 Met. 587.

In *Attleborough* v. *Mansfield*, these exceptions to the general rule were recognized, but it was held that the fact that the aid in that case was not continuous did not bring the case within the exceptions; and that the general rule applied.

In *Topsfield* v. *Middleton*, 8 Met. 564, the writ, as appears from the original on file in the clerk's office, was dated May 8, 1841, the notice was given on March 24, 1840, and the plaintiff sought to recover for supplies furnished before the notice, and also for supplies furnished after the notice down to April 9, 1841. The defendant tendered the amount due for supplies furnished before the notice was given, and contested its liability for the supplies subsequently furnished, on the ground that a new notice should have been given. This was the only question considered by the court, which held, Mr. Justice Dewey delivering the opinion, that no new notice was necessary, and that the plaintiff was entitled to recover the full amount claimed.

In *Commonwealth* v. *Dracut*, 8 Gray, 455, under the Rev. Sts. c. 46, § 13, the law was assumed to be as above stated, and judgment in the case was rendered for the plaintiff accordingly.

In the first cases which arose under the St. of 1841, it was contended that the act in effect repealed the Rev. Sts. c. 46, § 13, but the court held that the only purpose of the act was to determine the measure of damages, and to allow the full amount paid to the hospital; and that the act did not alter the law in regard to the time in which the action should be brought, or the length of time for which a town might recover, or the notice to be given. *Cummington* v. *Wareham*, 9 Cush. 585. Two actions between the same parties were tried together for the support of a pauper in the State lunatic hospital at Worcester. In the first case the plaintiff sought to recover the amounts paid by it to the hospital from December 15, 1848, to the date of the writ, which was January 15, 1850. Notice was given on March 15, 1849. It was held that the plaintiff was entitled to recover the full amount of its claim. In the second action, which was brought during the pendency of the first, on December 31, 1851, the plaintiff sought to recover the expenses paid to the hospital from December 2, 1844, the time of the commitment of the pauper to the hospital, to the date of the writ, deducting the amount recovered in the first action. Notice was given on December 9,

1850, and it was held that the plaintiff could recover from three months prior to the notice, and down to the time of bringing the action. It was also held that the fact that the previous action was pending did not obviate the necessity of giving a new notice, and this on the authority of the cases which we have already cited as establishing the exceptions to the general rule.

The language of Chief Justice Shaw on this point is as follows: "It remains to consider the claim for the period which elapsed between the commencement of the former suit, and the time of the commencement of this suit. This depends on different considerations. The law is very explicit that for every new action a new notice must be given, even though a former action between the same parties, for the support of the same pauper, is still pending. *Sidney* v. *Augusta*, 12 Mass. 316. *Walpole* v. *Hopkinton*, 4 Pick. 358. *Uxbridge* v. *Seekonk*, 10 Pick. 150." 9 Cush. 591. So far from the case holding that the plaintiff was limited to the three months before the second notice was given, it was expressly said by the Chief Justice: "We think therefore that the time, for which alone the plaintiffs in this suit can recover, must be computed from September 9, 1850, three months before the notice, and continued down to the time of bringing this action [December 31, 1851], or the time when the defendant town assumed the charge of the pauper, whichever first occurred." 9 Cush. 591, 592.

In *Andover* v. *Easthampton*, 5 Gray, 390, the plaintiff sought to recover money which it paid to the State lunatic hospital at Worcester on December 2, 1854, for the support of a pauper at the hospital from December 1, 1848, to December 1, 1854. The writ was dated March 17, 1855. Notice was given on December 4, 1854. It was held that the plaintiff was entitled to recover. There is nothing in this case inconsistent with the preceding cases. The fact that the St. of 1841, c. 77, did not change the provisions of the Rev. Sts. c. 46, § 18, as to notice to the defendant and the limitation of the action, was expressly recognized. The point decided was that the plaintiff did not incur the expense until it paid the hospital, and that, as the payment was within three months before, and the action was brought within two years after the notice, it was seasonably brought.

In *Amherst* v. *Shelburne*, 11 Gray, 107, the writ was dated

April 27, 1857. The plaintiff sought to recover money paid in March and December, 1856, for the support of a pauper at the State lunatic hospital at Worcester. The notice was sent to the defendant on November 28, 1854, and was as follows : "The treasurer of the State lunatic hospital at Worcester has presented to town of Amherst a bill of $621.40, for board and articles of clothing furnished to Norman Smith from November 1, 1848, to June 1, 1854; six years past. We shall look to you to furnish us the money to pay this bill, and also for Smith's support since June 1, 1854, and as often as the bills at the hospital become due, which is, we believe, on the first of June and first of December each year." The notice also set forth the fact in regard to the pauper's settlement.

The money paid the plaintiff in March, 1856, was the $621.40 specifically mentioned in the notice. It was held, as to this, that the plaintiff could recover, on the authority of *Andover* v. *Easthampton*. As to the second item it was said by the court: "For the sum paid by the plaintiffs to the hospital, in addition to $621.40, the defendants are not liable in this action, for the reason that they have not received any legal notice of the plaintiffs' claim thereto. *Cummington* v. *Wareham*, 9 Cush. 591."

The case of *Amherst* v. *Shelburne* is in some aspects an anomalous one. As to the first item recovery was allowed, although the action was not brought until more than two years after the notice was given, whereas the general rule is that such an action must be brought within the two years. As to the second item, the court either misapprehended the language of Chief Justice Shaw in *Cummington* v. *Wareham*, or decided that the plaintiff could not recover this item because no notice in regard to it was given within two years of the bringing of the writ. We cannot regard the case as an authority for the position that the plaintiff in an action on the statute is limited to the expenses incurred within three months prior to the notice.

In *Worcester* v. *Northborough*, 140 Mass. 397, support was furnished by the plaintiff to a woman from December 28, 1881, to February 13, 1882. Board was also paid for a minor child on March 1, 1882. Notice was given on January 7, 1882. The writ was dated February 9, 1884. The plaintiff was allowed to recover only for the expenses incurred during two years prior

to the date of the writ, being for the board of the child and for four days' support of the woman. No notice is taken in the opinion in this case that the suit was not brought within two years after the notice was given; nor is any reason given why the plaintiff, if entitled to recover at all, was not entitled to recover for such period of time within the three months prior to the notice as aid was furnished. An examination of the briefs in this case shows that the attention of the court was not directed to either point.

In *Reading* v. *Malden*, 141 Mass. 580, aid was furnished by the plaintiff from March 1, 1881, to April 1, 1882. Two notices were given, one on March 2, and the other on March 31, 1881. The writ was dated September 15, 1883. The plaintiff contended that it was entitled to recover because the aid was begun within three months before the notice, and was ended within two years before the action was brought; but the court held that, as the action was brought more than two years after the notice, it could not be maintained. It was said "that the cause of action arises at the time the notice is given." The law as stated in *Attleborough* v. *Mansfield*, 15 Pick. 19, namely, that "the right to recover is expressly limited to a period commencing three months before and continuing two years after notice given," was cited with approval. It was also said of *Townsend* v. *Billerica*, 10 Mass. 411, *Hallowell* v. *Harwich*, 14 Mass. 186, and *Uxbridge* v. *Seekonk*, 10 Pick. 150, "These cases have not been overruled or modified by any subsequent cases."

This review of the authorities leads us to the conclusion that the case of *Taunton* v. *Wareham*, 153 Mass. 192, so far as the point now before us is concerned, was erroneously decided, and should be overruled; and that the ruling requested by the plaintiff, being in accordance with the weight of authority in this Commonwealth, should have been given.

Exceptions sustained.

JOHN CLINTON *vs.* BOSTON BEER COMPANY.

Suffolk. November 18, 1895. — November 18, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Personal Injuries — Child — Due Care — Negligence.

An action for personal injuries occasioned to a child five years old by being run over in the street of a city by a wagon driven by the defendant's servant cannot be maintained if there was no evidence that the servant was negligent, or that the plaintiff or his mother, who had given him permission to leave the house alone to make a purchase at a store, was in the exercise of due care.

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant's servant in driving a wagon drawn by a pair of horses over him.

At the trial in the Superior Court, before *Fessenden*, J., there was evidence tending to show that the plaintiff, a boy five years and five months old, lived with his parents on the north side of Second Street in South Boston; that the street was sometimes pretty busy, although generally there were not many teams passing upon it; and that the plaintiff was a smart, healthy child, and was often sent by his parents to stores to get various articles without the aid of written memoranda. The plaintiff's mother testified that on the morning of March 28, 1893, she sent him to the grocery after three articles, and on his coming home with them she gave him a penny and he left the house alone, with her permission, to buy candy; that there were two candy shops in the neighborhood; that she could not say to which one he went; that she did not see where he went or what he did from the time he left the house till she saw his foot before the wheel; that he went out alone and was not in the care of anybody; that when it was about time for him to come back she went to a window on the second floor to watch for him; that the first thing she saw on reaching the window was a pair of horses and a long wagon belonging to the defendant company; that the team was facing on Second Street, passing around the corner on another street by the window on the other side; that the next she saw was the plaintiff's left foot standing on the

ground about a foot or a foot and a half in advance of the farther hind wheel, — the right hand rear wheel; that almost in an instant the wheel was over it; that she put up the window and called to the driver to pick up the child for her; that the horses were walking fast, the driver holding the reins as a driver ordinarily does and looking straight ahead at the horses, and when the mother called to him he turned and looked back; that she could n't say whether he looked at the child or where he looked, but he looked towards where the child was; that he did not look up at her; that by the time she got to her door the wagon was gone; that it was very long and loaded with bags piled on one another; that the body of the wagon was "high up," and she could not see anything on the other side of it; that she saw one foot standing and the black stocking covering one leg of the child, but owing to the wagon and its load being between her and the child she saw none of his body until she saw him knocked down; that he was standing when the wheel went over him; that it was the only team in sight at the time of the accident, which occurred about nine o'clock in the forenoon; that she knew that the street was frequently traversed by brewery teams; that she had lived there seven or eight months, but at the time of the accident teams were not passing; and that in consequence of the injury received the plaintiff lost the whole of one of the middle three toes of his left foot and parts of two others.

The judge ruled that the plaintiff could not maintain the action, and directed a verdict for the defendant; and the plaintiff alleged exceptions.

E. Glover, (*E. Everett* with him,) for the plaintiff.

J. A. Campbell, for the defendant, was not called upon.

By the Court. There was no evidence for the jury that the defendant was negligent, or that the plaintiff or his mother was in the exercise of due care.

Exceptions overruled.

JAMES T. WHITE & another *vs.* JAMES M. SOLOMON.

Suffolk. November 23, 1894. — November 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract — Sale — Delivery — Evidence — Deposition — Signature.

A. signed a contract by which he agreed, "in consideration of its delivery for me" at a specified express office, to pay B. $35 for an article bought of him, as follows: $10 "upon delivery at the express office," and the balance in monthly payments, and that, upon A.'s failure to make any of the stipulated payments, all of the instalments remaining unpaid should immediately become due and payable, and B. might take the article from A.'s possession. The article was delivered as agreed at the express office. A. refused to receive it, and the express company after a time left it at B.'s place of business in pursuance of a rule of the company and without B.'s assent, and it was held subject to A.'s order. There was no repudiation of the contract by A. before the delivery at the express office. *Held*, in an action upon the contract, that the delivery at the express office fixed B.'s right to the price of the article; and that he was entitled to recover that amount. FIELD, C. J., ALLEN & MORTON, JJ., dissenting.

The deposition of a party to an action is not rendered inadmissible because he refused to answer a cross-interrogatory, if it appears to have been immaterial.

In an action upon a contract purporting to have been signed by the defendant, his answer to an interrogatory, "The signature resembles mine. I wish to have the contract identified before answering further," coupled with the absence of any later denial, affords sufficient evidence of his signature.

HOLMES, J. This is an action upon the following contract:

"White's Physiological Manikin.

"Place and date: 75 Court Street, Boston, Mass., June 7, 1889.

"Messrs. J. T. White & Co., Publishers, New York.

"Gentlemen: Please deliver according to shipping directions given below, one White's Physiological Manikin, Medical Edition, price $35.00. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35.00 as follows: $10.00 upon delivery at the express office, and the balance in monthly payments of $5.00, each payable on the first of each and every month thereafter, until the whole amount is paid, for which the publishers are authorized to draw when due.

"It is expressly hereby agreed that in case of the failure to pay any one of the said instalments after maturity thereof, all of

said instalments remaining unpaid shall immediately become due and payable, and the said James T. White & Co. may take or cause to be taken the said manikin from the possession of the said or their representatives, to whom he may have delivered the same without recourse against said James T. White & Co. for any money paid on account thereof. It being expressly agreed that the money paid on account shall be for the use and wear of said manikin.

"Shipping directions to be filled out by the agent.

"To whom sent. J. M. Solomon.
75 Court Street.
Town, Boston. County of Suffolk.
State, Massachusetts.

"James M. Solomon,
75 Court Street.
Agent W. F. Byrd."

There was evidence, and we must assume the judge who tried the case to have found, that the manikin was delivered as agreed to the express company, freight prepaid, that the defendant refused to receive it, that in consequence the express company after a time left the manikin at the plaintiffs' place of business, in pursuance of a rule of the company and without the plaintiffs' assent, and that it is held subject to the defendant's order. There had been no repudiation of the contract by the defendant before the delivery of the manikin at the express office.

The main question is whether the judge who tried the case ought to have ruled that "the plaintiffs are not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract." A majority of the court are of opinion that this ruling properly was refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office, but that assumption does not dispose of the case. In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he

has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms, that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly *solvendum in futuro*) of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words "in consideration of its delivery" are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. See the observations of Blackburn, J., in *Martineau* v. *Kitching*, L. R. 7 Q. B. 436, 455. Benjamin, Sales, (4th ed.) 716, 717. When, as here, all the conditions have been complied with the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot by an act of his own repudiating the title gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See *Smith* v. *Bergengren*, 153 Mass. 236, 238.

If the first payment of ten dollars upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to accept the manikin or to pay the ten dollars, the sellers' only remedy would be for a breach, and that they could not leave the manikin at his house and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company and the provision for payment of ten dollars "upon delivery at the express office" must mean after the delivery, so that the delivery is the

first act, and by itself without more fixes the rights of the vendors to the price, just as the transfer of the stock did in *Thompson* v. *Alger*, 12 Met. 428, 444. Our decision is in accord with the following cases; we know of no decisions to the contrary. *Marvin Safe Co.* v. *Emanuel*, 21 Abb. N. C. 181. *Brewer* v. *Ford*, 54 Hun, 116, 120; *S. C.* 59 Hun, 17, 19; 126 N. Y. 643. *Carnahan* v. *Hughes*, 108 Ind. 225. See further *Burnley* v. *Tufts*, 66 Miss. 48; *Tufts* v. *Griffin*, 107 N. C. 47; but compare *Tufts* v. *Grewer*, 83 Maine, 407; *Swallow* v. *Emery*, 111 Mass. 355, 357.

Two remaining exceptions may be disposed of in a few words. It is objected that a deposition of one of the plaintiffs was not admissible because he refused to answer a cross-interrogatory. The cross-interrogatory was whether or not one Byrd had made other sales than the contract in suit for the plaintiffs. It does not appear to have been material. Therefore the deposition properly was admitted. We need not consider whether, if the question had been material, the deposition ought to have been excluded unless before the trial the defect had been brought to the attention of the court that it might pass such order on the subject as should seem proper.

It was objected that there was no evidence of the defendant's signature. But the defendant's answer to an interrogatory, "The signature resembles mine. I wish to have the contract identified before answering further," coupled with the absence of any later denial, was enough. *Exceptions overruled.*

FIELD, C. J. It is not easy, perhaps, to reconcile all our decisions upon the measure of damages in actions for goods bargained and sold or for goods sold and delivered, but the general rule is, I think, that where the title passes to the vendee by the contract, and the contract has been executed by a delivery or by what is equivalent to a delivery, the vendee is liable to the vendor for the price; but where the title does not pass to the vendee by the contract, and he declines to receive and accept the goods sold, the damages are the injury suffered from the breach, which usually is the difference between the price agreed upon and the market value of the goods at the time and place of delivery. *Collins* v. *Delaporte*, 115 Mass. 159. *Whitney* v.

Thacher, 117 Mass. 523. *Schramm* v. *Boston Sugar Refining Co.* 146 Mass. 211. *Tufts* v. *Bennett*, 163 Mass. 398. *Laird* v. *Pim*, 7 M. & W. 474, 478.

This question, in a contract for the sale of stock in a corporation, was considered in *Thompson* v. *Alger*, 12 Met. 428, 443. In that case the court held that the plaintiff was entitled to recover as damages the price agreed to be paid, and say: "The argument against such recovery is, that this stock was never accepted by the defendant; that this, at most, was a mere contract to purchase; and that the defendant, having repudiated it, is only liable to pay the difference between the agreed price and the market value of the stock on the day of the delivery. Such would be the general rule as to contracts for the sale of personal property; and such rule would do entire justice to the vendor. He would retain the property as fully in his hands as before, and a payment of the difference between the market price and that stipulated would fully indemnify him. Such would have been the rule in this case, if nothing had been done to change the relation of the parties. If, for instance, the defendant had repudiated the contract before any transfer of stock to him had been made on the books of the corporation, it might properly have applied here. But this is a case of somewhat peculiar character in this respect. The contract of the vendor to sell to the defendant one hundred and eighty shares of railroad stock required a previous transfer of the shares on the books of the corporation. This, from the very nature of the case, was a previous act; and when done, it passed the property on the books of the company to the defendant. This was done by the vendor as early as October 14th, 1841, in respect to all the shares stipulated to be sold. At this time, the defendant had not repudiated the contract. . . . In this state of the case, as it seems to us, the true rule of damages is the contract price. The stock has been transferred to Alger on the books of the corporation, and the vendor, having done this, in the proper execution of the contract, and before it was repudiated by the defendant, may well insist upon this rule as the measure of damages."

This rule of damages has been applied in this Commonwealth to contracts for the sale of stock in corporations, where the vendor has before trial duly tendered the stock or offered to trans-

fer it, and has renewed the tender or offer in court at the trial. *Thorndike* v. *Locke*, 98 Mass. 340. *Pearson* v. *Mason*, 120 Mass. 53. See *Nichols* v. *Morse*, 100 Mass. 523; *Frazier* v. *Simmons*, 139 Mass. 531.

If the contract in this case could be considered as an absolute contract of sale, it may be that the court could have found from the evidence such a delivery as in accordance with our decisions might be held to pass the title as between the parties. But then it might be necessary to consider whether, if the manikin was of value, it would not be necessary for the plaintiffs to keep the delivery good in some manner, as by storing it for the defendant at or near the place of delivery, or by tendering it to him at the trial in order to enable the plaintiffs to recover the entire price. If the manikin had been sent by the plaintiffs from a distant foreign country, and on the defendant's refusing to receive it had been sent back to them with their assent, and retained by them there, it would seem more reasonable to permit the plaintiffs to recover their damages caused by the defendant's refusal than to recover the entire price agreed to be paid, and to leave to the defendant only the chance of obtaining possession of the manikin in such manner as he could. If, on the vendee's refusing to receive the property bought, it is resold by the vendor by public auction, after notice to the vendee, the damages recovered are, of course, the difference between the price agreed to be paid and the sum obtained by the vendor from the resale, if reasonable care is taken to obtain for the property all that it is worth.

It becomes necessary in the present case to consider the nature of the contract. The contract, I think, is in effect a contract for a conditional sale, and the intention is that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract, the plaintiffs are authorized to retake the manikin without being accountable to the defendant for any of the money paid by him on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article and it is returned to and retained by the vendor? I

think that the construction to be given to the contract is, that, if the defendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant and retain what he has paid on account of the price, or they may leave the manikin in the possession of the defendant and sue him for the instalments of the price which remain unpaid, but the plaintiffs cannot collect the whole price and also retake the manikin; they cannot hold the title to the property and also recover the price of it.

But it is said that the plaintiffs have not retaken the manikin. The manikin has been returned to the plaintiffs, and is retained by them subject, as they say, to the order of the defendant. It is retained in New York City, and by retaining it there I think it must be held that the express company returned it to them with their assent, and that the plaintiffs have ratified this action of the express company.

The damages to be recovered when a vendee, in a conditional contract of sale, refuses to receive the property, and it is returned to the vendor by his assent and is retained by him, seem to me analogous to the damages to be recovered when a vendee in an executory contract of sale refuses to receive the property. *Morse* v. *Sherman*, 106 Mass. 430, 434. *Tufts* v. *Bennett*, *ubi supra*. See *Tufts* v. *Grewer*, 83 Maine, 407. The title in each case remains in the vendor, and the damages, when the thing sold is a commodity usually bought and sold in the market, are generally the difference between the price agreed to be paid and the market value of the property at the time and place of delivery. In my opinion, such should be the rule in this case. I find nothing in the agreement which distinguishes the present case from the ordinary one where the vendee of property agrees to pay a part of the price on delivery, and the remainder of the price in instalments after delivery.

Justices ALLEN and MORTON concur in this opinion.

J. E. Kelley, for the defendant.

G. H. Ryther, for the plaintiffs.

MARIE CARON, administratrix, *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Hampden. September 24, 1895. — November 26, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Loss of Life — Railroad — Due Care — Assumption of Risk — Employers' Liability Act — "Train" — "Charge or Control" — Fellow Servant — Negligence — Instructions — Defect in "Ways, Works, or Machinery" — Evidence.

Evidence that a person employed by a railroad corporation as the hind end brakeman on a train, whose duty it was to make up the train and put it together and make the couplings, was last seen, before a collision of cars which caused an accident resulting in his death, going along towards the rear end of the train with a pin and one or two links in his hands, and was found at a place where there was a separation between the cars, there being nothing to show that he had any warning or knowledge that the cars which caused the collision were coming down the track, or that he could see them, it being dark, and it not appearing that the presence of a lantern there would have prevented the accident, or that it was his duty to see that there was a lantern at his end of the train, will justify the jury, in an action against the corporation for causing his death, in finding that he was in the exercise of due care.

A person employed by a railroad corporation to make up trains in its yard assumes the risks arising from the ordinary method of transacting its business, but not that from cars which are sent in at the rate of ten or twelve miles an hour, and with such force as to throw off the track one car of a train which he was making up, and to break the draw-bars of others.

A number of cars coupled together, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive engine which has been detached, constitute a "train," within the meaning of the employers' liability act, St. 1887, c. 270, § 1, cl. 3.

The words in the employers' liability act, St. 1887, c. 270, § 1, cl. 3, "any person in the service of the employer who has the charge or control of any . . . train upon a railroad," mean a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole and of the men engaged upon it. It is not necessary that such person should be actually upon the train itself; a laborer or brakeman in such a position that for the moment he physically controls and directs the movements of a train is not in charge or control of it, though, under some circumstances, he may have such charge or control; and it is possible that more than one person may have "the charge or control" of a train at the same time.

Brakemen, whose duty it is to take care of the brakes on the cars of a train where each is stationed, and to stop it seasonably when it has cleared a switch in the yard in which it is being shifted on to a side track, and after the engine and caboose have been detached, acting under the supervision and direction of the

conductor, who is on the ground or in the caboose, are not in "the charge or control" of the train, within the meaning of St. 1887, c. 270, § 1, cl. 3, but are fellow servants of a person who, while employed by the railroad corporation in making up another train on the track in question, is killed by a collision of the two trains.

Whether the foreman of the switching gang in the yard of a railroad corporation, whose duty it is to direct on which track a train shall be put, it being the conductor's duty to see that it is switched on to the designated track, and it not appearing that such foreman, after he has given the direction, has anything further to do with the train, has "the charge or control" of the train, within the meaning of St. 1887, c. 270, § 1, cl. 3, *quære.*

In an action against a railroad corporation for causing the death of a person in its employ, by reason of the negligence of some person who had the charge or control of a certain train, in shifting it over upon the track where the former was at work, it appeared that the foreman of the switching gang in the yard said to the head brakeman on the train that there was room for forty cars on the track clear of the switch to the next track. There was nothing to show that this statement was not true, or that it was an improper place to direct the train to. It also appeared that it was customary, while trains were being made up, to switch cars in on the same tracks at the same time from both ends of the yard. *Held*, that there was no evidence of negligence on the part of the foreman.

Whether a dangerous method of doing business constitutes a defect in the "ways, works, or machinery" of an employer, within the meaning of the employers' liability act, St. 1887, c. 270, *quære.*

A person assumes the risk of such dangers as ordinarily are incident to the service in which he is engaged, and if after he has entered the service no change is made in the mode of doing the business so as to increase its dangers, he cannot be heard to complain that it might have been made safer, or that it was conducted in a hazardous manner.

In an action against a railroad corporation for causing the death of the plaintiff's intestate, while in its employ, by reason of the negligence of some person who had the charge or control of a certain train in shifting it over upon the track where the intestate was at work, the conductor of the train was asked, in cross-examination, the following question: "Whether or not, after the caboose was cut off, you assumed any management of the trains?" *Held*, that the question was properly admitted.

TORT, by the administratrix of the estate of Joseph Caron, for causing his death while he was in the defendant's employ as a brakeman in its freight-yard at West Springfield, about nine o'clock in the evening of June 8, 1893. The declaration was under the employers' liability act, St. 1887, c. 270. At the trial in the Superior Court, before *Dewey*, J., it appeared that there were two main tracks running generally east and west through the middle of the freight yard, and tracks on either side of the main tracks running parallel with them for about three quarters of a mile; that the south main track, which was the east bound track, was called No. 2, and the first track on the south side of it

was called No. 4, and the next side track was called No. 6; that while Caron was engaged in the discharge of his duties as one of a gang in making up a train at the east end of track No. 4, a train arrived from the west in charge of one Stickles as conductor, and stopped on the main track; that, the usual signal having been given, the train, having as head-end brakeman one O'Brien, and as hind-end man one Desloury, was switched from the main track on to track No. 4, so as to clear the switch to track No. 6; and that the cars, the engine and caboose having been detached, ran with such speed as to collide with the train upon which Caron was working, and he received injuries which resulted in his death.

The jury returned a verdict for the plaintiff; and the judge reported the case for the determination of this court. The facts, material to the points decided, appear in the opinion.

W. H. Brooks, (*G. Hay, Jr.* with him,) for the defendant.

J. B. Carroll, (*W. H. McClintock* with him,) for the plaintiff.

MORTON, J. This case was submitted to the jury on the second, third, sixth, and seventh counts in the plaintiff's declaration. The jury found for the plaintiff on the seventh count, which alleged that the plaintiff's intestate was injured by reason of the negligence of some person who had the charge or control of a certain train, in shifting it over upon the track where the plaintiff's intestate was at work. The count does not allege how or in what manner the shifting of the train led to the injury, but it was not demurred to. See *Steffe* v. *Old Colony Railroad*, 156 Mass. 262.

The defendant contends that the plaintiff's intestate was not in the exercise of due care. There was evidence tending to show that he was the hind-end man on the train of which one Collins was conductor, and that it was his duty to make up the train and put it together and make the couplings. "If there was any place lacking a pin or link, he was supposed to put it in," one of the witnesses testified. The last that was seen of him before the accident he was going along towards the rear end of the train with a pin and one or two links in his hands, and he was found at a place where there was a separation between the cars. There was nothing to show that he had any warning or knowledge that the cars which caused the collision

were coming down the track, or that he could see them; and for aught that appears he was engaged in the discharge of his duty when injured. Due care may be inferred from the absence of negligence as well as from positive acts of diligence. *Maguire* v. *Fitchburg Railroad*, 146 Mass. 379. *Mears* v. *Boston & Maine Railroad*, 163 Mass. 150. From the place where he was found it does not appear that if Caron had had a lantern the accident would or might have been prevented; and, so far as appears, there was no duty resting on him to see that there was a lantern at the end of the train that he was making up.

We think that there was evidence which justified the jury in finding that he was in the exercise of due care.

The defendant contends further that the plaintiff's intestate assumed the risk. There was testimony from which the jury might have found that it was customary to run cars in on the same tracks at the same time from both ends of the yard, while trains were being made up; and it would be reasonable to say that the defendant's intestate assumed the ordinary risks arising from that method of transacting the business. *Lynch* v. *Boston & Albany Railroad*, 159 Mass. 536. But we do not think that it fairly can be held that he assumed the risk of accident from cars which were sent in, as there was evidence tending to show that the colliding cars were, at the rate of ten or twelve miles an hour, and with such force as to throw off the track one car of the train which Collins and his men were making up, and to break the draw-bars of others. Such a manner of doing the business would be unreasonable, and not within any risk which the plaintiff's intestate assumed.

The defendant also contends that the cars which were switched on to the track where Caron was working did not constitute a train at the time of the accident; that if they did, neither O'Brien nor Desloury nor Mozier was in "the charge or control" of it, as the instructions of the court permitted the jury to find they were; and that under the seventh count the defendant could be held liable only in case the accident resulted from the negligence of some one person who had "the charge or control" of them in shifting the cars to the track where the plaintiff's intestate was.

It is not easy to define what under all circumstances would

constitute a train within the meaning of the statute. A locomotive with one or more cars attached to it, with or without passengers or freight, in motion upon a railroad from one point to another by means of power furnished by the locomotive, would undoubtedly constitute a train. *Dacey* v. *Old Colony Railroad*, 153 Mass. 112. So it would if the steam was shut off from the locomotive, and the train was moving by its own momentum. Whether a single car under such circumstances would constitute a train, or whether a number of cars coupled together and at rest would constitute one, we need not now consider. The word "train," as used in the railroad act (Pub. Sts. c. 112), generally signifies cars in motion. Usually the power would be furnished by a locomotive. But whether a number of cars coupled together and in motion, and forming one connected whole, do or do not constitute a train, does not depend, we think, upon whether a locomotive engine is attached to them at the time, and they are moved by the power thus supplied. The liability to accident, for which St. 1887, c. 270, was designed to furnish a remedy, would be the same in kind, though perhaps not so great in degree, whether the motive power was furnished by a locomotive attached to the cars or in some other manner. And it seems to us that a number of cars coupled together as these were, forming one connected whole and moving from one point to another upon a railroad, in the ordinary course of its traffic, under an impetus imparted to them by a locomotive which shortly before the accident had been detached, constitute a train within the meaning of St. 1887, c. 270, § 1, cl. 3. See *Devine* v. *Boston & Albany Railroad*, 159 Mass. 348; *Cox* v. *Great Western Railway*, 9 Q. B. D. 106; Roberts & Wallace, Employers' Liability, (3d ed.) 300.

The next and more difficult question is whether either of the two brakemen, O'Brien and Desloury, or Mozier, the foreman of the switching gang, was in "the charge or control" of the train when the accident occurred. The words "the charge or control" do not seem to have received a final construction anywhere. In *Gibbs* v. *Great Western Railway*, 11 Q. B. D. 22, Field, J. expresses a doubt whether the words "charge" and "control" are intended to mean different things. But in the same case in the Court of Appeal they seem to have been re-

garded as meaning different things, (12 Q. B. D. 208,) though the point was not decided; and in Roberts & Wallace, Employers' Liability, (3d ed.) 293, 294, that view is adopted. On the other hand, the implication of our own decisions, so far as they can be said to have given rise to one, is that they are to be regarded, not perhaps as synonymous, but as explanatory of each other, and as used together for the purpose of describing more fully one and the same thing; *Donahoe* v. *Old Colony Railroad*, 153 Mass. 356; *Thyng* v. *Fitchburg Railroad*, 156 Mass. 13; *Steffe* v. *Old Colony Railroad*, 156 Mass. 262; *Devine* v. *Boston & Albany Railroad*, 159 Mass. 348; *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, 534; *Lynch* v. *Boston & Albany Railroad*, 159 Mass. 536, 538; and we think that this is the better construction. If "control" is one thing and "charge" is another, then, inasmuch as to some extent every brakeman upon a train would have "control" of it, every employee injured by an accident resulting from the carelessness of a brakeman would have a right of action against the corporation which employed him, and the defence of common employment as to brakemen would be done away with, even though the brakemen might be acting under an immediate superior. The statute is to be fairly construed, and, while it removes the defence of common employment in some cases, it does not extinguish it altogether, and we do not think that the Legislature intended that it should be abolished in all cases where injuries were sustained by the carelessness of a brakeman. If it had, it would have used language more truly descriptive of a brakeman's usual occupation than the words "any person in the service of the employer who has the charge or control of any . . . train upon a railroad." It is *the* charge or control of which the statute speaks, and not *a* charge or control, and it is the charge or control of the train as a connected whole which is meant, not of portions which together form a whole. *Thyng* v. *Fitchburg Railroad*, *ubi supra*. We think, therefore, that by the words "any person . . . who has the charge or control" is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it.

It is not necessary that the person in charge or control should

be actually upon the train itself. *Donahoe* v. *Old Colony Railroad*, 153 Mass. 356. On the other hand, the mere fact that a laborer or brakeman is put in such a position that for the moment he physically controls and directs its movements under the eye of his superior does not of itself constitute him a person in "the charge or control" of the train, though there may be circumstances under which he would have such charge or control. *O'Connor* v. *Neal*, 153 Mass. 281. *Steffe* v. *Old Colony Railroad*, 156 Mass. 262. It is possible that more than one person may have "the charge or control" of a train at the same time. The case of the engineer is expressly provided for, and it is not likely that any negligence of his which should affect the train would not be negligence in the management of the locomotive engine of which at the time he had "the charge or control."

Applying these principles to the case before us, we do not think that either O'Brien or Desloury had "the charge or control" of the train as it went on to the side track, and after the engine and caboose had been detached, but that they were fellow servants of the plaintiff's intestate. They certainly had not the charge or control before that, and after it they were still acting as before, under the supervision and direction of Stickles, the conductor, who was on the ground or in the caboose, and had at no time given up the direction or control. The duty of each was to take care of the brakes on the cars at his own end of the train, and to stop it seasonably, in conjunction with the other, when it had cleared the No. 6 switch. They did not have the charge, and except in a very limited sense, and one as we think not meant, they did not have the control.

We doubt also whether, *quoad* this train, Mozier, the foreman of the switching gang, could be said to have had "the charge or control." All that he did was to direct on which track it should be put. "The charge or control" of the train and of the men on it remained in the hands of Stickles, the conductor, and it was his duty to see that it was switched on to the designated track. There is nothing to show that, after he had given the direction, Mozier had anything further to do with the train. But even if he had "the charge or control," we see no evidence of negligence on his part. There is nothing to show that there was not, as he said to O'Brien, room for forty cars on the No. 4

track clear of the switch to No. 6, which was the next track, or that it was an improper place to direct the train to; and in view of the custom of the yard to switch cars in at both ends on the same track, no special warning or signal on his part as to the cars at the other end of the track would seem to have been required, even if his statement that there was room for forty cars did not of itself carry an implication which the brakeman would understand as meaning that there were cars already standing there.

It was admitted that there was no negligence on the part of the engineer of Stickles's train, and, while it is not entirely clear, we do not understand that it was contended that there was any negligence on the part of Collins, the conductor of the train that was standing on track No. 4.

We think it sufficiently appears from the instructions contained in the report that the jury must have understood that the plaintiff was entitled to recover only in case there was negligence on the part of a person in charge or control of the train of which Stickles was conductor, in shifting it over on to track No. 4, and consequently that the defendant was not harmed by the refusal to give the specific instruction to that effect which was asked for.

We do not understand the defendant now to argue that there was no evidence proper to be submitted to the jury on the question of the negligence of Stickles.

The second count was for a defect in the ways, works, and machinery, which, it was alleged, "consisted in an improper and insufficient method of allowing cars to be switched upon the track where said Caron was at work at the time while said track was in use by another train, and in allowing said cars to be so switched without any lights or other signals or warnings to persons while upon said track." The court instructed the jury, in effect, that a method adopted by an employer for carrying on his business which involved danger to one or more of his servants while they were in the discharge of their duty and using reasonable care would be a defect in the ways, works, and machinery. As there may be a new trial, we think it advisable to advert to the instruction thus given. No case has yet gone so far in this State as to hold that a dangerous method of doing business may con-

stitute a defect in the ways, works, or machinery, though there is high authority for it in England, on which the learned judge who tried the case in the Superior Court evidently relied. *Smith* v. *Baker*, [1891] A. C. 325, 354 (per Lord Watson). We do not think it necessary to consider the question in the present aspect of the case before us, since, as the exceptions stand, we are of opinion that, even if the method adopted was a dangerous one, the plaintiff's intestate must be held to have taken the risk of it. There is nothing to show that it had not been customary to switch cars on to tracks already occupied without warnings or signals save such as would naturally be given to one another by those engaged in the work, during the whole time that the plaintiff's intestate had been working in the yard, which, as his widow testified, was two years and four months. It does not appear that any change had been made in the mode of doing the business so as to make it more dangerous after he entered the defendant's service. The law is well settled that, under such circumstances, the servant assumes the risk of such dangers as ordinarily are connected with the service in which he is engaged. He enters the business as it is, and cannot be heard to complain that it might have been made safer, or that it was conducted in a hazardous manner. *Goodes* v. *Boston & Albany Railroad*, 162 Mass. 287, and cases cited. *O'Maley* v. *South Boston Gas Light Co.* 158 Mass. 135.

The question put to Stickles by the plaintiff, in cross-examination, was properly admitted.* It involved an inquiry of fact in relation to the management of the train.

Exceptions sustained.

* This question was as follows: "Whether or not, after the caboose was cut off, you assumed any management of the trains?"

THOMAS W. CHALMERS *vs.* WHITMORE MANUFACTURING COMPANY.

Hampden. September 26, 1895. — November 26, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Evidence — Expert Witness — Exceptions.

A question to an expert witness at the trial of an action, which assumes as an absolute fact, and not as a hypothesis, a matter which is in dispute, is properly excluded.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the breaking of a bolt in a machine upon which he was at work, an expert witness may give his opinion in regard to the relative fitness of steel and iron or other metals for use in the construction of a bolt for such a machine, but he cannot give an opinion which includes his views upon any conflicting evidence.

An exception to the exclusion of evidence, offered to contradict the testimony of another witness, will not be sustained if the excepting party fails to show that the excluded evidence, if received, might properly have been considered upon the issue.

TORT, for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the breaking of a bolt in a machine upon which he was at work in the defendant's mill at Holyoke. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the exclusion of certain evidence, the nature of which appears in the opinion.

J. B. Carroll & W. H. McClintock, for the plaintiff.

W. H. Brooks & W. Hamilton, for the defendant.

KNOWLTON, J. The plaintiff's counsel asked an expert witness this question: "Now, suppose a bolt occupying a position like this bolt, in which there is this constant sidewise jar on it, — I will ask you whether or not a steel bolt is a proper bolt for the place?" The question was ruled out on the defendant's objection, and the plaintiff excepted. The question assumed as an absolute fact in the case, and not as a hypothesis, that there was a constant sidewise jar on the bolt, and then asked the witness to answer the precise question which was the issue before the jury. Whether there was such a jar was in dispute. The weight of evidence tended to show that the greatest strain

that could be put upon the bolt by the ordinary working of the machine was about twenty-two pounds, and that there was no jar. We think the question was properly excluded. *Hunt* v. *Lowell Gas Light Co.* 8 Allen, 169. *Poole* v. *Dean*, 152 Mass. 589. *Stoddard* v. *Winchester*, 157 Mass. 567, 575. *Twomey* v. *Swift*, 163 Mass. 273.

The witness was then asked, "Is steel a proper material to use under the circumstances attending the use of this bolt in a machine?" The subject of the inquiry was pertinent to the issue, and the witness might properly give his opinion in regard to the relative fitness of steel and iron or other metals for use in the construction of a bolt for a place like this. But he could not give an opinion which included his views upon any conflicting evidence. He was testifying as a person possessed of special knowledge derived from study and experience. To make his testimony valuable and entirely intelligible, it was necessary that he should state to the jury upon what actual or hypothetical facts he was giving an opinion, and what his opinion was upon the facts supposed. The question called for the consideration of two different subjects: first, the circumstances attending the use of the bolt; and, secondly, the fitness of steel for use under different conditions. The evidence tends to show that there was a difference of opinion among the witnesses in regard to these circumstances in reference to the qualities of metals in different combinations which would best meet the requirements of the use, and the judge in his discretion might well refuse to permit the witness to answer a question which neither required him to state what his opinion was in regard to the requirements of the place where the bolt was, nor asked what he thought of the relative fitness of steel and iron to meet the different kinds of requirements. No question addressed to the opinion of the witness in any particular matter of science or expert knowledge was excluded. In determining whether a question is so framed as to bring to the aid of the jury matters purely of expert opinion in such form as to be intelligible, something must be left to the presiding judge, who often has before him facts which cannot well be presented in writing to an appellate tribunal, and whose finding upon any doubtful question of fact cannot be revised by this court. Moreover, in replying

to the question, "Have you had any observation of the comparative strength and utility of these bolts, both steel and iron, of this bolt, the bolt at this place, both steel and iron," the witness afterwards testified fully, and gave the plaintiff substantially all the advantage which he would have got from a negative answer to this question, or from an answer to the first question. This exception must be overruled.

The only other exception is to the refusal of the judge to permit the plaintiff to ask this question, "Do you know whether or not any cast iron bolt came with those two last machines, — I mean wrought iron?" The machine on which the plaintiff was working was called the Cranston Under-cut Machine. The evidence tended to show that its weight was 6,300 pounds; that there were from seventy-five to one hundred bolts in it; that about ninety per cent of the paper manufacturers in this country use these machines; and that of the different sizes there were about one hundred in use by the paper manufacturers in the city of Holyoke. Charles Cranston, the inventor of the machine, was called by the defendant as a witness. He testified that he was the manufacturer of these machines; that they first came into use about 1866, and had been much improved since; that six or seven years ago he sold the defendant the machine on which the plaintiff was working; that it was of the most improved kind; that the defendant had four of them in all; and that all the bolts in these various machines which he had built and sent out for the last ten years have been of machinery steel, the same as this bolt that broke. He testified at length as an expert, to the effect that he believed this kind of bolt to be better and stronger than any other. In cross-examination he testified that before the accident he never heard of a bolt breaking at this place; that he sent a new machine to the defendant, but could not give the date, and could not tell whether it was before or after the accident; that he did not know whether he sent up an iron bolt for that or not, but did not believe he did; that he did not recollect every bolt with sixty or eighty men at work, and could not see everything that went out of the shop; that he did not think he sent it full size (referring to the shape of the bolt that broke, which is cut down in one part from its largest size to extend the shoulder); that

he had not made a bolt of iron at his shop for twelve years; that he did not make them of full size at his shop; and that he was not supposed to see every bolt that went into a machine, and that it might have been of full size. The defendant's treasurer and manager testified that the defendant had had two large machines come within two or three years; that he had not examined them particularly with reference to this bolt, but that this bolt was not supposed to be of full size without any shoulder. The plaintiff, in reply, proposed to put the question above quoted, and stated his purpose to contradict the witness Cranston by the answer, and "offered to show that a wrought iron bolt had been sent, and they were full size from end to end."

The sale of the last machine by Cranston to the defendant was introduced in cross-examination, and was immaterial to the issue. Whether all of its bolts were of steel or some of them were of iron was also immaterial. The plaintiff was therefore so far bound by the answers made by Cranston in cross-examination in regard to this matter that he could not introduce testimony from other witnesses to show that they were false for the purpose of contradicting this part of his testimony. *Eames* v. *Whittaker*, 123 Mass. 342. If it were a fact that either before or after the accident the defendant purchased another machine which had an iron bolt in the place where this one broke, that would not be competent on the main issue to show negligence. *Menard* v. *Boston & Maine Railroad*, 150 Mass. 386. *Downey* v. *Sawyer*, 157 Mass. 418, 421. It is contended that, because the witness Cranston testified in direct examination that all these machines which were in general use all over the country had been made at his shop, and that they were all made with bolts of steel like this which broke, and that he had not made a bolt of iron for one of these machines for many years, and that he thought steel the best material for such bolts, it was competent to introduce the answer to this question to contradict him in the substance of his testimony. To do this the plaintiff called his own brother, who had already given important testimony, in which he had been contradicted by other witnesses, and who was a workman in a paper mill, and who, so far as appeared, had no knowledge of iron except what he had derived from tending one of these machines, and asked him the question which was excluded. An expert had already testified that in his opinion "it would be

impossible for any one to tell by mere inspection, without a test, the difference between a finished bolt of machinery steel of good quality and one of wrought iron which is free from seams." The witness was only asked whether any wrought iron bolt came with the two last machines. The offer was merely to show that a wrought iron bolt of full size from end to end had been sent. When an important case has been tried at great length, and a verdict has been rendered with all presumptions and indications in favor of its correctness, an excepting party who asks to have it set aside on account of alleged error in the exclusion of testimony ought to be held very strictly to show that the evidence, if received, might properly have been considered upon the issue. It cannot be presumed in his favor that the evidence would have gone beyond the strict terms of his offer. If the plaintiff's brother had testified that among the seventy-five to one hundred bolts in the machine when it came to the defendant's mill there was one of wrought iron, of full size from end to end, could the jury properly have treated it as a contradiction of the substance of Cranston's testimony in regard to his method of manufacturing these machines, of which there were one hundred then in use in Holyoke, or in regard to his opinion that steel was the best material for such bolts? Cranston testified that he could not have personal knowledge of what went with every machine, and that there might have been such a bolt among the others. There was no offer to show that the new machine as set up and used had an iron bolt at the point in question, or that Cranston knew that an iron bolt was sent with the machine. If the testimony had been received without more, would not the jury have been forced to believe, if they believed the witness, that the presence of one such bolt was from some cause which had no relation to the general facts to which Cranston testified? If the judge had received it, we should have been disinclined, upon the printed evidence, to hold its admission to be an error which would affect the verdict. On the other hand, we think the judge might well rule, on the evidence before him, that it had no such relation to the evidence relied on by the defendant as to entitle the plaintiff to have it considered as affecting the value of Cranston's testimony. We are of opinion that the plaintiff has no legal ground of objection to the ruling.

Exceptions overruled.

ADELINE S. LINCOLN *vs.* ANNA L. GAY.

Worcester. September 30, 1895. — November 26, 1895.

Present: FIELD, C. J., ALLEN, KNOWLTON, MORTON, & BARKER, JJ.

Bailment — Negligence of Bailee — Action — Estoppel — Contract — Acceptance of Offer.

If cloth is delivered to a dressmaker to be made into a dress, without any instructions, she is held to that degree of skill and care which will enable her to do the work intrusted to her in a reasonable and proper manner; and an action may be maintained against her for making up the dress on the wrong side of the cloth, if, in the exercise of a proper degree of skill and care, the dress ought not to have been made up in that way.

In order to establish an estoppel on the part of the plaintiff in an action, it is necessary that there should be evidence tending to show that the defendant was induced by the plaintiff's conduct to do something different from what he would otherwise have done, and that the plaintiff knew or had reasonable cause to know that the defendant would so act.

If an offer by one party to a contract of bailment is varied in its acceptance by the other party, and the latter's proposition is not accepted before it is withdrawn by him, he is not bound thereby.

CONTRACT, to recover for injury to the plaintiff's dress pattern in making the same up on the wrong side of the cloth. Trial in the Superior Court, before *Hopkins*, J., who allowed a bill of exceptions, in substance as follows.

The defendant, who was a dressmaker, testified that the plaintiff instructed her to make up the dress on the wrong side of the goods, and introduced evidence showing that the plaintiff tried on the garment at three different times while it was being made up.

The garment was sent by the defendant to the plaintiff's residence on October 20, 1894, and the defendant testified that on October 23 the plaintiff came into her rooms and said to her that there were two mistakes in her suit; that the interlining had been omitted, and that the goods had been made up wrong side out; that the defendant said to her, "I am willing to put the interlining in, but I can't see how you can blame me for something you have selected yourself"; and that the plaintiff decided that if the defendant would put the interlining in, and fix

the collar, she would accept the suit, and she said, "You may send up for it to-morrow or next day."

The defendant also introduced the evidence of one Creesey, who was in her employ, and who testified in corroboration of the defendant's evidence as to the conversation with the plaintiff. It appeared that two or three days after this conversation, and before the defendant sent for the dress, the plaintiff wrote her a letter stating that she could not use the dress, and requesting a settlement.

The plaintiff testified that she delivered the material to the defendant without any instructions as to the side upon which the cloth was to be made up; that she left the whole matter of the making of the dress to the defendant; and that while she was trying the same on she made no examination of it and took no especial notice of it, and did not notice that the dress was being made up wrong side out until it was sent to her house. She also denied that she ever told the defendant that, under certain conditions, the dress would be satisfactory, or that she would accept it.

The defendant asked the judge to instruct the jury as follows:

"1. If the plaintiff delivered the dress pattern to the defendant to be made up, without instructions, and the defendant acted in good faith, understanding that the dress should be made up on the unfinished side, and the plaintiff saw the dress, and fully understood that it was so being made up when the defendant was making it up, she would be estopped to refuse acceptance of the dress, or to refuse to pay for the labor and material put into it by the defendant.

"2. If the plaintiff, after the dress was completed, agreed to accept the same upon the changes suggested, as testified to by the defendant, she cannot recover in her action."

The judge refused to give the instructions requested, and instructed the jury, among other things, as follows:

"The claim on the part of the plaintiff is that there was no express stipulation with reference to which side of this cloth should be made up. It is a question for us, then, what stipulation the law will imply under such circumstances.

"Perhaps I can simply illustrate it. If any one of us should take a piece of broadcloth to our tailor and ask him to make it

into a coat, and he should undertake to do so and nothing more was said about it, the law would carry with the contract which we made the stipulation that he should make it into a coat, using due and proper care and skill and proper workmanship, and that would involve putting the cloth in right side out.

"It is the claim on the part of the defendant that, while this suit was being made, the plaintiff was aware of the fact that it was being made up wrong side out. What is the significance of that fact, if it be a fact? If you should determine that, upon various occasions when it was being fitted, the way it was being worked up came to the knowledge of the plaintiff, then that is a circumstance which you should take into consideration upon the direct question whether the original agreement was that it should be made up wrong side out; and it would also be some evidence, not conclusive, that she agreed to modify the original contract and to accept the work as being made up. If the contract originally was to make it up right side out, whether by express or implied directions, it was entirely competent for the plaintiff at any time to modify that contract by agreeing with the defendant that it might be made up on the wrong side, and if you should find that, upon the several occasions when trying it on, it was called to her attention, and she knew it was being made up wrong, that would be some evidence, not conclusive, but would be some evidence that she agreed to modify the original contract and to accept the work as being made up. But it may be evidence also upon the proposition, as claimed by the defendant, that the original agreement was that it should be made up wrong side out.

"Of course you must be satisfied she knew of the fact when she was trying it on, that it was being made up in a wrong manner.

"If you determine that she did know it was being made up this way, you may take that into consideration on the question whether she modified her original contract, or whether she made the original contract as claimed by the defendant."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. A. Gile & C. T. Tatman, for the defendant.

C. M. Thayer, for the plaintiff.

MORTON, J. If the dress was delivered to the defendant by the plaintiff without any instructions, the defendant, being a bailee for hire, was held to that degree of skill and care in the particular occupation in which she was engaged, which was that of a dressmaker, which would enable her to do the work intrusted to her in a reasonable and proper manner. *Jackson* v. *Adams*, 9 Mass. 484. Story, Bailments, § 431, and cases cited. Her understanding that it was a proper way to make the dress up wrong side out would be immaterial, therefore, if in the exercise of a proper degree of skill and care the dress ought not to have been made up in that way.

So much of the instruction requested as related to the matter of estoppel was also clearly erroneous. It made the plaintiff's knowledge that the dress was being made up wrong side out the sole test. But in order to justify the jury in finding an estoppel, it was necessary that there should be evidence tending to show that the defendant was induced by the plaintiff's conduct to do something different from what she would otherwise have done, and that the plaintiff knew or had reasonable cause to know that the defendant would so act. *Tracy* v. *Lincoln*, 145 Mass. 357. *Stiff* v. *Ashton*, 155 Mass. 130. The instructions requested omitted this element. We doubt also whether the evidence would have warranted a finding that there was an estoppel. The jury have negatived the claim of the defendant that the plaintiff gave her instructions to make the dress up wrong side out. The defendant had begun to make the dress before the plaintiff saw the garment, and it does not appear that she was induced to make it up wrong side out in consequence of anything that the plaintiff said or did, or omitted to say or do.

The remaining instruction was also rightly refused. The defendant offered to put the interlining in, and the plaintiff thereupon said that if she would put the interlining in and fix the collar she would accept the suit. It does not appear that this proposition was accepted by the defendant before it was withdrawn by the plaintiff.

We discover no error in the instructions as given, or in the refusals to rule as requested.

Exceptions overruled.

COMMONWEALTH *vs.* EDWARD J. LYNCH.

Essex. November 5, 1895. — November 26, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Conduct of Defendant sufficient to justify Conviction.

A defendant may be convicted on a complaint charging him with illegally keeping intoxicating liquors with intent to sell the same, if his conduct when the house in which he lived was visited by officers with a search-warrant was such as to warrant an inference that the liquors found secreted in the building were kept by him for unlawful sale.

COMPLAINT, charging the defendant with illegally keeping intoxicating liquors with intent to sell the same, at Marblehead, on April 14, 1894.

At the trial in the Superior Court, before *Lilley*, J., there was evidence tending to show that on and prior to the above date one Bridget White, whose daughter was the wife of the defendant, illegally sold liquor in a house situated on premises distant about one hundred yards from the house in which the defendant lived; that on and prior to that date the said White also kept a grocery store on her premises; that, on January 6, the defendant and his wife were seen to come from the house in which he lived, and while he entered the store his wife entered the house; that the defendant was carrying a basket containing a newspaper, but the witness could not say whether there was anything under the newspaper or not; that, on January 14, the defendant with a can in his hand came from the house in which he lived and entered the store; that, on April 6, the defendant was seen passing about half a dozen times between the house in which he lived and the premises of said White; that on several other occasions the defendant was seen passing to and from said premises, sometimes carrying something under his coat; that, on April 4, the wife of the defendant was seen coming from the house in which the defendant lived and the premises of said White; that White was not seen going to and from the house in which the defendant lived; that, on January 9, an expressman was seen to carry a package covered with paper, resembling a five-gallon keg,

into the yard of the house in which the defendant's family and three other families lived; that the said expressman then went into the grocery store of White, carrying his delivery-book with him; that a son of White was seen to go behind the counter, and the expressman to go up to the counter and come out in a minute or two; that, on March 28, a driver of the American Express stopped at White's store, went in with his receipt-book, was gone a minute or two, and then drove to the house where Lynch lived, took a two or three gallon jug into the yard of the house, but did not take his delivery-book; that, on January 13 or 14, an expressman was seen to stop his pung at the house, and take a keg into the yard, and come out and enter White's store; that as he was driving away some one whistled, whereupon the expressman turned around and drove back; that the defendant said something, and the expressman was heard to say, "I'll come back"; that the expressman then drove to the house where the defendant lived, and the defendant then brought out of the yard and gave to the expressman a jug and a keg; that on none of these occasions was the expressman seen to enter the tenement occupied by the defendant, and that he might have gone into the tenements of the other occupants of the house; that, on April 14, certain officers with a search-warrant visited the two and a half story dwelling-house wherein the defendant's family and three other tenants lived, in the end of which there was a common entrance for all the tenants; that the defendant's tenement was locked; that an officer went to White's house and found the defendant there; that the officer there heard some one ask for a key; that the defendant went with the officer and unlocked a tenement on the lower floor, in which the defendant lived; that nothing was found there except two decanters of wine, which the Commonwealth did not claim to have been illegally kept; that the tenement directly over the tenement of the defendant was occupied; that the officers then ascended two flights of stairs in hallways which were common to the several tenants, the defendant following with a lighted lamp; that from the hallway at the head of the second flight of stairs, which hallway ran the full length of the house, with a stairway reaching the same at either end and common to all tenants, there were doors leading into four attic rooms, locked; that an officer

asked the defendant for a key to a room next the head of the stairs; that he said he had no key, but subsequently said that he guessed he had a key which would fit it, and unlocked the door with a key which he took from his pocket; that the room contained a trunk which was admitted to be the defendant's; that one of the officers testified that the defendant said to him that these rooms "belonged to Mrs. Cahoon"; that in the ceiling over the hallway, near the head of the stairs coming from the part of the house in which the tenement occupied by the defendant was situated, was an opening or scuttle into an unfinished space under the roof; that after coming out of the room just referred to, one officer mounted on the back of another, opened the scuttle and passed through the scuttle, and that immediately the defendant went down stairs, taking the lighted lamp with him, leaving the officers in darkness except for a candle which they then lighted; and that in the space into which the scuttle opened there were found four and a half gallons of whiskey and a gallon and a half of rum, in three jugs.

It appeared that the defendant told the officers that he had nothing to do with any part of the building other than the tenement on the lower floor and the single room in the attic, and that the other rooms in the attic were occupied by the three other tenants.

The defendant asked the judge to rule that there was not sufficient evidence upon which to submit the case to the jury. The judge declined so to rule, but submitted the case to the jury with appropriate instructions, which were not objected to; and the jury returned a verdict of guilty. The defendant alleged exceptions.

H. F. Hurlburt & E. T. McCarthy, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

KNOWLTON, J. The defendant's conduct when the house in which he lived was visited by officers with a warrant to search for intoxicating liquors was such as to warrant an inference that the liquors found secreted in the building were kept by him for unlawful sale. When they visited the attic rooms and were about to search the room near the place where the liquors were subsequently found, he said at first that he had no key that would unlock the door, but soon afterwards he took a key from

his pocket and unlocked it. The room contained a trunk which was admitted to be his. There was testimony that he said to one of the officers that these rooms "belonged to Mrs. Cahoon." There was other testimony that he admitted that this single room was his, and said that the three other attic rooms belonged to other tenants. In a hallway common to all the tenants there was a scuttle, near the head of the stairs coming from the part of the building occupied by the defendant, which opened into an unfinished space under the roof. After coming out of the defendant's attic room, in his company, one of the officers mounted upon the back of another, opened this scuttle, passed through it, and found four and a half gallons of whiskey and a gallon and a half of rum, in three jugs. As the officers started to open the scuttle, the defendant went down stairs, carrying the lighted lamp with him, and leaving the officers in darkness except for a candle which they then lighted. The jury might well consider these circumstances as indicating guilty knowledge. There were many other circumstances in evidence which tended to show that this place was used by the defendant and his wife as a storehouse for liquors to be sold by his wife's mother, who was selling liquors unlawfully in a place near by. The case was rightly submitted to the jury. *Exceptions overruled.*

COMMONWEALTH *vs.* GEORGE W. CURRIER.

Essex. November 6, 1895. — November 26, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Intoxicating Liquors — Conviction for bringing Intoxicating Liquors into a Town to be illegally sold.

In order to justify the jury in finding a verdict of guilty on a complaint for bringing intoxicating liquors into a town to be there sold in violation of law, it is not necessary that they should be satisfied that the defendant began and completed the transportation, but only that he knowingly aided and assisted in bringing the liquor into the town for illegal sale there.

COMPLAINT, for bringing intoxicating liquors into the town of Amesbury, on August 30, 1894, the defendant having reasonable

cause to believe that the same were intended for sale in Amesbury, in violation of law.

At the trial in the Superior Court, before *Lilley*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions.

G. E. Batchelder, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

MORTON, J. The defendant was charged with bringing into the town of Amesbury spirituous and intoxicating liquors, having reasonable cause to believe that they were to be sold there in violation of law. It appeared that Amesbury was what is termed a "no license town." The defendant was a driver for an express company, doing business between Boston and Amesbury, whose goods came in part by freight by a freight train which arrived at the station in Amesbury daily about ten o'clock in the forenoon. There was evidence tending to show that on the day named in the complaint the defendant was seen driving from the railroad station in the direction of a hotel called the American House, having amongst other things a sugar barrel in his wagon; that he was found unloading the barrel at a side door of the hotel; that on the head where the tag had been was marked in lead pencil, "10 doz. C"; and that on examination the barrel was found to contain ten dozen bottles of lager beer. There was also evidence tending to show that for several weeks before the day complained of he had been seen delivering twice a week at the American House barrels similar in appearance to the one in question; that he had been seen driving up a passageway by the side of the Attitash House, another hotel, about the middle of August, with a barrel similar to the one in question, and came back without it; that a few hours later, when a raid was made on the Attitash House, a barrel similar to the one in question was found with lager beer in it; and that both the American House and the Attitash House had the reputation in Amesbury of being places where liquor was sold in violation of law. There was likewise testimony tending to show that he had been in the employment of the express company for about six weeks prior to August 30, and had been seen delivering goods for the express company in Amesbury, and taking goods away from freight cars. His conduct when he was driving with barrels in

his wagon, similar in appearance to the one in question, and saw any of the officers of the town, also was described, and was before the jury.*

We think that it was competent for the jury to find, on this and the other evidence in the case, that the defendant was guilty of the offence charged. *Commonwealth* v. *Commeskey*, 13 Allen, 585. *Commonwealth* v. *Brown*, 154 Mass. 55. *Commonwealth* v. *Loewe*, 162 Mass. 518.

In order to justify the jury in finding a verdict of guilty, it was not necessary that they should be satisfied that the defendant began and completed the transportation, but only that he knowingly aided and assisted in bringing the liquor into the town for illegal sale there. *Commonwealth* v. *Brown*, *ubi supra*.

Exceptions overruled.

CHARLES W. GOSS *vs.* OSCAR CALKINS.

Plymouth. November 20, 1895. — November 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Answer — Defence of Payment.

In an action of contract, the defence of payment is open under an answer to a declaration in set-off alleging "that, if the defendant shall prove that plaintiff ever owed the defendant the amounts set forth in said counts, he has paid the same in full."

CONTRACT. The defendant filed a declaration in set-off, consisting of four counts upon promissory notes, one count upon an I O U, and a sixth count upon an account annexed. The answer to the declaration in set-off was as follows:

"And now comes the plaintiff, and for answer to the defendant's declaration in set-off and to each count therein contained, says that, if the defendant shall prove that plaintiff ever owed

* The testimony was that the defendant would keep looking back as if watching, and would look up and down cross streets as he passed; and that when he caught sight of them he would drive on or drive away.

the defendant the amounts set forth in said counts, that he has paid the same in full."

At the trial in the Superior Court, without a jury, before *Mason*, C. J., the plaintiff offered evidence of payment under this answer, to which the defendant objected, and asked the judge to rule that no evidence of payment was admissible thereunder. The judge refused so to rule, and ruled that the plaintiff could prove payment thereunder; and the defendant alleged exceptions.

B. C. Moulton & E. D. Loring, (*V. J. Loring* with them,) for the defendant.

H. H. Chase & F. M. Bixby, for the plaintiff.

ALLEN, J. This case cannot be distinguished from *Swett* v. *Southworth*, 125 Mass. 417, where it was held that the defence of payment was open under an answer like that in the present case. *Exceptions overruled.*

COMMONWEALTH *vs.* PATRICK F. MANNING.

Middlesex. November 25, 1895. — November 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Intoxicating Liquors — Sufficiency.

A complaint for unlawfully exposing and keeping for sale intoxicating liquors with intent unlawfully to sell the same on the first day of June, 1894, and on divers other days and times between that day and the day of making the complaint, which was the fifth of the following December, is sufficient; and the negation of authority, "not having then and there any license . . . according to law then and there to expose, keep for sale, or sell said liquors," applies to the whole period.

COMPLAINT to the Second District Court of Eastern Middlesex, charging that the defendant, on the first day of June, 1894, and "on divers other days and times between that day and the day of making this complaint [which was the 5th of the following December], at Waltham, in said county of Middlesex, and within the judicial district of said court, unlawfully did expose and keep for sale intoxicating liquor with intent unlawfully to

sell the same in this Commonwealth, the said Patrick F. Manning, not having then and there any license, authority, or appointment according to law then and there to expose, keep for sale, or sell said liquors."

In the Superior Court, on appeal, before the jury were empanelled, the defendant renewed a motion to quash made in the court below, on the grounds that the complaint was "uncertain and informal, and that the want of license, authority, or appointment according to law to expose, keep for sale, or sell intoxicating liquors was not sufficiently alleged."

Richardson, J. overruled the motion, and the defendant excepted. At the trial the defendant asked the judge to rule that the government was limited in its proof of the offence to June 1, that being the only date upon which it was alleged that the defendant had no license, authority, or appointment to keep liquors. The judge refused so to rule, and ruled that the jury might find that he kept them on any day within the dates covered by the complaint, and that the "then and there" in the phrase of the complaint "not having then and there any license, authority, or appointment," referred to the first day of June, and to any other day between said first day of June and the day of making the complaint.

There was evidence upon which the jury would have been warranted in finding that the defendant, on November 23, 1894, kept liquors with intent to sell the same unlawfully. The defendant's counsel asked the judge to rule that there was not sufficient evidence to warrant the jury in finding that the allegations in the complaint were established. The judge refused so to rule, and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

F. P. Curran, for the defendant.

G. A. Sanderson, Assistant District Attorney, for the Commonwealth.

ALLEN, J. The complaint charges an offence committed during a single period of time, from the day first named to the day of making the complaint. *Commonwealth* v. *Sheehan*, 143 Mass. 468. *Commonwealth* v. *Dunn*, 111 Mass. 426. *Commonwealth* v. *Hoye*, 9 Gray, 292. The negation of authority "then

and there" applies to the whole period. *Commonwealth* v. *McKenney*, 14 Gray, 1. *Commonwealth* v. *Boyle*, 14 Gray, 3. *Commonwealth* v. *Chisholm*, 103 Mass. 213.

Exceptions overruled.

COMMONWEALTH *vs.* WILLIAM GORMAN.

Suffolk. November 25, 1895. — November 26, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, & LATHROP, JJ.

Policy Slips — Evidence — Instructions.

The offence of having policy slips in one's possession can be committed at any time, and therefore, at the trial of a complaint under St. 1895, c. 419, possession at any time may be proved, although the slips were not found in the defendant's possession when arrested on the complaint, nor when arrested for any violation of law mentioned in § 3 of the statute.

An exception to a refusal to give a request for a ruling that a statute is unconstitutional will not be considered if the instruction to the jury, which was sufficiently favorable to the party asking the request, renders the exception immaterial.

COMPLAINT, under St. 1895, c. 419, by Orlando B. Lailer, to the justices of the Municipal Court of the City of Boston, alleging that the defendant, on September 10, 1895, at Boston, "did have in his possession for the purpose of sale, transfer, and delivery, a certain printed slip and bill then and there designed to guarantee and assure to a person to whom the same would and should be so sold, transferred, and delivered as aforesaid, a chance of drawing and obtaining a prize and thing of value (a more particular description whereof is to said Lailer unknown) to be drawn in the game and device commonly known as policy lottery."

At the trial in the Superior Court, before *Gaskill*, J., it appeared that the implements were found upon the person of the defendant while being searched after his arrest as an idle and disorderly person on the day previous to that on which the present complaint was made. The officer who then arrested the defendant was asked by the District Attorney what he found upon the person of the defendant at the time of the arrest. The

defendant objected, on the ground that the question was not competent until evidence was offered of the cause of the defendant's arrest, and that the burden was on the government to show that any person having the implements upon him, as alleged in the complaint, was lawfully arrested for gaming, or for having in his possession gaming implements, before such implements could be admitted as evidence.

The defendant requested the judge to rule that the provisions of § 3 of the statute, to the effect that the finding of any gaming implements upon the person of the defendant was *prima facie* evidence of his guilt of the offence charged, were unconstitutional; but the judge refused so to rule.

The defendant also requested the judge to rule that if the jury should find that, when the defendant was lawfully arrested on the charge set forth in the complaint, he did not have in his possession the implements set forth therein, they must acquit him; but the judge refused so to rule, and instructed the jury that the implements, etc. found upon the defendant were not *prima facie* evidence of his guilt, but that the government must satisfy the jury beyond reasonable doubt of the defendant's guilt, and gave other instructions not objected to.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

W. E. Macdonald, for the defendant.

J. D. McLaughlin, Second Assistant District Attorney, for the Commonwealth.

HOLMES, J. We presume that the implements found upon the defendant's person were policy slips, although the exceptions do not tell us what they were. There is no contention to the contrary. It seems that they were not found when the defendant was arrested in this case, nor when he was arrested for any violation of law mentioned in St. 1895, c. 419, § 3, and that therefore they are not within the clause of that section expressly making them competent evidence. The objection to evidence of the finding, except in a case brought within that clause, implies that the offence charged cannot be committed at other moments than that of the defendant's arrest for that, or at least for a similar offence. The ruling last requested rests on the same proposition. But as the offence can be committed at any time,

the fact that the defendant had policy slips in his possession at the time of the alleged offence is admissible as the most important part of the offence charged.

The judge instructed the jury that the finding of the implements upon the defendant was not *prima facie* evidence of his guilt. This was sufficiently favorable to the defendant, and made immaterial the request for a ruling that the statute on this point was unconstitutional. See further *Commonwealth* v. *Williams*, 6 Gray, 1, 6. *Exceptions overruled.*

BOSTON AND ALBANY RAILROAD COMPANY *vs.* COUNTY COMMISSIONERS OF HAMPDEN.

Hampden. September 25, 1895. — November 27, 1895.

Present: FIELD, C. J., ALLEN, HOLMES, KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Certiorari — Reservation of Case — Petition of City Officials for Alteration in Railroad Bridge — Decision of County Commissioners upon Petition — Alterations or Repairs — Statute.

If a case is reserved for the determination of this court, by agreement of the parties, upon petition and answer, it is not open to the petitioner to contend at the argument that the case is not properly before the court.

A petition to the county commissioners, reciting that the mayor and aldermen of a city "are of opinion that it is necessary for the convenience of the public that an alteration should be made" in a bridge by which a railroad crosses a highway, and describing the circumstances which cause inconvenience to the public, is sufficient to give the commissioners jurisdiction, under Pub. Sts. c. 112, § 129, to determine whether any, and, if so, what alteration is necessary, and to prescribe the manner and limits within which it shall be made.

A decision of county commissioners upon a petition of the mayor and aldermen of a city, under Pub. Sts. c. 112, § 129, prescribing additions to be made to the upper surface of the masonry of a bridge by which a railroad crosses a highway in the city, and other changes and new structures designed to divert the water which otherwise would come upon the masonry and leak through it and fall upon the highway, and to carry that water into the sewers, orders the making of alterations and not of repairs; and such alterations come within the purview of the statute, although the bridge is one built in compliance with a decree passed in prior proceedings under the same statute, and in which an apportionment was made of the expenses and burdens of the crossing, as existing before the prescribed alterations.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners, in ordering certain things to be done to a bridge by which the petitioner's railroad crosses Main Street in Springfield. The case was heard by *Morton*, J., upon petition and answer, and reserved for the determination of the full court; such decree to be entered as law and justice might require. The facts sufficiently appear in the opinion.

The case was submitted on briefs to all the judges.

Samuel Hoar, for the petitioner.

G. D. Robinson, for the respondent.

BARKER, J. It is not open to the petitioner to contend that the case is not properly before us, for the reason that it was reserved by agreement of the parties for our determination upon the petition and answer. The plan referred to in the decision of the county commissioners is not necessary to a clear understanding of the general scope of the work which the decision prescribes, or of the manner and limits within which the work shall be done. It is evident that no change is to be made in the location or the grade either of the railroad or of the highway, and none in any portions of the structure of the bridge except with reference to the upper surfaces of the stone arch and of its abutments, which are required to be so treated that they will be impervious to water, and, in connection with a new system of drains, will carry into the city sewer any water which may flow from the surfaces to be so treated. If the work required by the decision shall be done there will be no change in the method by which the railroad traffic is conducted over the highway, and none in the use of the highway, save that, if the work serves its intended purpose, water will no longer leak through the masonry of the bridge and fall upon the highway, and an inconvenience now experienced by the public will thus be removed.

The application to the county commissioners recites that the mayor and aldermen "are of opinion that it is necessary for the convenience of the public that an alteration should be made in said bridge, as [that is to say, because] the same is now constructed so that water which falls upon the same in times of storms, and which falls upon the premises of said railroad company, passes through said bridge and falls upon the street below, to the common nuisance of the public travelling on said

street." The railroad company concedes that under the alternative wording of the statute, "If . . . the mayor and aldermen . . . are of the opinion that it is necessary for the security or convenience of the public," (Pub. Sts. c. 112, § 129,) it is enough that the change sought should be necessary for the public convenience, without more, but contends that the county commissioners had no jurisdiction because the mayor and aldermen did not set out the substance of their opinion in the petition, and did not present any definite plan for alterations either in the petition or at the hearing before the county commissioners, and that because the plan embodied in the decision originated with the last named board, the mayor and aldermen could not have been of the opinion, when they made their petition, that such changes should be ordered. In other words, the company contends that the petitioning officials must be shown to have so exercised their judgment as to have determined that some particular alteration specified in the petition is necessary before the county commissioners have jurisdiction under the statute; and it would seem to be a logical sequence of this contention, if sound, that without an amendment of the petition no alteration could be ordered in such proceedings unless it was specifically adjudged to be necessary by the officials who initiate them, and was so stated in the petition; and the petitioner here so contends.

This contention is unsound. By preferring their petition the officials who invoke the action of the county commissioners show that they are of the opinion that some alteration is necessary, and they state the existing circumstances with reference to the bridge and the way which make some alteration necessary. This was in substance all that was contained in the petition of the selectmen in *Norwood* v. *New York & New England Railroad*, 161 Mass. 259, where it was held that it was not necessary that a plan or specifications should accompany the petition, nor that the alterations prayed for should be particularly set out. The reason given in that decision was that the alterations necessary are to be determined by the commissioners and the court. We think the statute requires only that the officials who apply for an alteration shall have determined that some alteration, the general nature of which is disclosed by the petition, is necessary, and that upon such a petition as the one now under

consideration the commissioners have jurisdiction to proceed, and to determine whether any alteration is necessary, and, if so, what alteration, and to prescribe the manner and limits within which it shall be made.

The railroad company also contends that the decision does not prescribe the making of alterations, but of mere repairs, and that the statute does not apply to such a case as the present. In the opinion of a majority of the court, this contention is unsound. It is conceded that the bridge has been constructed in accordance with decrees passed in prior proceedings under the same statute, and that it remains exactly as it was built, without injury, dilapidation, or loss. The things which the present decision requires to be done are additions to the upper surface of the masonry, and other changes and new structures designed to divert the water which otherwise would come upon the masonry, and to carry that water into the sewers. They are not acts of restoration, or repairs, but alterations designed to obviate a nuisance which had no existence until after the former decrees had been carried into effect. There is no contention that the existing nuisance was foreseen by any of the parties concerned in the former proceedings, or by the public authorities under whose orders the bridge was built and left in its present condition, and this consideration makes it impossible to treat the present proceeding as an attempt on the part of the city to escape from a burden imposed upon it by the former decrees with reference to the crossing.

We think that the alterations come within the purview of the statute, although the bridge is one built in compliance with a decree passed in prior proceedings under the same statute, and in which an apportionment of the burdens of the crossing as now existing was made. Both the railroad and the highway were built and are maintained for the convenience of the public, and the State retains its control in order that the public convenience may be at all times served by each. The necessity of an alteration for the security or convenience of the public at the time when the question is to be determined is the test to be applied. If such a necessity exists, the alterations may be ordered, whether there have been former proceedings under the statute or not; and by the statute the expense of such altera-

tions, and the burdens which may be imposed upon the parties concerned, are to be dealt with in the proceedings in which the alterations are ordered. The fact that the expenses and burdens of the structures to be altered have been apportioned in former proceedings will no doubt have such consideration as it may deserve in deciding how the expenses and burdens of the alterations to be now made shall be borne, and such expenses and burdens may, by the proper authorities, be imposed wholly upon one party or be apportioned.

Petition for certiorari denied.

KATE HOULIHAN *vs.* CONNECTICUT RIVER RAILROAD COMPANY.

Hampden. October 18, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Instantaneous Death — Employers' Liability Act — Due Care — Assumption of Risk — Dependency.

At the trial of an action against a railroad company, under St. 1887, c. 270, §§ 2, 3, for the instantaneous death of an employee occasioned by his being thrown from a trestle by the breaking of a plank while he was walking thereon, helping a fellow workman push a hand-car, it appeared that he was present when a caution to keep inside the rails was given by the foreman, and had been told by his companion just before the accident that he had better so walk, and thereupon, having been walking with one foot outside the rail, he did walk between the rails, and was so walking when last noticed by his companion, whose attention was thereafter taken up with his own work until the accident happened. *Held*, that the question of the intestate's due care was for the jury, even if it had been shown that he kept on walking with one foot outside the rail until the accident happened; and that while he assumed the general risk of falling from the trestle, he could not be held to have assumed the risk arising from the defective plank, as there was no evidence that he knew of it.

The daughter of an employee who lives with her and turns over to her all his wages, from which and from the money received for board of her two brothers, the only other members of the family, she buys the household supplies and provisions and the clothes for herself and her father, she doing the housework, using all the money as she sees fit, in no way accounting for it to her father and laying up none of it in the bank, may be found to be a "dependent," within the meaning of St. 1887, c. 270, § 2.

TORT, under St. 1887, c. 270, §§ 2, 3, by the plaintiff, as one of the next of kin of Michael Houlihan, for causing his death. At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the nature of which appears in the opinion.

F. P. Goulding & W. H. Brooks, (*F. L. Dean* with them,) for the defendant.

J. B. Carroll & W. H. McClintock, for the plaintiff.

BARKER, J. 1. The present is not a case in which the cause of the accident and the conduct of the deceased must be wholly left to conjecture. The evidence justifies a finding that, while walking upon a trestle helping a fellow workman push a hand car, the deceased was thrown from the trestle by the breaking of a plank, a part of which was found next to his body upon the ground. Assuming that he fell because he stepped outside the rail, could the jury find that act to be consistent with due care? No doubt it was less dangerous to walk inside the rails, and not only was he present when a caution to keep inside the rails was given by the foreman, but he had been told by his companion just before the accident that he had better so walk, and thereupon, having been walking with one foot outside the rail, he did walk between the rails, and was so walking when last noticed by his companion, who was helping to push the car, and whose attention was thereafter taken up with his own work until the accident happened. But ordinary care does not require that one should invariably adopt the very safest course of action, and, considering the construction of the trestle and the nature of the work in which he was engaged, we think that if the deceased had kept on walking with one foot outside the rail it would have been a question for the jury whether he was acting with due care. Certainly the jury might find that a single step outside the rail was consistent with due care. A slipping of the foot, or a stumble, or a yielding of the faulty plank might require him to put his foot outside; and from the fact of his compliance with the fresh warning of his companion, and the fact that the latter did not thereafter notice him until he felt the jar occasioned by the fall, the jury might find that the deceased did not again step outside without some good reason. It is suggested that he may have slipped between two planks, and so have been

thrown from the trestle, but we think the position of the body and of the broken portion of the plank upon the ground beneath the trestle, with the testimony of his companion as to what he observed, justified a finding that the accident was due to the breaking of the plank.

2. While the deceased assumed the general risk of falling from the trestle, there was no evidence that he knew of the defective plank, and he cannot be held to have assumed the risk arising from that defect.

3. The plaintiff was the daughter of the deceased, and he lived with her and turned over to her all his wages. The family consisted of her father, herself, and two older brothers, one a bricklayer and the other a janitor. She bought the household supplies and provisions, and the clothes for herself and her father, and did the housework. Her brothers paid their board to her, twenty dollars per month, and her father's wages were nine dollars a week. She used all the money as she saw fit, in no way accounting for it to her father, and she laid up no money in the bank. This state of things was quite different from that which appeared in *Hodnett* v. *Boston & Albany Railroad*, 156 Mass. 86, and we think that it supports a finding that the plaintiff was in fact dependent upon the earnings of the deceased. See *Daly* v. *New Jersey Steel & Iron Co.* 155 Mass. 1, 5, and cases cited. *Exceptions overruled.*

SAMUEL S. GIBSON *vs.* JOHN B. SULLIVAN.
ADNA F. TRIPP *vs.* SAME.

Bristol. October 29, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Negligence — Assumption of Risk — Due Care.

In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged negligence of the defendant in failing to furnish suitable appliances and safeguards, if the evidence is conflicting upon the ques-

tion whether certain appliances and safeguards for the work in question, which he did not furnish, were necessary or customary, and the evidence shows that the plaintiff was of more than ordinary skill and experience in his trade, but that he never had any experience in this particular work, the questions whether the defendant was at fault, and whether the plaintiff had assumed the risk, or was not in the exercise of ordinary care, are for the jury.

TWO ACTIONS OF TORT, for personal injuries occasioned to the plaintiffs respectively, while in the defendant's employ as masons, by the fall, upon a staging on which they were standing while at work, of certain terra-cotta brackets and copings which projected from the wall of a building in process of erection by the defendant, the weight of the brackets and copings breaking the staging and precipitating the plaintiffs to the ground. The declaration in each case contained four counts, the first three at common law, and the fourth under the employers' liability act, St. 1887, c. 270. The cases were tried together in the Superior Court, before *Braley*, J., and at the close of the evidence the plaintiffs elected to rely upon the second and fourth counts of the declarations.

The jury returned a verdict for the plaintiff in each case; and the defendant alleged exceptions. The facts appear in the opinion.

C. W. Clifford & O. Prescott, Jr., for the defendant.

L. LeB. Holmes & E. D. Stetson, for the plaintiffs.

BARKER, J. The defendant concedes that it is immaterial whether there was evidence upon which the jury might have returned verdicts for the plaintiffs upon the fourth counts of the declarations. The second count in each declaration was at common law, alleging a negligent failure of the defendant to furnish suitable appliances, safeguards, and means for the work, by reason of which failure the plaintiff was exposed to and injured by unnecessary risks, of which he was ignorant, but which the defendant knew or ought to have known. The defendant contends that verdicts for the plaintiffs upon these counts were not authorized by the evidence, because the evidence does not justify a finding that he was negligent, and because, if there was evidence for the jury that he was negligent, then upon the evidence the danger arising from the negligence was obvious, and the plaintiffs must be held to have assumed the risk of injury therefrom, or to have been wanting in due care.

In the present cases there was evidence tending to show that the defendant failed to furnish iron rods to be inserted in the holes in the tops of the terra-cotta coping to tie the coping to the wall, and that such irons should have been used to tie the coping pieces to the wall while the work was in progress, and there was no evidence that the defendant used any care or diligence to furnish such iron ties or any supporting appliances in lieu of them. But there was also evidence tending to show that they were unnecessary, and that the work was reasonably safe as it was in fact conducted. There was evidence that each of the plaintiffs was of more than ordinary skill and experience as a mason, from which, in connection with the description of the work and the materials used in it, the jury might have found that they knew and appreciated whatever danger in fact existed. But the plaintiff Tripp testified that he had never set terra-cotta brackets before, had seen but very little terra-cotta set, and that such as he had seen were set flush with the wall; that he did not know what the holes in the tops of the pieces were for, and knew nothing about any irons, and that he relied on the foreman whether there were irons to be there or not. So also the plaintiff Gibson testified that he had never set any terra-cotta like that used on this building; that he was not familiar with this kind of terra-cotta; that the difference between it and other terra-cotta which he had used was in the proportion of the projecting part to the rest of the bracket; and that he was ignorant of the manner in which this should be set, and relied entirely upon the instructions of the foreman. There was also evidence from the defendant's experts that binding irons to hold the coping were not necessary, nor part of the ordinary method of construction. Besides this, sample pieces of the brackets and coping were shown to the jury, and there was evidence tending to show how much they projected, and that when set the weight of the filling would hold them in place. Upon this state of the evidence, the questions whether the defendant was at fault, and whether the plaintiffs had assumed the risk, or were not in the exercise of ordinary care, were for the jury.

Exceptions overruled.

JAMES O'CONNOR *vs.* AUGUSTUS E. RICH.

Bristol. October 29, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Master and Servant — Due Care — Negligence — Fellow Servant — Assumption of Risk.

An employer owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow servants for their negligence; and the risk of accident from previous negligence of servants in their field is one of the ordinary risks of the business which the employee assumes by virtue of his contract on entering the service.

TORT, for personal injuries occasioned to the plaintiff while in the defendant's employ. Trial in the Superior Court, before *Lilley*, J., who, at the close of the evidence, at the defendant's request, directed the jury to return a verdict for the defendant; and the plaintiff alleged exceptions. The facts appear in the opinion.

E. Higginson, (*J. W. Cummings* with him,) for the plaintiff.

J. F. Jackson, for the defendant, was not called upon.

KNOWLTON, J. The plaintiff fell and was injured by reason of the breaking of a plank in a temporary staging on which he was working in the defendant's building. It is not disputed that the staging was of a kind the construction of which is ordinarily left to the servants of the builder, and that the duty of the master concerning it was performed if he furnished a sufficient supply of suitable materials from which to construct it. In this case there was uncontradicted evidence that there were plenty of planks furnished by the defendant from which to build the staging, and the negligence, if there was any, was on the part of the workmen who put the planks in place in taking one which was not adapted to such a use. Upon these facts, if the plaintiff had been in the defendant's service at the time when the staging was built, it would be very clear that he could not maintain his claim. *Kennedy* v. *Spring*, 160 Mass. 203.

But it appears that, although he had previously worked for a considerable time upon the building, he was away working for

another person four days before the day of the accident, and this staging was erected a day or two before his last engagement in the defendant's service began. Under these circumstances the question is whether the defendant is liable to him for the previous negligence of a servant in doing work which may properly be intrusted to servants. We are of opinion that an employer under such circumstances owes one who is about to enter his service no duty to inspect all the work which has been done by his servants previously, and which ordinarily may be intrusted to them without liability to their fellow servants for their negligence. If he owes no such duty, the risk of accident from previous negligence of servants in their own field is one of the ordinary risks of the business which the employee assumes by virtue of his contract on entering the service. See *Moynihan* v. *Hills Co.* 146 Mass. 586, 591. This point was expressly decided in *Killea* v. *Faxon*, 125 Mass. 485, a case very similar to this in its facts. See *Wilson* v. *Merry*, L. R. 1 H. L. (Sc.) 326.

Exceptions overruled.

ATTORNEY GENERAL *vs.* GEORGE A. BRIGGS & others.

Bristol. October 30, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Devise and Legacy — Public Charity — Application of Doctrine of Cy pres — Trust — Equity.

A devise in a will of a sum in trust, "as a fund forever," the income of which is to be appropriated for the support of a school in a certain school district in a town, the sum being in addition to the land and schoolhouse thereon already given to the district by the testator, creates a good public charitable bequest.

If it becomes impracticable to administer a bequest for the support of a school in a certain school district in a town precisely according to the terms of the will creating it, the charity is of such a kind that the testator's purpose must be carried out as nearly as possible in accordance with his design, even though the result reached differs in minor particulars from that intended.

The fact that the residue of an estate is given by will to a charity does not defeat the application of the doctrine of *cy pres* to another charitable bequest which it becomes impracticable to administer precisely according to the terms of the will.

The residuary clause of a will, which in another clause gives a sum to a public

charity, is to be considered only as other parts of the will are considered, to aid in ascertaining the general purpose of the testator in regard to the gift in question.

Where it has been found impracticable to administer the gift in a will of the income of a fund for the support of a school in a certain school district in a town precisely according to the terms of the will, even if the benefits from the fund shall be shared by all the inhabitants of the town, it will not be extending the effect of the gift beyond the proper scope of the doctrine of *cy pres* in its application to such a case; and, if it is plainly within the testator's general intent that the town as a whole shall share his bounty, if it cannot otherwise be made available by those residing in the district specified, this court will frame a scheme for applying the income of the fund to educational purposes for the benefit of persons living within the territory which was formerly such district, and in that vicinity, and of such other persons in the town as in the exercise of their legal rights may incidentally derive advantage from it.

INFORMATION IN EQUITY, filed June 2, 1891, at the relation of the inhabitants of Fairhaven, against George A. Briggs, trustee of a fund created by the will of Abner Pease, deceased, the heirs and next of kin of said Pease, and the Male Overseers of the New Bedford Monthly Meeting of Friends, a corporation, praying that the court would declare and establish the trust created by the will to be a public charity, and to decree its enforcement; and that, if the trust could not be specifically carried out according to the directions of the will, the same might be decreed to be executed as nearly as possible to the intent of the testator, by appropriating the income of the trust fund for certain specified purposes, or that the case might be referred to a master to report a scheme for the administration of the trust as nearly as possible to the intent of the testator. The case was referred to a master, who found and reported the following facts.

Abner Pease died on December 23, 1852, leaving a will dated January 18, 1847, which was duly proved and allowed, and which contained, among other provisions, the following clauses:

"I give the use and improvement of the remainder of said farm to the school committee of said town of Rochester and successors in that office, in trust for the benefit and use of the two school districts in said Rochester, generally known by the names of Aucute and Pine Island districts, to be divided between said districts as follows." Then follows a description of the boundaries.

"After the decease of my wife, or when she ceases to be my

widow, I give to my said executors during their lives, or the life of the survivor, and after their decease, or should they decline the trust, to the selectmen of Fairhaven in trust, and to their successors in that office, as a fund forever, five thousand dollars, the income of which to be appropriated for the purpose of supporting a school in school district No. 19 in said Fairhaven, called the Pease District. This sum is in addition to a lot of land and schoolhouse thereon which I have already given said district.

"I give, after the decease of my said wife, or when she ceases to be my widow, to the overseers of the Long Plain Friends 'Preparatory' Meeting, and their successors in that office, in trust forever, the remainder of my personal estate not otherwise disposed of; the income of which to be appropriated for the benefit of the Friends Meeting in said Fairhaven and Rochester."

Mercy Pease, the testator's wife, died on May 22, 1860.

On June 25, 1863, the executors having declined the trust, George H. Taber, Jonathan Cowen, and Bartholomew Taber of Fairhaven, at that time selectmen of the town, were duly appointed by the Probate Court, and gave bonds and entered upon the duties of their office. George H. Taber resigned his trust on March 19, 1880, and Bartholomew Taber and Jonathan Cowen resigned their trusts in September, 1880, and George A. Briggs of Fairhaven was duly appointed the trustee on January 23, 1882, gave bond, and entered upon the duties of his office, and still continues to be the trustee of the fund.

School District No. 19, afterwards commonly called the Pease District, was established by vote of the town of Fairhaven in 1838, at the special request of Abner Pease, who carefully defined its limits. It comprised about twenty-five acres in a nearly triangular shape, bounded north by Bridge Street, which runs directly east from the New Bedford and Fairhaven Bridge, or rather by a line running just far enough north of Bridge Street to include all the houses standing on that street, west by the harbor, and southeast by Herring River, which runs southwesterly across the line of Bridge Street into the harbor.

The first meeting of the district for organization was held on April 16, 1838. On the same day Pease gave to the inhabitants of the district a deed of a lot near the centre of the district, with a schoolhouse upon it already erected by him.

From that time until his death Pease took an active interest in the affairs of the district, was at times on its prudential committee, and was one of the committee having charge of the enlarging of the building in 1847 or 1848.

In 1869, the school district system in the Commonwealth was abolished by general law. The town of Fairhaven never after that re-established the system under the authority of any subsequent legislation.

School was kept in the district, and in the house given to the district by Pease, from the organization of the district in 1838 until the year 1885. There never has been any other schoolhouse within that district. From the beginning and until the fund provided by Pease in his will became available, the school was maintained by the district in the ordinary manner of a district school. After this fund became available, its income was applied towards supporting the school, the balance necessary for the purpose being paid from the town appropriations as before. From 1855 to 1869 inclusive, the average amount received annually from the town towards the support of the school was $237, and during those years the average attendance of scholars was forty-eight. From the abolishing of the school district system in 1869 until the year 1885, the town, by agreement with the trustee, paid one half the current expenses of the school. During that time the average attendance was twenty-six.

In 1885 the town accepted as a gift from Henry H. Rogers an elegant new brick schoolhouse located in a very desirable spot near the centre of the town. This school building is intended and designed for the accommodation of all the scholars in town except those in the rural districts. It will comfortably accommodate 400 pupils. The average number of scholars on the rolls since it was opened has been about 320. The number is not any larger than that at the present time. This is called the Rogers School. It is 3,300 feet distant from the centre of the Pease District. The Rogers School is a graded school, and has every facility for employing the most improved methods in common school instruction; a large proportion of the school children in the town attend this school. Four rural schools from one to three miles away are still maintained. These have an average attendance of twenty-five to thirty scholars.

In 1885, as soon as the Rogers School was opened, the school committee of the town proposed to remove to this school the scholars in the Pease District. At a meeting of the inhabitants of the district, called to consider this proposition, at which fifteen or twenty persons were present, the proposition was approved. The scholars were removed to the Rogers School, and have been there ever since. No dissatisfaction with this arrangement has ever manifested itself. There are now twenty-five school children living within the limits of the old Pease District, in ten or twelve families.

Since 1885, the trustee has not used the income of the fund for any school purpose, but has allowed it to accumulate until the principal and interest now amount to about $8,000.

Since the school has been transferred to the Rogers School, the heirs of Abner Pease have brought a writ of entry and recovered the schoolhouse and lot, by reason of a breach of a condition in the deed requiring that the schoolhouse should be kept and maintained by the inhabitants of the district for the use of a school. Judgment in this suit was obtained by default, the inhabitants of the district, though summoned, making no appearance.

"In the present condition of things I have no doubt it is impracticable to establish and support such a school, and I so find. If the children had no other chance for instruction, I have no doubt it would be both possible and practicable to use the income of this fund within the district in such a way as to be of considerable benefit to them.

"But under the present circumstances, with the town ready to give them good instruction through thirty-eight or forty weeks in the year, and with an excellent school within easy reach, which they are expected to attend, and which they are now attending with perfect satisfaction, to use the income of this fund to maintain a separate school in the old Pease District for the twenty-five scholars in that district would be worse than a waste of money.

"Some of my reasons for this opinion are these: 1. The whole territory within this district lies flat and low. It is not an inviting locality for a school. 2. The probable expense of supporting in the district, outside of the cost of a school build-

ing, would be $350 a year; with the present income of the fund it is not probable that a school could be maintained for more than one half of the usual school year. 3. Such a school must necessarily be a mixed school, with all the grades of scholars under one teacher. With the Rogers School open to them, I do not believe any scholars would attend this school unless they were compelled to do so.

"It was suggested by the counsel for the trustee that the trustee might properly and profitably spend the income in providing some kind of instruction which does not come within the usual course of common school instruction, or which at least does not embrace the whole of such instruction, as, for instance, in a drawing school, or writing school, or school for manual training, or an evening school of some sort.

"If such a disposition of the money would come within the intention of the testator, I think the fact that for these last nine years the trustee has made no attempt to spend the money in this way is good evidence that he has not found it advisable or practicable so to spend it; and I think in this matter he has shown good judgment. There was no evidence before me that there was any field for such instruction among the inhabitants of this district which would justify the use of the income in that way.

"The only other plan for using this fund suggested by the trustee was to hold it, either till the town should build a schoolhouse in the district and assist the trustee to support a school there, or until the fund should accumulate to such an amount as to be sufficient to support a school without assistance from the town. The trustee frankly stated that he did not expect to see either of these events happen during his lifetime.

"There are now about 175 inhabitants in the Pease District. The territory is already pretty well covered with houses, and it is not likely that the population will greatly increase for many years to come."

In regard to the contention in this case of the Male Overseers of the New Bedford Monthly Meeting of Friends, that, the particular legacy for a charitable purpose having failed, it should fall into the residuum of the testator's personal estate, which also creates a valid charity, this residuary clause was passed

upon by the Supreme Judicial Court in the case of *Dexter* v. *Gardner*, 7 Allen, 243. Ever since that decision was given, and until the present time, the income of the residuary fund has been expended conformably to the terms of the decision. While the Overseers of the New Bedford Monthly Meeting expend some of the income of this fund for charitable purposes other than educational, they expend a fair share of it for the education of children within the particular meetings comprising the Long Plain Preparative Meeting.

Hearing upon the information and answers, the master's report and exceptions thereto, before *Morton*, J., who reserved the case for the consideration of the full court; such disposition to be made as law and justice might require.

E. L. Barney, for the trustee.

G. F. Tucker, for the Male Overseers of the New Bedford Monthly Meeting of Friends.

A. E. Perry, for the heirs at law of the testator, submitted the case on a brief.

W. Clifford & A. B. Collins, for the Attorney General.

KNOWLTON, J. The will of Abner Pease contains a provision as follows: "After the decease of my wife, or when she ceases to be my widow, I give to my said executors during their lives, or the life of the survivor, and after their decease, or should they decline the trust, to the selectmen of Fairhaven in trust, and to their successors in that office, as a fund forever, five thousand dollars, the income of which to be appropriated for the purpose of supporting a school in school district No. 19 in said Fairhaven, called the Pease District. This sum is in addition to a lot of land and schoolhouse thereon which I have already given said district." It is too clear for discussion that this creates a good public charitable bequest, to the administration of which this court will give all necessary aid. *Boxford Religious Society* v. *Harriman*, 125 Mass. 321. *Sears* v. *Chapman*, 158 Mass. 400. *Russell* v. *Allen*, 107 U. S. 163.

The schoolhouse referred to and the lot of land on which it stands have been recovered from the district by the heirs at law of Abner Pease, under a writ of entry brought on account of a breach in a condition in the deed of gift which required that the schoolhouse should be kept and maintained by the inhabitants

of the district for the use of a school. It is found by the master, for satisfactory reasons which are stated in his report, that it is impracticable to use the fund in question for the maintenance of a school in this district, and thus a case is presented in which the purpose of a testator cannot be accomplished in the manner prescribed. The question arises whether the charity must altogether fail, or whether it is a case for the application of the doctrine of *cy pres*, whereby the general purpose of the testator may be carried out in a way differing from that which he contemplated. He meant to have the money used in the support of a school in school district No. 19 for the benefit of that part of the public who might from time to time reside within the district, or so near it as to use the school established there. He had an interest in the education of children, and particularly in the education of children residing in that district. But we should undoubtedly do him injustice if we should interpret his purpose so narrowly as to make the continuance of the charity depend upon the maintenance of a school within the limits of the district, the entire area of which was only about twenty-five acres. When he made his will he thought the continuance of a school there was the best way of promoting education in that vicinity. The promotion of education in that neighborhood was his object, and the charity is of such a kind that his general purpose must be carried out as nearly as possible in accordance with his design, even though the result reached differs in minor particulars from that intended. *Jackson* v. *Phillips*, 14 Allen, 539. *Weeks* v. *Hobson*, 150 Mass. 377. *Sears* v. *Chapman*, 158 Mass. 400. *Attorney General* v. *Glyn*, 12 Sim. 84. *Biscoe* v. *Jackson*, 35 Ch. D. 460. *Birchard* v. *Scott*, 39 Conn. 63.

It is contended in behalf of the residuary legatees, that inasmuch as the bequest cannot be used exactly as provided by the will, and as the residue is given to a charity, it should be held that this bequest has failed, and that the fund should go to them for the charitable uses mentioned in the residuary clause. But the fact that the residue is given to a charity does not defeat the application of the doctrine of *cy pres* to another charitable bequest which it becomes impracticable to administer precisely according to the terms of the will. This rule is established by the highest authority in England, and it is founded upon the

same principles of interpretation as the general doctrine of *cy pres* itself. The residuary clause is to be considered only as other parts of the will are considered, to aid in ascertaining the general purpose of the testator in regard to the gift in question. *Ironmongers' Co.* v. *Attorney General*, 10 Cl. & Fin. 908. *Mayor of Lyons* v. *Advocate General of Bengal*, 1 App. Cas. 91.

Upon the facts found by the master it is the duty of the court to frame a scheme which shall accomplish the general purpose of the testator as nearly as possible according to the terms prescribed by his will. It may be difficult, if not impracticable, to use the income of the fund in such a way as to give the inhabitants of the territory which was formerly school district No. 19 any greater benefits from it than others have who are accommodated by the Rogers School; but even if the benefits from it should be shared by all the inhabitants of the town it would not be extending the effect of the gift beyond the proper scope of the doctrine of *cy pres* in its application to a case of this kind. If the gift could be administered precisely as the testator intended, its principal effect would be to relieve the inhabitants of the district from an expenditure which they would otherwise be obliged to make in the performance of their public duties. After the abolition of the school districts under the St. of 1869, c. 110, until the school was discontinued upon the opening of the Rogers School in 1885, the school in the district was maintained by the town, and the practical effect of the gift was merely to relieve the town from taxation yearly to the amount of the annual income of the fund. In another part of his will the testator has given property to two other school districts in the town of Rochester, the benefit of which since the abolition of the school districts has been enjoyed by all the inhabitants of that town. It was plainly within his general intent that the town of Fairhaven as a whole should share his bounty if it could not otherwise be made available by those residing in district No. 19.

Upon the facts found by the master it seems that the income of the fund should be applied in some way towards the support of the Rogers School, or used in furnishing instruction of some kind in connection with that school. The case must be further heard by a single justice, who will frame a scheme, either with or without the aid of a master, for applying the income of the

fund to educational purposes for the benefit of persons living within the territory which was formerly school district No. 19, and in that vicinity, and of such other persons in the town as in the exercise of their legal rights may incidentally derive advantage from it. *So ordered.*

BURTON H. ALDRICH & another *vs.* ALFRED B. HODGES.

Bristol. October 30, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Trover — Conversion — Consignment of Goods with Right of Sale and Payment when sold — Defence — Pendency of previous Action by Consignor against Defendant for Conversion of same Goods.

The consignees, who are partners, of goods, having the rightful possession of them, with the right to sell them and to pay for them as they are sold, the title remaining in the consignor until the purchase price has been paid, may maintain trover for the conversion of the goods by an officer, who seizes them upon an execution against one of the consignees; and the pendency of a previous action in the same court by the consignor against the officer for the conversion of the same goods is no defence.

TORT, by Burton H. Aldrich and William Dobson, copartners as B. H. Aldrich and Company, for the conversion of certain liquors, alleged to be the property of the plaintiffs. Answer: 1. A general denial. 2. That the defendant, as a deputy sheriff, seized the goods in question by virtue of an execution against the plaintiff Aldrich. Writ dated December 24, 1894. Trial in the Superior Court, before *Lilley*, J., who allowed a bill of exceptions, in substance as follows.

There was evidence tending to prove that S. C. Boehm and Company, of New York, had consigned the goods in question to the plaintiffs, which was denied by the defendant.

A member of the firm of Boehm and Company, called as a witness by the plaintiffs, testified that the title of the goods remained in them until the purchase price was paid; that the plaintiffs were to have possession of the goods, which had been shipped and delivered to them by Boehm and Company; and

that Boehm and Company were to be paid for the goods by the plaintiffs as they were sold by the latter.

This testimony was uncontradicted; and it appeared that the plaintiffs had possession of the goods at the time of the alleged conversion by the defendant.

It appeared in evidence that an action was brought by Boehm and Company against the defendant, on July 21, 1894, in the Superior Court, which action is still pending; and that in that action the conversion of the same goods by the defendant was complained of as in the case at bar.

At the conclusion of the evidence, the defendant asked the judge to rule that the present action could not be maintained; but the judge declined so to rule.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

F. V. Fuller, for the defendant.

F. S. Hall, for the plaintiffs.

BARKER, J. We assume that the title to the goods remained in Boehm and Company until the purchase price should be paid, and that the plaintiffs, to whom as partners Boehm and Company consigned the goods, had the rightful possession of them, with the right to sell them and to pay for them as they were sold. The defendant having seized the goods upon an execution against one of the plaintiffs, contends that this action cannot be maintained, because before its commencement Boehm and Company had brought their action against him for the conversion of the goods, returnable to the same court, and that their action is still pending. But the pendency of that action has no effect upon the title of the goods; *Miller* v. *Hyde*, 161 Mass. 472, 482; and therefore constitutes no defence to the present action, whether pleaded in abatement or proved as a defence upon the merits under the general issue. No question of pleading, or as to the measure of the plaintiffs' damages, is raised by the exception, which is merely to the refusal to rule that the present action could not be maintained. The plaintiffs had a special property in the goods, and lawful possession, and could maintain trover. *Burke* v. *Savage*, 13 Allen, 408. *Shaw* v. *Kaler*, 106 Mass. 448.

Exceptions overruled.

JAMES CONATY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Bristol. October 31, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Personal Injuries — Invitation to cross Railroad Track — Due Care — Negligence — Law and Fact.

In an action for personal injuries occasioned to the plaintiff by being struck by a locomotive engine at a crossing, the jury may well find that the plaintiff, who had waited for several minutes in front of the closed gates, while several trains passed in each direction, had a right to consider the raising of the gates one half or three quarters of the way up as an indication that the crossing was free; and as, when he started to cross, he did not omit to look for approaching trains, and another team crossed in safety after the gates began to rise and before the plaintiff was struck, it cannot be said as matter of law that he was negligent.

TORT, for personal injuries occasioned to the plaintiff while crossing the defendant's tracks in Taunton, by a collision between the horse and tip cart driven by the plaintiff, and a locomotive engine of the defendant.

At the trial in the Superior Court, before *Hammond*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

E. H. Bennett & F. S. Hall, for the defendant.

J. P. Lyons, for the plaintiff.

BARKER, J. At the crossing there were four parallel railroad tracks, and on the one nearest the plaintiff several high cars were standing on the north or left hand side of the street, obstructing the view of the other tracks in that direction. The plaintiff found the gates down when he reached the crossing, and waited about three minutes, sitting on his cart ten or twelve feet from the gates on the northerly half or left hand side of the street. While he was waiting he saw two or three trains pass in each direction. After these trains had passed, the gate tender raised the gates one half or three quarters of the way up, and the plaintiff then started to cross, looking down the railroad south as soon as he reached the most westerly track, and then turning his head

to look north, when he was immediately struck by an engine coming from the north, and which when he started was hidden from him by the cars standing on the westerly track.

The plaintiff's position with reference to the centre line of the street is immaterial, as the law of the road applies only to persons meeting or passing with vehicles. Pub. Sts. c. 93, §§ 1, 2. A person who is about to cross a railroad is not under all circumstances obliged to stop to look and listen. *Clark* v. *Boston & Maine Railroad*, *ante*, 434. Acts of a gateman or signalman which tend to mislead a traveller into the belief that he may cross with safety, and invitations express or implied, are to be taken into account in determining whether an attempt to cross is negligent. *Warren* v. *Fitchburg Railroad*, 8 Allen, 227, 231. *Sweeny* v. *Old Colony & Newport Railroad*, 10 Allen, 368, 377. *Bayley* v. *Eastern Railroad*, 125 Mass. 62. *Johanson* v. *Boston & Maine Railroad*, 153 Mass. 57. *Merrigan* v. *Boston & Albany Railroad*, 154 Mass. 189. *Livermore* v. *Fitchburg Railroad*, 163 Mass. 132. *Clark* v. *Boston & Maine Railroad*, *ubi supra*. The plaintiff had waited for several minutes in front of the closed gates, while several trains passed in each direction, and the jury might well find that he had a right to consider the raising of the gates as an indication that the crossing was free. When he started to cross, he did not omit to look for approaching trains. Another team crossed in safety after the gates began to rise, and before the plaintiff was struck. It cannot be said as matter of law that the attempt to cross the tracks under such circumstances was negligent.

Exceptions overruled.

FAITH A. WATERWORTH, administratrix, *vs.* AMERICAN ORDER OF DRUIDS.

Bristol. October 31, 1895. — November 27, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Beneficiary Association — Certificate of Membership — Failure to pay Assessment — Action.

A defence to an action on a certificate of membership in a beneficiary association cannot be maintained on the ground that the deceased in his lifetime ceased to be a member of the defendant corporation by reason of his failure to pay an assessment made in accordance with the by-laws, if, so far as appears, he endeavored faithfully to perform his duties as a member, and certain complications which arose were caused by a mistake for which he was not responsible.

CONTRACT, to recover $2,000 on a certificate of membership issued by the defendant, a beneficiary association, to William C. Waterworth, for the benefit of Sarah Waterworth, his wife. After the beginning of the action, Sarah Waterworth having died, the plaintiff, as her administratrix, was admitted to prosecute the same. Trial in the Superior Court, before *Sherman*, J., who directed a verdict for the defendant, and, at the request of the parties, reported the case for the determination of this court. If the plaintiff was entitled to recover, judgment was to be entered for her for $1,485, with interest from the date of the writ; otherwise, judgment was to be entered for the defendant. The facts appear in the opinion.

J. W. Cummings & C. R. Cummings, for the plaintiff.

M. G. B. Swift & G. Grime, for the defendant.

KNOWLTON, J. The only alleged ground of defence to this suit is that William C. Waterworth in his lifetime ceased to be a member of the defendant corporation by reason of his failure to pay the fiftieth assessment made in accordance with the by-laws. So far as appears, he endeavored faithfully to perform his duties as a member, and the complications which have arisen were caused by a mistake for which he was not responsible. He was ill for a considerable time before his death, and when he paid the forty-ninth assessment he sent the money by his son, and by him sent notice of his change of residence

from North Court Street to No. 11 Suffolk Street. The son, being unable to get into the lodge, left the money and a notice of the change of residence with an officer of the lodge on duty at the door, who sent in the money and communicated the information to the collector inside. The collector received it there, and by his mistake or that of one of the intervening messengers entered the residence on the book as No. 12 Suffolk Street instead of No. 11. William C. Waterworth had no knowledge of the fiftieth assessment when it was made, but received notice of the fifty-first, and paid it promptly. At some time after making this payment, he was notified by the collector that he was suspended for non-payment of the fiftieth assessment. He then sent one dollar, which was the amount of the assessment, and made an application for reinstatement, which had the recommendation of but one member instead of two as required by the by-laws, and he wrote upon it the words, "Sir: I never received the 50th assessment." Before it was acted upon, he died. Unless he lost his rights as a member by his failure to pay the assessment, the plaintiff is entitled to recover.

The by-laws are in part as follows: "It shall be the duty of the collector to at once notify every member liable to an assessment. . . . This notice may be mailed to or left at the last known post office address or residence of a member, or handed to him in person, and when so mailed or delivered it shall be a legal and sufficient notice to the member. Each member shall notify the collector of any change of address to which such notice shall be forwarded. Each member shall pay the amount due on notice of the collector within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days shall stand suspended from the order and all benefits therefrom, and should the member die during the period of such suspension no benefit shall be paid to his or her beneficiary. The collector shall immediately notify the Prior of the date of such suspension, and the Prior shall announce the suspension and date thereof at the next meeting of the council," etc.

In this case no notice was given to the deceased, as required by the by-laws. The notice was not mailed to his last known post office address or residence, and the place to which it was

directed was never his address or place of residence. His failure to pay within thirty days under these circumstances could not work a suspension of his membership, and if his membership could have been suspended by his failure to pay, followed by notice from the collector to the Prior of his suspension in the belief that he had been properly notified, and an announcement by the Prior of the "suspension and date thereof at the next meeting of the council," upon which we express no opinion, there was no such notification or announcement, nor anything upon the records of the subordinate council in regard to the matter. Inasmuch as the failure to pay did not work a suspension, and there were no proceedings founded upon it in the subordinate council to cause a suspension, his rights as a member were never lost, and, the defendant having received the amount of the assessment which he sent when he heard that it was due, there is nothing to preclude the plaintiff from the recovery which she seeks. The imperfect application for a reinstatement, accompanied as it was by a declaration that he was not in default, was not a waiver of his rights. According to the terms of the report there must be,

Judgment for the plaintiff.

COMMONWEALTH *vs.* WILLIAM H. PORTER.

Essex. November 6, 1895. — November 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, & LATHROP, JJ.

Complaint — Alleged Insufficient Allegation.

An averment in a complaint for a violation of Pub. Sts. c. 207, § 53, that the defendant "did then and there cruelly drive" a certain horse, following the statute, is sufficient, without a further allegation that the defendant knew the horse to be unfit for labor at that time.

COMPLAINT, under Pub. Sts. c. 207, § 53, charging that the defendant at a time and place named, "with force and arms, was the person having the charge and custody of a certain animal, to wit, a horse, and that the said horse was then and there unfit for

labor by reason of sores upon the back and legs of said horse, and that the said William H. Porter did then and there cruelly drive the said horse when unfit for labor as aforesaid." In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment, for the reason that there was no allegation therein that "the defendant knew that the horse named in the complaint was unfit for labor by reason of sores upon his back and legs, or otherwise." The motion was overruled by *Gaskill*, J., and the defendant excepted.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

N. D. A. Clarke, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

HOLMES, J. The word "cruelly," in Pub. Sts. c. 207, § 53, exhausts the requirements of the statute, whatever they may be, with regard to the state of mind of the actor; (*Commonwealth* v. *McClellan*, 101 Mass. 34, 35; *Commonwealth* v. *Lufkin*, 7 Allen, 579;) and therefore an allegation that the defendant "did then and there cruelly drive" the horse, following the statute, is sufficient without a further allegation that the defendant knew the horse to be unfit for labor at the time. See *Commonwealth* v. *Barrett*, 108 Mass. 302. *Exceptions overruled.*

COMMONWEALTH *vs.* ANNIE A. M. BREWER.

Essex. November 6, 1895. — November 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Manslaughter — Evidence — Dying Declarations — Admissibility of Evidence depending upon a Collateral Fact.

At the trial of an indictment for manslaughter by shooting, even if the exclusion of the question to the defendant by her counsel, "In October did you have a miscarriage?" was wrong, in the absence of an offer to connect the fact with the defendant's condition in the middle of December, when the shooting occurred, it may be cured by afterwards allowing her to testify that on the day of the shooting she was suffering from the effects of a miscarriage, and was weakened by reason of it.

At the trial of an indictment for manslaughter the exclusion of a question put to a

witness of the defendant whether there was a change in the habits of the deceased with reference to drinking between October 20 and December 13, upon which latter day the defendant shot him, does the defendant no harm if she is allowed to prove his condition on that day.

At the trial of an indictment for manslaughter the defendant was allowed to testify that she had been pregnant by the deceased, and her testimony was not controverted by the government. *Held*, that the exclusion of evidence that she had made a similar statement *in pais* did her no harm, even assuming that the facts were such as to take the evidence out of the general rule against hearsay.

Dying declarations are admissible, if the evidence is clear that they were made under a sense of impending death.

When the admissibility of evidence depends upon a collateral fact, the regular course is for the judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury to exclude it if they should be of a different opinion on the preliminary matter.

INDICTMENT, for the manslaughter of Gideon W. Lattimer, on December 13, 1894, at Lynn. At the trial in the Superior Court, before *Gaskill*, J., the following facts were not in dispute.

Lattimer was a single man, and the defendant was a single woman. For some months before December 13, 1894, an engagement of marriage had existed between Lattimer and the defendant, and there had been illicit relations between them. On the morning of December 13, 1894, Lattimer called at a house in Lynn where the defendant lived, met her at the exterior door and went with her to a chamber in the house, where they were alone for a short time. A revolver which had formerly belonged to Lattimer was in a bureau drawer in the chamber, in the possession of the defendant. During the interview between them three shots were discharged from a revolver, which was there held in the defendant's hands, the first of which inflicted a mortal wound in the abdomen of Lattimer. Of the other two shots, one took effect in the shoulder of Lattimer, and the other was buried in a panel of the outside door of the house. Lattimer died of the mortal wound on December 15, 1894, at about nine o'clock in the evening. The Commonwealth contended that each of the three shots was fired by the defendant with the intention of inflicting injury upon Lattimer, and that the account given by Lattimer in his dying declaration, hereinafter contained, was substantially true. The defendant contended, and testified in her own behalf, that Lattimer assaulted her, threw her on a bed and was choking her, when she pulled the revolver, which she had previously given to him

in the room, from his pocket, and took it into her hand for the purpose of protecting herself from violence, and that in the struggle the shot which inflicted the mortal wound and the second shot were accidentally fired, and that the third shot was fired by her in the belief that it was necessary for her own defence.

The defendant testified, without objection, that between July and November, 1894, she was twice pregnant by Lattimer She was then asked by her counsel the question, "In October did you have a miscarriage?" which, upon objection by the government, was excluded, and the defendant duly excepted. The defendant subsequently was permitted to testify, without objection, that on the day of the shooting she was suffering from the effects of a miscarriage, and was weakened thereby.

There was testimony on behalf of the defendant in respect to the strength and physical appearance of Lattimer and his characteristics of temper. The defendant testified that on December 13, when Lattimer called upon her, he was under the influence of liquor, and that she smelled liquor in his breath. The defendant called a witness and asked him the following question: "Was there a change in his (Lattimer's) habits with reference to drinking from on or about October 20 to December 13?" Upon objection by the government, this question was excluded, and the defendant duly excepted. The defendant was permitted to introduce testimony upon the condition of Lattimer with respect to drink upon the day of the homicide.

The defendant called a witness, who testified that she was at the head of a lying-in hospital in Lynn, and that in the latter part of November, 1894, the defendant called at that hospital with a man unknown to the witness. The witness was then asked the following question: "Did you know from any talk with her that she was in a family way?" Upon objection by the government the question was excluded, and the defendant duly excepted. The government did not attempt to controvert the defendant's claim that she was pregnant by Lattimer.

The government introduced testimony that, at about four o'clock in the afternoon of December 15, the following conversation occurred between Lattimer and the persons hereinafter named. Dr. Stevens, the attending physician, said to him, "It

becomes my duty to tell you that there is no chance for you to recover." Dr. Pinkham, a consulting physician, also said to Lattimer, "There is no chance." Dr. Stevens said, "There is no other way." Lattimer said, "Oh, my God, must I die!" It was not regarded as a question, but as an exclamation, by the physicians, as Dr. Pinkham testified without objection. Frank E. Wells, city marshal of Lynn, then said, "Now, Lattimer, you know your condition as the doctors have told you, and I want you to tell me what happened to you, where it occurred, and all about it." Lattimer then proceeded to make a statement in reference to the cause of his injuries, which was reduced to writing as it was made. The statement was then read to him, and the city marshal said, "Now, Lattimer, knowing your condition, as the doctors have told you, is this statement true?" Lattimer replied, "It is true, so help me God." While making this statement Lattimer asked for water, saying, "Give me some water, if I have got to die."

The government was then permitted, against the objection and under the exception of the defendant, to put in evidence the statement, which was as follows:

"It occurred at 13 Bond Street. I went down there to return what things I had belonging to her. She asked me upstairs. She wanted me to sit down. I said, 'No, anything you want to say to me, say it now'; she had a ring in her hand and said, 'Won't you take some little thing to remember me by?' I said, 'No.' She went to the drawer, as I supposed after some little thing, and must have taken the revolver from the drawer. I did n't know it, and she put it against my breast and fired. She held it in both hands so that I could not see it."

Inspector Rowe. "Who fired the shot? *A.* Maud Brewer. No one else."

Marshal. "Did you touch her before that? *A.* No.

"*Q.* Did you have that revolver in your possession? *A.* No, I did not.

"*Q.* Did you have any revolver in your possession that day? *A.* No, I did not."

Inspector Rowe. "Were all three shots fired in that room? *A.* No sir. One was fired in the room; that one struck me in the bowels. The one that struck me in the back was fired just

as I turned to leave the room. The third one was fired when I was standing at the foot of the stairs, when I was trying to unfasten the front door. The revolver which she had I left at her house on Brownville Avenue some two months ago. I left it lying on the table, and neglected to take it away with me when I went."

The defendant's objection to the admission of this testimony was, that it did not sufficiently appear that Lattimer believed himself to be in a dying condition. The jury were instructed by the judge as follows:

"You are not to consider the statement of Lattimer which was put in evidence by the Commonwealth, unless you are satisfied beyond a reasonable doubt that, at the time Lattimer made that statement, he believed that there was no hope of life. It is argued that the expression of Lattimer, "Oh, my God, must I die?" was an inquiry, and indicated a hope of recovery. If you are satisfied that there existed a hope, belief, or expectancy, or a lingering chance still for life, as viewed by Lattimer, then you are not to consider that statement, and it should be excluded."

The case was submitted to the jury under appropriate instructions, not excepted to, and they returned a verdict of guilty. The defendant alleged exceptions.

J. H. Sisk, for the defendant.

W. H. Moody, District Attorney, for the Commonwealth.

HOLMES, J. 1. If the exclusion of the question to the defendant, "In October did you have a miscarriage?" was wrong, which we do not intimate, in the absence of an offer to connect the fact with the defendant's condition in the middle of December, it was cured by afterwards allowing her to testify that on the day of the shooting she was suffering from the effects of a miscarriage, and was weakened by reason of it.

2. The question whether there was a change in Lattimer's habits with reference to drinking between October 20 and December 13 was immaterial. The defendant was allowed to prove his condition on the day when she shot him.

3. The defendant was allowed to testify that she had been pregnant by Lattimer, and her testimony was not controverted by the government. Under these circumstances, the exclusion

of evidence that she had made a similar statement *in pais* did her no harm, even assuming that the facts were such as to take the evidence out of the general rule against hearsay. This exception was not argued.

4. The dying declarations of Lattimer were admissible. The evidence was clear that they were made under a sense of impending death. Just before they were made, both the attending doctors had told Lattimer that there was no chance of his recovering. His exclamation in answer, "Oh, my God, must I die!" and his later request, "Give me some water, if I have got to die," imply an acceptance of the fact. The rebellion suggested by the words is not against the truth, but against the hardship of the fact. The judge by admitting the evidence impliedly found that Lattimer believed what the doctors told him. If it were true, as the defendant argues, that it was wrong to let the jury revise the judge's preliminary finding, without which he could not have admitted the evidence, the defendant did not suffer, but on the contrary was allowed a second chance of getting the evidence excluded, — a chance of which her counsel seems to have availed himself by arguing that Lattimer's words expressed a hope of recovery. But the course adopted was right, and was in accordance with the settled practice. When the admissibility of evidence depends upon a collateral fact, the regular course is for the judge to pass upon the fact in the first instance, and then, if he admits the evidence, to instruct the jury to exclude it if they should be of a different opinion on the preliminary matter. *Commonwealth* v. *Preece*, 140 Mass. 276, 277. *Commonwealth* v. *Robinson*, 146 Mass. 571, 580 *et seq.*

Exceptions overruled.

AMOS NOYES & another, executors, *vs.* INSTITUTION FOR SAVINGS IN NEWBURYPORT & another.

Essex. November 6, 1895. — November 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Savings Bank Book — Title to Deposit.

If A. deposits in a savings bank a sum of money and keeps in his possession during his life the deposit-book, which is found by his executors among his effects after his decease and the account in which is headed "A. and B., Newburyport, payable to either or survivor," and it appears that the book was never in the possession of B. and that he had no knowledge of the deposit until after the death of A., the deposit remains the property of A.

CONTRACT, to recover a deposit in the defendant bank by the executors of the will of Annie M. Pike. Mary L. Hewett intervened as a claimant of the fund under St. 1894, c. 317, § 33. Trial in this court, before *Lathrop*, J., who found for the plaintiffs for the balance of the amount of the deposit and accrued interest, and, at the request of the claimant, reported the case for the determination of the full court. If the finding was not warranted, a new trial was to be granted; otherwise, judgment was to be entered for the plaintiffs on the finding. The facts appear in the opinion.

H. P. Moulton, for the claimant.

A. Noyes, for the plaintiffs.

KNOWLTON, J. The plaintiffs' testatrix, Annie M. Pike, deposited in the defendant savings bank the money for which this suit is brought, and kept in her possession during her life the deposit-book, which was found by the plaintiffs among her effects after her death. The account in the book was headed, "Annie M. Pike and Mary L. Hewett, Newburyport, payable to either or survivor." It appears that the book was never in the possession of the claimant, and that she had no knowledge of the deposit until after the death of the testatrix. Upon these facts, it was rightly held that the deposit remains the property of the original depositor, and that the plaintiffs are entitled to recover. This is settled by a series of decisions in this Com-

monwealth as well as elsewhere. *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228. *Ide* v. *Pierce*, 134 Mass. 260. *Sherman* v. *New Bedford Five Cents Savings Bank*, 138 Mass. 581, 582. *Nutt* v. *Morse*, 142 Mass. 1. *Parkman* v. *Suffolk Savings Bank*, 151 Mass. 218. *Booth* v. *Bristol County Savings Bank*, 162 Mass. 455, 457. *Judgment on the finding.*

EBIN R. SMITH *vs.* EDWARD F. BROWN.

Essex. November 6, 1895. — November 27, 1895.

Present: FIELD, C. J., HOLMES, KNOWLTON, MORTON, & LATHROP, JJ.

Restraint of Trade — Valid Contract — Injunction — Penalty — Damages.

B. signed an agreement which recited that for value received of A., and for the further consideration of A. "taking from me my lease of an apothecary shop in I., . . . my promise herein being the chief inducement leading him to take said lease, and to purchase the property therein, and in said shop and the good will of the business, — I hereby agree with said A. . . . under a penalty of one thousand dollars (to be forfeited and paid said A. or his legal representatives, in the event of my committing any breach of this agreement) not to engage directly or indirectly, or become in any manner interested, in the drug business within at least two miles of said apothecary shop, whose lease said A. takes from me, without first obtaining the written consent of said A. thereto." *Held*, on a bill in equity for an injunction for a violation of the contract, and for the payment of one thousand dollars as liquidated damages, that the contract was valid; that, as there was evidence of laches on the part of A., an injunction was rightly refused; that the sum named was a penalty, and that the judge was warranted in finding substantial damages.

BILL IN EQUITY, filed February 21, 1895, to restrain the defendant from continuing in the drug business in Ipswich, in violation of his contract with the plaintiff, and for the payment of one thousand dollars as provided therein. The answer set up, among other defences, laches. In the Superior Court a decree was entered that the plaintiff recover of the defendant the sum of seven hundred and fifty dollars, with costs, without any reference to an injunction; and both parties appealed to this court. The contract and the facts of the case appear in the opinion.

E. R. Thayer, for the defendant.

H. P. Moulton, (*F. V. Wright* with him,) for the plaintiff.

HOLMES, J. This is a bill praying for an injunction and for damages on the following contract:

"For value received of Ebin R. Smith, of East Cambridge, in the county of Middlesex, the receipt of which is hereby acknowledged, and for the further consideration of said Smith taking from me my lease of an apothecary shop in Ipswich, in the county of Essex, — my promise herein being the chief inducement leading him to take said lease, and to purchase the property therein, and in said shop and the good will of the business, — I hereby agree with said Smith and his assigns and legal representatives, under a penalty of one thousand dollars (to be forfeited and paid said Smith or his legal representatives, in the event of my committing any breach of this agreement) not to engage directly or indirectly, or become in any manner interested, in the drug business within at least two miles of said apothecary shop, whose lease said Smith takes from me, without first obtaining the written consent of said Smith thereto.

"Witness my hand and seal on this fifth day of May, A. D. 1884.

"Edw. F. Brown."

The decree assessed substantial damages, and by implication refused an injunction. Both parties appeal.

In the first place the defendant says that the contract is an unlawful restraint of trade, because it is not limited to the time of the plaintiff's continuing in the business, or otherwise. But the covenant may be presumed to have added to the value of the good will of the plaintiff's business more than it would have done if limited. It goes no further than other contracts which have been enforced by the courts, and we shall not be ingenious in discovering new grounds for holding it void. *Ropes* v. *Upton*, 125 Mass. 258. *Hitchcock* v. *Coker*, 6 Ad. & El. 438, 454, 455.

If the contract is valid the plaintiff says that he is entitled to an injunction enforcing it, or if not, then he has a right to the whole sum mentioned in the contract, which he says is to be regarded as liquidated damages. The defendant, on the other hand, argues that in the absence of evidence directed to the point the plaintiff can recover only nominal damages. We cannot say that there was no evidence of laches sufficient to warrant the judge who saw and heard the witnesses in refusing an injunction. The plaintiff admitted that he knew that a store was

being prepared which he had every reason to believe would be an apothecary's shop, that he had been told that the defendant and one Roberts were going to start a store, and that there was a good deal of talk about it. It is plain that he understood from the talk that Brown and Roberts were going to start an apothecary's shop at the place in question. This was some months before he took any steps. He gave no notice until the bill was filed, in the latter part of February, 1895. In the mean time the defendant and Roberts spent a considerable sum, probably more than that mentioned in the contract, in fitting up the place. They have put between twenty-five hundred and three thousand dollars into the business. Furthermore, there was evidence that the defendant signed the contract without reading it or paying any attention to it, and that the plaintiff was aware of the fact, and therefore was aware that there were special reasons for notifying the defendant, if the latter was openly proceeding with seeming innocence to do what his agreement forbade. It is not necessary to go further on this branch of the case, or to consider whether, if this evidence were submitted to us in print without a finding, we should give the plaintiff an injunction, instead of damages. See *Ropes* v. *Upton*, 125 Mass. 258, 262.

With reference to the defendant's contention as to damages, we have no doubt that the judge who tried the case was warranted in finding substantial damages from the defendant's competition in a small place, without evidence specifically directed to what the damage would be, just as in the case of words affecting a trader in the way of his trade. See *Tripp* v. *Thomas*, 3 B. & C. 427; *Davis* v. *Shepstone*, 11 App. Cas. 187, 191. The damages, being for breach of an entire contract, of course must be assessed once for all, and necessarily are largely a matter of estimate. See *Drummond* v. *Crane*, 159 Mass. 577, 581.

The plaintiff's position raises more difficulty. We assume in favor of the plaintiff that the words "under a penalty" are not conclusive against the sum named being regarded as liquidated damages. *Lynde* v. *Thompson*, 2 Allen, 456, 459. *Ropes* v. *Upton*, 125 Mass. 258, 262. *Sainter* v. *Ferguson*, 7 C. B. 716. *Sparrow* v. *Paris*, 7 H. & N. 594. We agree that the event to which the so called penalty is attached is one, in a certain sense, and we do not need to controvert what sometimes has been said,

that in this class of cases the courts incline to treat the sum named as liquidated damages. *Ropes* v. *Upton*, 125 Mass. 258, 260. 1 Sedgwick, Damages, (8th ed.) § 418. On the other hand, the breach might vary in gravity very much according to the degree of the defendant's share in helping competition. The judge may have found that the words used were selected by the plaintiff's lawyer, that the contract was signed by the defendant without reading it, and without advice from any lawyer employed by him, on the faith of assurances given in the plaintiff's presence, and that the defendant was entitled to the most favorable construction in case of any ambiguity or doubt. We cannot say that no view of the circumstances would warrant the judge in regarding this as being a penalty, as it is called in the contract. Even if the use of that word is not conclusive, it has been declared by this court, and by others, that very strong evidence would be required to authorize them to say that the parties' own words do not express their intention in this respect. The intention to liquidate damages may not prevail in all cases, but if the intent expressed is to impose a penalty, the court cannot give the words a larger scope. *Higginson* v. *Weld*, 14 Gray, 165, 173. *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17. *Smith* v. *Wainwright*, 24 Vt. 97, 102, 104. *Smith* v. *Dickenson*, 3 B. & P. 630, 632. *Astley* v. *Weldon*, 2 B. & P. 346, 350.

Decree affirmed.

COMMONWEALTH *vs.* MICHAEL FITZGERALD.

Hampden. September 25, 1895. — November 29, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Public Bridge — Property of County — Indictment — Variance.

A county in which is located a bridge laid out as a public highway between two towns, the cost of the construction, maintenance, and repair of which is apportioned between the county and the towns, has a qualified or special property in a part of the bridge, which, under Pub. Sts. c. 214, § 14, is sufficient to sustain an indictment for burning the bridge, alleging it to be "the property of the county."

INDICTMENT for burning, on September 3, 1894, at Springfield, "a certain bridge, to wit, the old toll bridge, so called, extending from West Springfield to Springfield, in said county of Hampden, over the Connecticut River, the property of the county of Hampden." At the trial in the Superior Court, before *Braley*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, which appear in the opinion.

T. Fitzgibbon, for the defendant.

C. L. Gardner, District Attorney, for the Commonwealth.

MORTON, J. The bridge in question was originally a toll bridge. By St. 1872, c. 131, § 1, it was laid out as a public highway, and the care and superintendence of it were given by § 4 to the city council of Springfield and the selectmen of West Springfield. Commissioners were appointed who awarded the proprietors thirty thousand dollars "as damages for the laying out of said bridge, piers and abutments, and way as a public highway, and for the land, toll-house, and all the appurtenances." Of this sum, fifteen thousand dollars was apportioned to the county of Hampden, and was duly paid by it. Ten thousand dollars was allotted to the city of Springfield, four thousand dollars to the town of West Springfield, and one thousand dollars to the town of Agawam. The commissioners also awarded that the county should pay one half of the expense of maintenance and repairs, which it has done, and that the city of Springfield should pay one third, and the town of West Springfield one sixth.

The indictment alleged that the bridge was the property of the county of Hampden. The defendant asked the court to rule that there was a variance between the allegation and the proof, and also to instruct the jury that there was no evidence that the county had any general or special property in the bridge. The court refused to rule or instruct as requested, and the case went to the jury with instructions that for the purposes of the case they might consider the bridge as the property of the county.

If under Pub. Sts. c. 214, § 14, the county had any property general or special in the whole or any part of the bridge, then the instruction was correct, and there was no variance.

In the case of highways or town ways laid out in the ordinary

manner, all that is acquired, so far as the soil is concerned, is an easement in the land on which they are located and constructed; and that belongs to the public, and not to the counties or cities or towns which are required to pay the damages caused by laying them out, and the expenses of making and maintaining them. The fee remains in the owner of the soil. *Andover* v. *Sutton*, 12 Met. 182. *Cheshire* v. *Adams & Cheshire Reservoir*, 119 Mass. 356. *Charlotte* v. *Pembroke Iron Works*, 82 Maine, 391. The ways thus created are for the general benefit of the public, and not for the special use of any particular county, city, or town, though it may happen that those living in the vicinity will derive more benefit from them than those living elsewhere, and that local needs may have been the immediate cause of the laying out.

Public bridges form parts of the highways or town ways in which they are constructed, and, except when other provision is made therefor, are to be built and maintained and kept in repair by the county or city or town where they are situated. Pub. Sts. c. 52, § 1.

Originally, it was provided that they should be constructed by the towns in which they were situated (3 Mass. Col. Rec. 144, 145); but afterwards, as the burden thus imposed on the towns was deemed too great, the counties in which they were located were obliged to build them (Ibid. 376); now, the authority to build them grows, generally speaking, out of, and is included in, the authority to lay out and make highways and town ways, and the obligation to maintain and repair them arises out of a like obligation. 3 Dane, Abr. 278.

There have been numerous instances, however, of which we cite a few, and of which this case furnishes an example, in which either the Commonwealth has borne the whole or a part of the expense of construction, in which latter case the residue and the expense of maintenance and repair have been divided between one or more counties and the benefited cities or towns, or the whole cost of construction and of maintenance and repair has been apportioned between the county and certain cities and towns, or has been placed upon certain towns, or has been provided for in some other especial manner. Prov. St. 1693–94, c. 22, 1699–1700, cc. 11, 27; 1 Prov. Laws, (State ed.) 158,

383, 419. Prov. St. 1716–17, c. 5, 1736–37, c. 5; 2 Prov. Laws. (State ed.) 44, 795. Prov. St. 1746–47, c. 22; 3 Prov. Laws, (State ed.) 326. Prov. St. 1764–65, c. 23, 1768, c. 12; 4 Prov. Laws, (State ed.) 740, 1023. Prov. St. 1770–71, c. 31; 5 Prov. Laws (State ed.) 133. St. 1860, c. 95. St. 1862, c. 177. St. 1868, c. 309. St. 1869, c. 161. St. 1871, c. 177. St. 1872, c. 295. St. 1873, c. 200. St. 1875, c. 175.

In all of these cases, unless there is some special provision to the contrary, the easement or right of way belongs to the public, and not to the counties or cities or towns which have been obliged to contribute to the cost of furnishing, constructing, and maintaining the bridges, and they cannot maintain an action for any injury or obstruction to the right of way as such, for the reason that they have no right of property in it.

But the easement is one thing, and the structure and materials composing a bridge or way are another thing. Those are analogous to erections on the land of another, under a right secured for that purpose by the party erecting them; as long as the ways exist they form a part of them and are subject to use by the public. But when the ways are discontinued or abandoned, the structures and materials entering into and forming a part of them revert, not to the public or to the landowner, but to the counties, cities, and towns that furnished them and paid for them, and which therefore, while they continued to be used by the public, have a qualified or special property in them. *Troy* v. *Cheshire Railroad*, 23 N. H. 83. *Bidelman* v. *State*, 110 N. Y. 232. *Shirk* v. *County Commissioners*, 106 Ind. 573. *Greeley Township* v. *County Commissioners*, 26 Kans. 510. *Harrison* v. *Parker*, 6 East, 154. *Wellington* v. *Wilson*, 16 U. C. (C. P.) 124. Elliott, Roads & Streets, 36. *Corwin* v. *Cowan*, 12 Ohio St. 629. *Wagner* v. *Cleveland & Toledo Railroad*, 22 Ohio St. 563. See *Freedom* v. *Weed*, 40 Maine, 383.

The bridge in this case was laid out as a highway, which, strictly speaking, would constitute it a county way; *Denham* v. *County Commissioners*, 108 Mass. 202; and to some extent, no doubt, the county commissioners had authority over it. St. 1888, c. 313. But whether or not it was wholly the property of the county we need not consider, since, under the principles above stated, it is clear that the county had a qualified or

special property in a part of it, and that was enough to sustain the indictment.

The result is, therefore, that the rulings of the Superior Court were correct, and that the exceptions must be overruled, and it is so ordered. *Exceptions overruled.*

CITY OF SPRINGFIELD *vs.* JAMES BOYLE, executor.

Hampden. September 25, 1895. — November 29, 1895.

Present: FIELD, C. J., KNOWLTON, MORTON, LATHROP, & BARKER, JJ.

Contract of Indemnity — License — Trial — Action — Defence — Evidence.

An instrument signed by M. recited that, in consideration of a license granted to a certain society by the authorities of a city to occupy a portion of the street in front of the society's lot where it was erecting a building, he agreed "that they shall comply strictly with the terms of said license, and indemnify the city from all loss, cost, or expense that it may suffer by reason of the occupancy described in said license." A person was injured, after the expiration of the license, by falling upon a depression in the sidewalk in front of the society's building, and recovered damages in an action against the city for his injury. In an action by the city against M. upon the instrument, the plaintiff introduced evidence tending to show that the depression was caused by teaming over the sidewalk during the erection of the building; and the defendant introduced evidence tending to show that it was caused by the laying of sewer and water pipes. *Held*, that the plaintiff was bound to satisfy the jury that the depression was caused by the teaming, and also that it happened within the time covered by the license.

It is competent for the jury, at the trial of an action, to compare the testimony of different witnesses, and to accept a part and reject a part, and if the verdict was or might have been reached in that manner it must stand, if there was any evidence beyond a scintilla to support it.

In an action by a city, upon an agreement to indemnify it for all loss caused by reason of the occupancy by a religious society under a license granted by the city, of a portion of the street in front of the society's lot where it was erecting a church, to recover the sum paid by the city as damages in an action against it by a person injured by falling upon a depression in the sidewalk in front of the building, it appeared that the foundation of the building had been put in before the license was granted, which was in May, 1889, for three hundred days; and there was evidence warranting the conclusion that the sidewalk was in good condition down to the time when the erection of the walls began, in May or June. There was also evidence that substantially all the wall was put up in 1889; that the towers were finished and the remaining stone put up in the following spring; that during the construction of the church the sidewalk was used for the storage of stone and brick; that teams were driven across it with

brick and stone and "broke it all up"; and that two or three months after the accident the sidewalk in front of the church was relaid by the parish. *Held*, that it was competent for the jury to find, on this evidence, that the depression in the sidewalk was caused by the teaming over it during the time covered by the license.

In an action upon a written agreement signed by the defendant, reciting that, in consideration of a license granted to a certain society by the authorities of a city to occupy a portion of the street in front of the society's lot where it was erecting a building, he agreed that the society should "comply strictly with the terms of said license," which was granted on condition that the society should conform to an ordinance of the city, the fact that no written agreement was given to the city by the society, as required by the ordinance, cannot be availed of in defence of the action.

If an agreement is signed by a person, reciting that, in consideration of a license granted to a certain society by the authorities of a city to occupy a portion of the street in front of the society's lot, where it was erecting a building, he agrees "that they shall comply strictly with the terms of said license, and indemnify the city from all loss, cost, or expense that it may suffer by reason of the occupancy described in said license," and the city pays a sum recovered as damages in an action against it by a person injured by falling upon a depression in the sidewalk in front of the building, the city is not obliged to attempt to collect of the society the sum so paid before bringing an action upon the agreement.

An instrument signed by M. recited that, in consideration of a license granted to a certain society by the authorities of a city to occupy a portion of the street in front of the society's lot where it was erecting a building, he agreed "that they shall comply strictly with the terms of said license, and indemnify the city from all loss, cost, or expense that it may suffer by reason of the occupancy described in said license." A person was injured, after the expiration of the license, by falling upon a depression in the sidewalk in front of the building, and recovered damages in an action against the city for his injury. In an action by the city against M. upon the instrument, several witnesses for the plaintiff testified that, before the occupancy under the license, the sidewalk was in good condition; that, during the erection of the building, teams loaded with brick and stone were often driven across the walk; and that the brick and stone were stored on it. *Held*, that the evidence was admissible.

CONTRACT, against the executor of the will of James J. McDermott, upon the following instrument, dated May 29, 1889, signed by "James J. McDermott, Treas.," and sealed: "In consideration of a license granted the Sacred Heart Society, by the supervisors of highways and bridges of the city of Springfield, to occupy a portion of the street in front of their lot on Chestnut and Linden Streets, where they are erecting a building, I hereby agree that they shall comply strictly with the terms of said license, and indemnify the city from all loss, cost, or expense that it may suffer by reason of the occupancy described in said license, and I further agree, at the end of the term for which said license is granted, that they shall remove

all rubbish made or deposited on said street in the erection of said building, and put that portion of the street in as good condition as it was before its occupancy by them." Indorsed upon it was the approval of the board of supervisors of highways and bridges.

The declaration alleged that the defendant's testator, for a good consideration, executed to the plaintiff the contract above set forth; that the Sacred Heart Society did not strictly comply with the terms of the license named therein; that the society did not, at the end of the term for which the license was granted, put that portion of Chestnut Street named in the license and the contract in as good condition as it was before its occupancy by the society; that the society had not indemnified the plaintiff from all loss, cost, or expense which it suffered by reason of such occupancy; that, by reason of the use made by the Chestnut Street society, as covered by the license, the same became in a defective condition, and was unsafe for public travel; that one Mary Cullinan, while on her way to attend the church of the society, on March 20, 1892, and while in the exercise of due care on her part, fell, by reason of such defective condition of the street; that she instituted suit to recover damages therefor, and recovered against the plaintiff judgment for $813.60 damages, and $57.16 costs of suit, which sums the plaintiff was obliged to, and did pay her; and that, by reason of such failure on the part of the society to comply with the terms of the license, the plaintiff had suffered great damage, which the defendant was obligated to it to pay.

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows.

Elijah A. Newell, a witness for the plaintiff, testified that he was the city clerk of Springfield; that he had the contract declared on; that a license was issued in connection with the contract, and was mailed to McDermott; and that the license read as follows:

"City of Springfield. Springfield, May 29, 1889. A license is hereby granted to Sacred Heart Society to occupy a portion of Chestnut and Linden Streets, not to exceed eight feet of their width, in front of their lot on said street, for depositing building materials thereon while building; provided, said materials shall

be in the street no more than three hundred days, and that the said Sacred Heart Society shall conform to Sections 1 and 2 of 'Ordinance No. 80, to amend Ordinance No. 44 of said City of Springfield,' as follows:

"'Section 1. No person, except the superintendent of streets in the performance of his duties, shall break or dig up the pavement or ground in any public street, or any sidewalk or common in the city, or erect any staging for building thereon, or place any materials or rubbish thereon, without first obtaining from the board of supervisors of highways and bridges a written license, stating the space in the street or other public place that may be occupied, and the time allowed for such occupancy, and such other provisions as they may deem best, and filing with the city clerk a written agreement, under seal, approved by said supervisors, to comply strictly with the terms of the license, and indemnify the city from all loss, cost, or expense that it may suffer by reason of such occupancy.

"'Section 2. Whenever any street, lane, alley, or sidewalk, or other public place in the city, shall, under any license granted, as provided in the preceding section, be dug up, obstructed, encumbered, or otherwise thereby rendered unsafe or inconvenient for travel, the person so licensed shall put, and at all times keep up, a suitable railing. . . . And shall also execute and file with the city clerk a written agreement, under seal, approved by said supervisors, to comply strictly with the terms of this license, and indemnify the city from all loss, cost, or expense that it may sustain by reason of the occupancy of the street above described.'"

It was signed by the board of supervisors of highways and bridges.

The witness further testified that the approval was placed upon the contract two days after it was signed by McDermott, and before the license was mailed to him; that the license had got that; that "we approved it at the same time"; and that, on May 31, 1889, it was read before Edward S. Bradford, mayor, John McFetheries, and L. Z. Cutler, supervisors of highways and bridges.

On cross-examination, he testified as follows:

"The license was issued for three hundred days; that was the

outside limit; there was no agreement, bond, or any other agreement of indemnity, or anything of that kind except this one; we received no agreement, contract, or any writing whatever from the Sacred Heart Society; the agreement was signed in the office; I was city clerk at that time; I kept no copy of this license; McDermott came in there as other people do, and he signed that bond after looking it over."

Mary Cullinan, a witness for the plaintiff, testified as follows:

"On Sunday, March 20, 1892, I went to church along Chestnut Street, at about seven o'clock in the morning; near the north side of the new Sacred Heart Church, on Chestnut Street, I fell down and broke my arm; the sidewalk was uneven and there was ice on it; I fell forward on my hand; I fell about the middle of the sidewalk; I can't tell how uneven the sidewalk was; I don't remember whether there was a hole there; when my foot struck, I knew it was uneven."

Willie Foy, a witness for the plaintiff, testified as follows:

"I was with Mrs. Cullinan on the day she received her injury; when she received the injury she was next the north tower of the new edifice of the Sacred Heart Church; she was about in the centre of the sidewalk; the sidewalk was very uneven; you could see the edges of the brick where there was a depression; she fell right on the ice; of course, there must be a depression to have ice there; I suppose the depression of the brick caused the ice to form; the ice was a patch as large as the seat of a chair; it was about in the centre of the walk and nearly to the north entrance of the church."

Melvin H. Strong, a witness for the plaintiff, testified as follows:

"In 1892 I lived at the corner of Chestnut and Everett Streets, the next corner to where this sidewalk was; I think I had lived there nine or ten years previous to March 20, 1892; I remember the time when they began the erection of their new edifice, but I don't remember the year; the building is of brick and stone; I could n't tell you how long they were in building the stone work; before they began work, the sidewalk in front of the church was good; during the erection of the church teams were driven across the walk with brick and stone, and it broke it all up; they made no other use of it in particular that I know of; they had to drive the teams across to get their brick and

stone up near the church where they used it; I never saw any material dumped exactly on the sidewalk; this driving of teams occurred along by the church, in front of the church; from that time on nothing was done in repairing or fixing the walk until they got done there."

Edward P. Blake, a witness for the plaintiff, testified as follows:

"In March, 1892, I lived on Carew Street; in going to my work from my house, I would pass the Sacred Heart Church usually four times a day, sometimes six; I recollect about when the church was begun; the condition of the sidewalk in front of that church, before they began the construction, was good, first class, recently relaid; it was as smooth as any walk I know of in Springfield; they used the walk, during the construction of the church, for the storage of material to a great extent, and I have seen the teams drive across it a great many times; brick and stone were stored on the walk; as near as I can remember, there were two or three places, at least, where they crossed that walk, had planks laid down, and a good portion of the time the walk was so obstructed that materials and teams could n't get through except here and there; I should say two years, at least, the walk was in that condition."

On cross-examination, the witness testified as follows:

"I think the cellar was built of brick; I don't remember whether there was any stone in the cellar; there was a good deal of teaming round when they were digging the cellar; I don't think the most of the teaming was done at that time."

Waitstill H. Allis, a witness for the plaintiff, testified as follows:

"I live on Carew Street, beyond this church; I recollect the fact of their beginning the erection of this church; at the time they began to use it, it was a good sidewalk; it had been recently relaid and was practically a new walk; along in the early part of the hauling of material there, they would drive in, two of them, get unloaded, drive out down across the walk, and turn out on the north side where there was a regular open driveway; to my recollection there were two or three places where they drove over the walk; that continued up to quite recently, within a year, I should think."

The testimony of the witnesses, Strong, Blake, and Allis, was admitted against the plaintiff's objection and exception.

John M. Keough, a witness for the defendant, testified as follows:

"I am the janitor of the Sacred Heart Church, and have been for nine years; during the nine years I have been there, there has been a sidewalk laid on Chestnut Street; during those nine years there has been no other sidewalk laid there; I could n't exactly tell just when they began to dig the cellar of the church, and I don't remember when they began to lay the brown stone; during the progress of the work they used to drive in there at the north side of the church, go back and forth; the brown stone was piled up between the curbstone in Chestnut Street and the sidewalk; the biggest part of the stone was taken from there in a hand-barrow, with two men, and some taken with a little truck, with two handles to it; this was a little two-wheeled truck, with wheels about three or three and a half inches wide; the stone was put on these trucks and drawn in there; during the progress of this work from the beginning, nothing was done to the sidewalk; during all the progress of this work, the walk was never obstructed only when the big stone was coming in there for the steps; when these stones were coming in, the teams backed up to the curbing on Chestnut Street and then they put a plank on a level with the team, slanted it in towards the walk and lifted the steps from the top of the wagon to the outside of the walk; none of this material or timber touched the walk; it was bearing on the blocking, and the blocking rested one end upon the wagon and the other end on the ground inside of the sidewalk; this same thing was done for each of the tower doors."

On cross-examination the witness testified as follows:

"Up to the time they began to build on top of the foundation, the church people had n't done anything in going over the walk; whatever was done was done after the foundation was up; I could n't exactly say whether it was after April, 1889, that they began to lay the ashler; when the ashler began to come for that church, they began to store it all along Chestnut Street, between the sidewalk and the curb; they did n't pile much in front, most of it went round to the back of the church; they had two ways of getting the ashler over the sidewalk; one was to carry it on a platform and the other was to drag it over on this truck; I

never saw them taking more than one at a time; they would wheel it across the walk, then dump it and come back and get some more; in July, 1892, two or three months after the accident, the sidewalk in front of the church was relaid by the parish."

Peter T. McGuire, a witness for the defendant, testified as follows:

"I passed by the church and property of the Sacred Heart Society on Chestnut Street four times a day for fourteen years; I remember the time they were building the Sacred Heart Church on Chestnut Street; the cellar wall was made of granite, no brick in it; during those years that I was passing through, there was no interference or interruption of travel upon the sidewalk in front of the church on Chestnut Street; the corner stone of the church was laid the 21st day of October, 1888; when the corner stone was laid, nothing more than what I should call the water-table to the building was erected."

On cross-examination, the witness testified as follows:

"This church is a large brown stone church; there was a good deal of stone out there at the front sometimes; some of the stone was pretty large; it was all brown stone; it was piled on what they called the grass plot, between the sidewalk and the curbing; I suppose the large stones were taken over from the street and got in there some way; after the corner stone was on, they did no more work on the church that winter; they waited until the next summer."

Thomas F. Bourke, a witness for the defendant, testified as follows:

"I was employed as a carpenter on the Sacred Heart Church; I began to work late in May or early in June, 1889; I continued to work there until the 30th of December, the same year; the work stopped then for some little time; during the time I was there, at the north side of the church, there was a temporary driveway made, and they drove in there with the stone and material for the building; there was also a driveway at the rear of the church on Linden Street; they also unloaded some of the ashler on the Chestnut Street side, and piled it on the grass plot between the curbing and the bricks; I think there was no teaming in front of the church on the place where the church stands,

on the brick sidewalk; the ashler that was on the grass plot between the brick walk and the curbing was taken into the premises in a hand-barrow, some of it, and some of it was carried in by two men on to the scales and derrick; there was nothing done to the sidewalk during the progress of the work that I know of."

On cross-examination the witness testified as follows:

"We started framing the roof in July or August, 1889; they were ready for part of the roof in October, I guess; I doubt if the entire ashler for the roof was finished that winter, when the work was stopped, the 20th of December; they shut everything down the 20th of December, and I think in the spring afterwards they finished the towers and put up the remaining stone; substantially, all the wall was put up in 1889."

Jeremiah R. Driscoll, a witness for the defendant, testified as follows:

"I live on Greenwood Street, near the corner of Chestnut Street, a little south of the Sacred Heart property; I am a contractor and excavator; I did the excavating for the cellar of the Sacred Heart Church and got the foundations ready; that was commenced the latter part of May, 1888; in 1887 and 1888 I had the contract from the city for laying the sewers; in such capacity, I connected the Sacred Heart property with the Chestnut Street sewer in October, 1888; that was done so as to be about four or five feet south of where the pipe actually was, — four or five feet, I should think, south of the north tower of the church; it was a very deep sewer; the soil was moist hard-pan over the hard red clay within six or seven feet of the surface, and then a mixture of hard-pan and sand; I had no shoring for the walls of that trench; I had to dig down fifteen feet, four and a half feet wide, without any bracing; there was a brick sidewalk at that time; I had to take up the brick; I think the water pipe was put in shortly after; there was no water pipe when I laid the sewer; that was put in the same trench; it was part of the same ditch; the sidewalk settled; it started at the side of the trench; it would naturally commence settling there; this had settled pretty near the width of the trench; in the centre it would naturally settle more; Foy pointed out the place where he said Mrs. Cullinan fell; it was right over this sewer

and water pipe; I laid the bricks; there is a brick curbing against the brick walk; the water getting between the bricks and the sidewalk would naturally crowd them out; I never saw any teaming done but what they used to draw their sand from Linden Street in front of the church and then turn in on Chestnut Street; they used to bring the brick on Everett Street, back of the church, and pile it up, and the ashler was mostly laid on Linden Street; a team could n't get in in front of the church edifice on the brick sidewalk; it would be impossible, so that there would be no teaming in front of the church edifice only on the Linden Street walk; they built a platform, the wagon was backed up across Chestnut Street and the horse was taken out, and then they built a platform with cribs from the wagon level with the wagon, and built it right straight to the steps of the church, and the platform was taken upon that, rolled in upon the rollers from the wagon on to the place in the entrance of the church; they were certainly two feet, and in some places three feet above the sidewalk; there was no pressure on the sidewalk; after they picked out what they wanted of the ashler on the grass plot, between the brick sidewalk and the curbing, they put it on hand-barrows and carried it in; they don't do any harm to the sidewalk unless they do it with their feet; I never saw a time when the sidewalk was n't perfectly clear; I never saw any harm come to the sidewalk from the building operations."

On cross-examination, the witness testified as follows:

"It would be impossible for teams to drive in in front of the church with a load; there were no big stones in the church with the exceptions of the platform and pilasters, no stone that would weigh over 300 pounds in the whole church outside of the pilasters and the steps; all the stone, big and small, that lay between the sidewalk and that church edifice never got in there by being taken in on a wagon in front; my attention was first called to this matter the Sunday the woman fell; that walk had been there probably ten years; it was not a new walk just laid; the new walk was laid about two years ago; that was the first walk that was laid after this accident; the sidewalk settled there, which it does wherever a sewer is laid in Springfield; it had been settling for two years, a little, more or less; it did n't look like a place in the walk as would be made by crushing in the

walk by weight; it looked like a settle, and that is what I know it was, as I passed by it every day."

The defendant testified that he had charge of McDermott's papers and effects, and did not find any such license as was spoken of among his papers and effects.

It was agreed that Chestnut Street was a public highway; that McDermott, who signed the instrument in suit, died July 26, 1891; that there was no question that the Sacred Heart Society existed; that Mary Cullinan recovered in her suit against the city of Springfield the sum of $813.60; that judgment was rendered for that sum and paid by the city; that the plaintiff in this action, if entitled to recover anything, was entitled to recover that sum with interest; that the date of the defendant's appointment as executor was December 16, 1891; and that the Sacred Heart Society was solvent.

At the close of the evidence, the defendant asked the judge to give, among other instructions, the following:

"1. Upon all the evidence, the defendant is entitled to a verdict. 2. Upon the whole evidence, the license issued to the Sacred Heart Society was illegal and void, and the defendant's testator was not bound by his guaranty of acts done or to be done thereunder. 3. Upon all the evidence, the occupancy of the sidewalk on Chestnut Street by the Sacred Heart Society, during the term of the license, did not cause the injury to Mary Cullinan, and the defendant is not liable for the amount which the plaintiff was obliged to pay to Mary Cullinan. 4. There is no evidence that the plaintiff has made any attempt to collect the amount of said damages from the Sacred Heart Society, and the plaintiff therefore cannot recover in this action. 5. There is no evidence that there was any use or occupancy of the sidewalk by the Sacred Heart Society at the point where Mary Cullinan fell and received her injury, and the plaintiff therefore cannot recover."

The judge refused to give the instructions requested, and instructed the jury, among other things, as follows:

"The plaintiff must satisfy you that at the point where Mrs. Cullinan met with her injury there was a defect in the sidewalk caused by the Sacred Heart people in using the sidewalk in connection with the construction of the church, under the license, and during the period of the license, and they must satisfy you that

that defect continued, had not been removed, had not been repaired, but continued down to the time when Mrs. Cullinan fell, and operated to produce her injury. I do not think it is legally necessary, in order that the defendant might be held responsible, if the other conditions of responsibility exist, that the accident should have happened during the period of the license, but it must be made to appear so that you are satisfied of it by the preponderance of the evidence, that during the period of three hundred days the people building the church produced a defect in the sidewalk, caused a state of things which appeared and was found in Mrs. Cullinan's case to be a defect, and that that condition continued unremedied down to the time when she met with her injury, and was the cause of that injury. If the plaintiff satisfies you of these facts, then the plaintiff would be entitled to recover. . . .

"Now, it may occur to you that nobody comes to testify directly to any specific act or acts of the Sacred Heart Society producing the defects. The evidence has been laid before you, the course of events, course of conduct, and you are asked to infer from the nature of the occupancy, which the plaintiff claims to have shown by the evidence, that this defect was produced in this way. And, on the other hand, you have the evidence and the suggestion that, if there was a defect there, it was caused by the laying of the sewer pipe and by the depression of the ground after it. Now, in any matter like this, where you have to find a fact, it is not necessary that there should be some witness called to testify to the precise fact which you are asked to find. It often becomes the duty of the jury, in dealing with a case, to find that a certain thing took place and that a certain thing occurred, a certain thing was done, from evidence of circumstances going before that thing, following after and surrounding it, which naturally and reasonably point to the conclusion that the thing in question or the act in question took place. That is, they may reach the conclusion, as an inference from other facts proved to their satisfaction, which seem in their minds to justify it. . . . So that, as the result of the whole matter, bearing in mind that the burden of proof is upon the plaintiff, it is for you to say whether the evidence satisfies you that this license was issued, and that there was this defect in the street, and that that defect was caused by the use which the Sacred Heart people made of the sidewalk under this license. If

so, the plaintiff is entitled to a verdict. If you are not so satisfied, then the defendant is entitled to your verdict."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. H. McClintock, (*J. B. Carroll* with him,) for the defendant.

G. D. Robinson, for the plaintiff.

MORTON, J. We discover no error in the instructions given, or in the refusals to instruct as requested. It plainly was a question of fact for the jury whether the depression in the sidewalk where Mrs. Cullinan fell was caused by the laying of the sewer and water pipe, or by teaming over the sidewalk. The plaintiff was bound to satisfy them that it was caused by the teaming, and also that it happened within the time covered by the license, and the court so instructed the jury. The plaintiff was not required to show just when or how the teaming produced the hole in the sidewalk. It was sufficient if it offered evidence of facts and circumstances from which it fairly might be inferred that that caused it at some time during the continuance of the license. The jury was not bound to believe all that every witness said. It was competent for the jury to compare the testimony of different witnesses, and to accept a part and reject a part, and if the verdict was or might have been reached in that manner, it must stand, if there was any evidence beyond a scintilla to support it.

We think that there clearly was such evidence. The foundation of the church had been put in before the license was granted; but there was testimony warranting the conclusion that the sidewalk was in good condition down to the time when the erection of the walls began. One Keough, a witness for the defendant, so testified. It did not appear very clearly when that was, but the jury, we think, reasonably might have found it to have been in the latter part of May or in the first part of June, 1889. There was also testimony that substantially all the wall was put up in 1889, and that the towers were finished and the remaining stone put up in the following spring; that during the construction of the church the sidewalk was used for the storage of stone and brick; and that teams were driven across it with brick and stone, and, as one witness said, "broke it all up." There was also the fact, which one of the defend-

ant's witnesses testified to on cross-examination without objection, that two or three months after the accident the sidewalk in front of the church was relaid by the parish.

It was competent for the jury to find on this testimony that the depression in the sidewalk was caused by the teaming over it during the time covered by the license; though they might also have found, if they had seen fit, that it was due to the laying of the sewer and water pipe.

The fact that no written agreement was given to the city by the Sacred Heart Society, as required by the ordinance, cannot avoid the agreement entered into by the defendant's testator, unless it was a condition precedent or subsequent that he should not be liable if such an agreement was not furnished by the Society to the city. No such condition is expressed or implied in the agreement, which is an absolute undertaking on his part that the society shall do certain things; amongst others, "indemnify the city from all loss, cost, or expense that it may suffer by reason of the occupancy described in said license." The society has not done that, and consequently the defendant is liable.

The plaintiff plainly was under no obligation to attempt to collect of the society the amount which it had been forced to pay in consequence of the defect in the sidewalk. The agreement was an original undertaking, and was not affected or impaired by the fact that the defendant's testator might have no remedy over against the society. If he had wished to provide for that contingency, something covering it should have been inserted in the agreement. *Bishop* v. *Eaton*, 161 Mass. 496, 501.

The jury properly may have understood the testimony of Strong, Blake, and Allis as referring to the time when the erection of the walls began, and to the subsequent use of the sidewalk. Its tendency was to show that the sidewalk was broken up and made defective by the society, and on that ground it was admissible.

Exceptions overruled.

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ADMINISTRATOR.

AGENT.

AGREED FACTS.

Where, judgment having been entered for the defendant, it seemed very possible that the agreed facts did not present the plaintiff's case adequately upon the point in question, the court said that the judgment was without prejudice to a motion to discharge the facts in the Superior Court, if the counsel for the plaintiff thought that he could show just cause. *Keneson* v. *Colgan*, 166.

AMENDMENT.

AMOUNT IN CONTROVERSY.

ANSWER.

APPEARANCE.

See Poor Debtor, 2; Principal and Agent, 1.

ARBITRATION.

See Insurance, 20, 21.

ARREST.

See Gaming; Insolvent Debtor, 2.

ARSON.

A defendant is rightly convicted of burning a dwelling-house standing on land belonging to a woman with whom he is living but to whom he is not married, if there is evidence that the building was the property of the woman. *Commonwealth* v. *Brooks*, 397.

ASSAULT.

See Exceptions, 4; Master and Servant, 1.

ASSESSMENT.

See Beneficiary Association; Betterment.

ASSIGNEE IN INSOLVENCY.

See Fraudulent Preference.

ASSIGNMENT.

See Collateral Security; Estoppel, 2; Evidence, 28.

ATTACHMENT.

See Bond, 3; Creditors' Bill, 1.

BAILMENT.

1. If cloth is delivered to a dressmaker to be made into a dress, without any instructions, she is held to that degree of skill and care which will enable her to do the work intrusted to her in a reasonable and proper manner; and an action may be maintained against her for making up the dress on the wrong side of the cloth, if, in the exercise of a proper degree of skill and care, the dress ought not to have been made up in that way. *Lincoln* v. *Gay*, 537.

2. If an offer by one party to a contract of bailment is varied in its acceptance by the other party, and the latter's proposition is not accepted before it is withdrawn by him, he is not bound thereby. *Lincoln* v. *Gay*, 537.

BANK.

See COLLATERAL SECURITY, 2, 3; ESTOPPEL, 2; SAVINGS BANK.

BENEFICIARY ASSOCIATION.

1. The condition in a certificate of membership issued by a beneficiary association, that, after a forfeiture, "said party may again renew his connection with the association by a new contract made in the same manner as the first, or for valid reasons to the officers of the association, (such as a failure to receive notice of an assessment,) he may be reinstated by paying assessment arrearages," seems to imply that, when the reinstatement is by a new contract, a new certificate shall be issued, and that unless this is done the reinstatement is merely by way of a waiver of the forfeiture. *Clarke* v. *Schwarzenberg*, 347.
2. If a member, before St. 1885, c. 183, of a beneficiary association fails, after the statute, to pay assessments seasonably, and, upon his application, is reinstated after each failure, but no new certificate of membership is issued, a creditor, who is the beneficiary named in the certificate, cannot recover the proceeds of the certificate, after the member's death, if the evidence tends to show that in the several instances the reinstatement was by way of a waiver of the forfeiture, and not by way of a new contract. *Ibid.*
3. A defence to an action on a certificate of membership in a beneficiary association cannot be maintained on the ground that the deceased in his lifetime ceased to be a member of the defendant corporation by reason of his failure to pay an assessment made in accordance with the by-laws, if, so far as appears, he endeavored faithfully to perform his duties as a member, and certain complications which arose were caused by a mistake for which he was not responsible. *Waterworth* v. *American Order of Druids*, 574.

BETTERMENT.

1. The board of public works of a city, established by a statute which vested in the board sole jurisdiction of the laying out and altering of streets or ways, passed an order reciting that, in the opinion of the board, common convenience and necessity required that P. Street should be widened for a certain distance, and directing that notice be given to the abutters, naming them, of the intention of the board to lay out P. Street by taking a portion of their land and laying it out as a public street, and that the board intended to assess a portion of the expense on the estates benefited, and

BILL OF REVIEW.

See EQUITY, 7.

BOND.

1. In an action to recover interest on the bond of a corporation by the holder thereof, which bond contains an absolute promise to pay interest on certain specified days, the burden of proof is not on the plaintiff to show that income has been earned; and while a provision that "interest shall be cumulative, and if any of the payments cannot be made on the dates named all interest due shall be paid as soon thereafter as sufficient money has been earned to enable the company to do so," may afford a defence to the company, if it can show that income has not been earned, it cannot be regarded as constituting the earning of income a condition precedent to the maintaining of an action, or as imposing the burden of proof upon the holder of the bond. *Strauss* v. *United Telegram Co.* 130.
2. A bond of a corporation, which declares that the corporation is indebted to the bearer in a certain sum which it promises "to pay to the bearer hereof, or, if it be registered, to the registered holder thereof," at a certain time and place, "with interest thereon at the rate of five per cent per annum," and which contains nothing on its face to show to whom it was originally issued, is a negotiable bond, and the holder thereof may maintain an action in his own name to recover the interest thereon which is due. *Ibid.*
3. In an action against A. and B., the property of B. was attached, and he gave a bond with sureties to dissolve the attachment which bound him to pay the judgment which the plaintiff might recover "in said action." Afterward, by agreement, "neither party" was entered as between the plaintiff and B., and judgment was recovered against A. *Held*, that the sureties on B.'s bond were liable. *Prior* v. *Pye*, 316.

See CONTRACT, 4; PRINCIPAL AND SURETY; SAVINGS BANK, 1.

BOSTON.

See EMINENT DOMAIN, 15–17.

BRIDGE.

A county in which is located a bridge laid out as a public highway between two towns, the cost of the construction, maintenance, and repair of which is apportioned between the county and the towns, has a qualified or special property in a part of the bridge, which, under Pub. Sts. c. 214, § 14, is sufficient to sustain an indictment for burning the bridge, alleging it to be "the property of the county." *Commonwealth* v. *Fitzgerald*, 587.

See COUNTY COMMISSIONERS.

BUILDINGS.

See CONTRACT, 1; EVIDENCE, 18, 19, 22, 24; INSURANCE, 7–12; NOTICE.

BURDEN OF PROOF.

If the only issue in an action of contract for the price of goods sold and delivered is payment, the burden of proof is on the defendant. *Clark* v. *Murphy*, 490.

See BOND, 1.

CAPE COD SHIP CANAL.

1. The fund deposited by the Cape Cod Ship Canal Company with the Treasurer of the Commonwealth, agreeably to the provisions of St. 1883, c. 259, § 19, which provides that "the Supreme Judicial Court shall have jurisdiction in equity to apply said deposit to the payment of any damages caused by the laying out, construction, and maintenance of said canal, and for all claims against said company for labor performed or furnished, and for land or materials taken or used in the construction of said canal," is for the benefit of all persons having claims within the terms of the statute, and, if it is insufficient to pay all in full, it should be divided ratably among them. *Crowell* v. *Cape Cod Ship Canal Co.* 235.
2. A bill in equity brought against the Cape Cod Ship Canal Company and the Treasurer of the Commonwealth to have a judgment recovered against the company paid out of the fund deposited with the company, as required by St. 1883, c. 259, § 19, should, as in the case of a creditors' bill or a suit for the administration of a trust fund, make all persons interested in the fund parties, and, if this is not done, the bill may be treated as brought in behalf of all parties in interest, and an opportunity given them to come in and present their claims. *Ibid.*

CERTIFICATE.

See BENEFICIARY ASSOCIATION.

CERTIORARI.

See BETTERMENT, 2.

CHARITY.

See EQUITY, 1; PUBLIC CHARITY; TAX, 3; TRUST AND TRUSTEE, 2–4, 6.

CHARTER PARTY.

See SHIPS AND SHIPPING.

CHILD.

See INFANT; WILL.

CITATION.

See POOR DEBTOR, 2.

CITY.

A municipality is liable to a private action for negligence in building or maintaining sewers. *Coan* v. *Marlborough*, 206.

See BETTERMENT, 1–4; CONSTITUTIONAL LAW, 2; EMINENT DOMAIN, 15–18; EVIDENCE, 26; INDEMNITY; PAUPER; SPECIFIC PERFORMANCE; TRESPASS, 1.

CLAIMS AGAINST THE UNITED STATES.

See CONSTITUTIONAL LAW, 3.

CODICIL.

See DEVISE AND LEGACY, 2.

COLLATERAL INHERITANCE TAX.

See JURISDICTION; TAX, 3.

COLLATERAL SECURITY.

1. Until a promissory note is extinguished by a judgment rendered in an action thereon, the right to retain collateral pledged as security for its payment remains with the holder. *Fowle* v. *Child*, 210.
2. If a married woman indorses a promissory note given by her husband to a bank for a loan to him, and pledges to the bank shares of stock owned by her as collateral security for the note, the fact that she subsequently indorsed other notes of her husband discounted at the same bank, without demanding the delivery to her of the certificate of stock, does not show an agreement on her part that the stock should be security for the general indebtedness of her husband to the bank. *Riley* v. *Hampshire County National Bank*, 482.
3. If a married woman indorses a promissory note given by her husband to a bank for a loan to him, and pledges to the bank shares of stock owned by her as collateral security for the note, it is competent for her to show, upon a bill in equity to redeem the stock, that her husband had no express authority to write upon another note, given by him to the bank for the amount to which his account had been overdrawn, a statement that the

stock is collateral security for that note also, and that the transaction was without her knowledge; and it is also competent for her to show that she never knew that he had overdrawn his account. *Riley* v. *Hampshire County National Bank*, 482.

4. A. signed two promissory notes to the order of B. of the same date, payable thirty days thereafter, one for five hundred and fifty and the other for three hundred and fifty dollars, and a third note identical with the others except that it was for nine hundred dollars and contained a provision that A. had deposited therewith as collateral security certain shares of stock with authority on the part of B. to sell the same on non-performance of the promise. On the same date B. signed a paper acknowledging receipt of the first two notes, and "as collateral security for payment of same" the last note with the shares, "and I agree, upon payment of the first two mentioned notes, to deliver to him the last described note and the shares." Nothing having been paid by A. on or after maturity of the notes, B. brought action on the first two notes and a second action on the third note, and the judge instructed the jury to return a verdict in each action for the amount of the notes and interest, not to exceed the *ad damnum* of the writ in either case; and they returned a verdict in each action for one thousand dollars, the amount of the *ad damnum* of the writ. *Held*, that, the condition in the agreement not having been performed, the agreement did not constitute a defence, that the fact that the last note was described in the agreement as collateral to the other two notes was immaterial, and that, while B. could have but one satisfaction of his debt, there was no objection to his taking judgment in both actions. *Burnham* v. *Windram*, 313.

See Estoppel, 2; Evidence, 14, 15, 28.

COLLECTOR OF TAXES.

A collector's deed contains a sufficient statement of the cause of the sale of the real estate, if it is intelligible and conveys the title which it was intended to convey, even though the statement does not follow the exact words of the legislative form at the end of St. 1888, c. 390, and is less specific than is desirable. *Pixley* v. *Pixley*, 335.

COMMERCE.

See Itinerant Vendors, 2.

COMMON.

See Eminent Domain, 18.

COMPLAINT.

1. An averment in a complaint for a violation of Pub. Sts. c. 207, § 53, that the defendant "did then and there cruelly drive" a certain horse, follow-

COMPROMISE.

CONDITION.

CONDITIONAL SALE.

CONFLICT OF LAWS.

An agreement, dated and signed in this Commonwealth by A., an inhabitant of the Commonwealth, to use all electrotypes ordered from B. in a foreign country only for the purpose of illustrating works to be published by A. in this country, and sent to B., who cabled to A. his acceptance of it, is to be governed by the law of this Commonwealth in determining the measure of damages in an action for its breach. *Meyer* v. *Estes*, 457.

CONSIDERATION.

CONSIGNOR AND CONSIGNEE.

CONSTABLE.

A constable cannot make a levy of an execution by sale of land where he has no jurisdiction in the towns where Pub. Sts. c. 172, § 29, require notifications to be posted up. *Lewis* v. *Norton*, 209.

CONSTITUTIONAL LAW.

1. The St. 1890, c. 437, entitled "An Act relative to wagering contracts in securities and commodities," is constitutional. *Crandell* v. *White*, 54.
2. The St. of 1893, c. 417, entitled "An Act to codify and consolidate the laws relating to elections," so far as it relates to the use of an official ballot in the election of city officers, is constitutional; and the contention that the use of the official ballot is made compulsory in the election of city officers, and optional in the election of town officers, and that therefore the statute is void as partial and unequal in its operation upon the rights of voters, cannot be maintained. *Cole* v. *Tucker*, 486.
3. It is within the constitutional power of the Legislature to pass a resolve authorizing the Governor and Council "to employ the agent of the Commonwealth for the prosecution of war claims against the United States to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under act of Congress" of August 5, 1861, "also to fix his compensation, which shall be paid out of any amount received therefrom." *Davis* v. *Commonwealth*, 241.

See BETTERMENT, 3; EXCEPTIONS, 3; ITINERANT VENDORS, 2.

CONTRACT.

I. *Making.*

See BAILMENT, 2; COLLATERAL SECURITY, 2; CONFLICT OF LAWS; GUARANTY, 1; INSURANCE, 7, 8, 22, 23; SLANDER, 2; USE AND OCCUPATION, 1.

II. *Consideration.*

1. Where the consideration of the defendant's promise to make papers giving property to the plaintiff's wife after the defendant's death is that the plaintiff will move from E. to A. and take care of the defendant, the moving of his buildings by the plaintiff from E. to A. is no part of the consideration, and therefore, conversely, the defendant's promise is not the consideration or conventional inducement for moving the buildings, and a repudiation of the express promise does not let in a recovery for the buildings on a *quantum valebat*. *Kenerson* v. *Colgan*, 166.

See EVIDENCE, 28; FRAUDULENT PREFERENCE, 2.

III. *Validity.*

2. An agreement by the purchaser of electrotypes, to be used only for the purpose of illustrating works to be published by him, "not to sell these electrotypes to any other parties, nor to multiply them for the purpose of selling them," is an agreement in restraint of trade, but, in view of the nature of the property, is reasonable, and will be enforced between the parties to it. *Meyer* v. *Estes*, 457.

See CONSTITUTIONAL LAW, 1; EQUITY, 2; EVIDENCE, 12, 13; FRAUDULENT PREFERENCE; PRINCIPAL AND AGENT, 5; RAILROAD, 2; SPECIFIC PERFORMANCE.

IV. *Construction.*

3. The rule of construing a writing most strongly against the party who wrote and proffered it, when it is reasonably capable of two constructions, and has been honestly understood and acted upon by the other party according to the construction which is most against the interest of the party proffering it, has been adopted by the court in certain cases of real ambiguity, but it was doubted whether there was need of invoking the rule in the present case. *Bascom* v. *Smith*, 61.

4. An insurance company executed an instrument by which it agreed to indemnify A. against losses by sales in his business in excess of one fourth of one per cent of his annual sales to an amount not exceeding $10,000, "save such sum or sums as shall be deducted therefrom as hereinafter provided." Among other conditions the instrument provided that, "in the computation of losses when final adjustment hereinunder is made, no loss on any one claim shall be included to an extent of more than 33⅓ per cent of" a certain rating in a mercantile agency, "and in no event shall claims of loss exceed 7,500 dollars on any one individual or firm"; and that, "in the computation of indemnity under this bond for which this company is liable: 1st, twelve (12) per cent shall be deducted from the total gross losses as calculated under the provisions of this bond; . . . 2d, the said ¼ per cent loss of said second party shall also be deducted from said total losses, and the remainder shall be and constitute the amount of indemnity to be paid by said first party, not to exceed said 10,000 dollars." A. suffered a loss of over $23,000 on sales to one person. *Held*, in an action on the instrument, that the twelve per cent and the one fourth of one per cent were to be deducted from $7,500, and the balance constituted the indemnity to which A. was entitled. *Rice* v. *National Credit Ins. Co.* 285.

See Deed, 1; Evidence, 28; Guaranty, 2; Indemnity; Insurance, 14, 25–27; Law and Fact; Promissory Note, 1; Railroad, 1; Ships and Shipping.

V. *Performance and Breach.*

5. A. signed a contract by which he agreed, "in consideration of its delivery for me" at a specified express office, to pay B. $35 for an article bought of him, as follows: $10 "upon delivery at the express office," and the balance in monthly payments, and that, upon A.'s failure to make any of the stipulated payments, all of the instalments remaining unpaid should immediately become due and payable, and B. might take the article from A.'s possession. The article was delivered as agreed at the express office. A. refused to receive it, and the express company after a time left it at B.'s place of business in pursuance of a rule of the company and without B.'s assent, and it was held subject to A.'s order. There was no repudiation of the contract by A. before the delivery at the express office. *Held*, in an action upon the contract, that the delivery at the express office fixed B.'s right to the price of the article; and that he was entitled to recover that amount. Field, C. J., Allen & Morton, JJ., dissenting. *White* v. *Solomon*, 516.

6. If a contract provides for the use by A. of certain articles to be ordered of B., and, while the contract is in force, B. forms a partnership with C. without A.'s knowledge, articles subsequently ordered by A. and furnished by the partnership must, as between the parties, be regarded as furnished by B., acting through the partnership, to A. in pursuance of the contract. *Meyer* v. *Estes*, 457.
7. A contract recited that "the undersigned, Messrs. A. & B. and Messrs. C. & D., . . . hereby agree to use all electrotypes ordered from E. . . . only for the purpose of illustrating works to be published by the said A. & B. and the said C. & D., or their heirs and successors in business," and was signed by the two firms named. The previous correspondence between the parties had informed E. that the two firms were jointly interested in a certain publication, which was an illustrated work in six volumes, of which each firm was to publish at its own expense three volumes; and it was agreed between the two firms that a part of the plates obtained from E. should be used in each of the volumes, that each firm should pay for the plates used in the volumes published by it, and that the plates should be the separate property of the firm which paid for them. E. did not know of this agreement. *Held*, in an action by E. for breach of the contract, that the contract was a joint agreement by both firms. *Ibid.*
8. Two firms executed an agreement to use all electrotypes ordered from a third person only for the purpose of illustrating works to be published by those firms, "or their heirs or successors in business," and not to sell the electrotypes to "any other parties." Afterwards one of the firms sold all its interest in the work in which the plates were to be used to the other firm, which subsequently dissolved, one of the members continuing to carry on the business. He afterwards sold the whole publication, including the electrotype plates, to A., who had no connection with either firm, and who used the plates only in the publication of the work in question. *Held*, that A. was not the "successor in business" of either firm, within the meaning of the agreement; and that the sale to him was a breach of the agreement, for which the damages recoverable were not necessarily nominal. *Ibid.*
9. If an agreement by A. to use all electrotypes ordered from B. only for the purpose of illustrating works to be published by A. provides that he is "to be responsible for every and all wrong use of said electrotypes to the amount of any damages which may have been caused thereby to" B., "and to pay furthermore a fine to" B. "equal to the tenfold price of the wrongly used electrotypes," the fine is a penalty which cannot be recovered, but B. is entitled to recover only the amount of damages which have been caused by a breach of the contract. *Ibid.*

See CONFLICT OF LAWS; DAMAGES; INSURANCE, 13; SPECIFIC PERFORMANCE.

VI. *Rescission.*

See BENEFICIARY ASSOCIATION; CONTRACT, 1; INSURANCE, 24; SHIPS AND SHIPPING.

CONTRIBUTORY NEGLIGENCE.

See EMPLOYERS' LIABILITY ACT, 10; INFANT; MASTER AND SERVANT, 8, 9, 11–13; NEGLIGENCE, 1, 2, 4, 7, 9, 10, 12; TRESPASS, 4; VERDICT, 3.

CONVERSION.

See PRINCIPAL AND AGENT, 3; TROVER.

CORPORATION.

1. If a count of a declaration in an action of tort for an alleged slander of an employee of the defendant corporation is to be construed as a count for discharging the plaintiff from its employ under such circumstances as to impute to him a charge of dishonesty, it must fail, as an action of tort does not lie against an employer for discharging a servant; nor can it be maintained as a count for slander, if no words are set forth. *Comerford* v. *West End Street Railway*, 13.
2. Even if, in an action of tort for an alleged slander of an employee of the defendant corporation, the words uttered by the defendant's superintendent can be considered defamatory, the action cannot be maintained if there is a variance between the allegations and the proofs. *Ibid.*
3. Whether a corporation is liable for slanderous words uttered by an agent or servant in the course of the business in which he is employed, *quære*. *Ibid.*

See BENEFICIARY ASSOCIATION; BOND, 1, 2; CAPE COD SHIP CANAL; CREDITORS' BILL, 4; EMINENT DOMAIN, 10, 11; FERRY; MASTER AND SERVANT, 1; RAILROAD.

COUNTY.

See BRIDGE.

COUNTY COMMISSIONERS.

1. A petition to the county commissioners, reciting that the mayor and aldermen of a city "are of opinion that it is necessary for the convenience of the public that an alteration should be made" in a bridge by which a railroad crosses a highway, and describing the circumstances which cause inconvenience to the public, is sufficient to give the commissioners jurisdiction, under Pub. Sts. c. 112, § 129, to determine whether any, and, if so, what alteration is necessary, and to prescribe the manner and limits within which it shall be made. *Boston & Albany Railroad* v. *County Commissioners*, 551.
2. A decision of county commissioners upon a petition of the mayor and aldermen of a city, under Pub. Sts. c. 112, § 129, prescribing additions to be made to the upper surface of the masonry of a bridge by which a railroad crosses a highway in the city, and other changes and new structures

designed to divert the water which otherwise would come upon the masonry and leak through it and fall upon the highway, and to carry that water into the sewers, orders the making of alterations and not of repairs; and such alterations come within the purview of the statute, although the bridge is one built in compliance with a decree passed in prior proceedings under the same statute, and in which an apportionment was made of the expenses and burdens of the crossing, as existing before the prescribed alterations. *Boston & Albany Railroad* v. *County Commissioners*, 551.

COURTS.

See JURISDICTION; MECHANIC'S LIEN, 1; SUPERIOR COURT; SUPREME JUDICIAL COURT.

COVENANT.

See DAMAGES; NEW TRIAL.

CREDITORS.

See BENEFICIARY ASSOCIATION, 2; CAPE COD SHIP CANAL; CREDITORS' BILL; INSOLVENT DEBTOR.

CREDITORS' BILL.

1. A debt need not be reduced to a judgment in order to maintain a bill in equity, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, to reach and apply in payment of a debt property of the debtor which cannot be attached or taken on execution at law. *Sandford* v. *Wright*, 85.
2. A bill in equity, under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, on a legal cause of action, should set out the cause of action as specifically as is required in an action at law. *Ibid.*
3. Whether a bill in equity, under St. 1884, c. 285, to reach and apply property of a debtor in payment of a debt, will lie when the claim is for less than twenty dollars, *quære*. *Ibid.*
4. The unissued bonds of the A. Company in the possession of a trust company, upon which the trust company has made no advances, and which it cannot issue except by the order of the A. Company, are not property or assets of the A. Company, and the right to any surplus that may remain after the mortgage of the plant of the A. Company to the trust company to secure the payment of the bonds is paid, the right to a release in case the bonds are paid in full by the A. Company and a possible right to require the return of the bonds in the hands of the trust company are not rights or claims on the part of the A. Company against the trust company to which a bill in equity under Pub. Sts. c. 151, § 2, cl. 11, and St. 1884, c. 285, § 1, will apply. *Eastern Electric Cable Co.* v. *Great Western Manuf. Co.* 274.

CRIMINAL LAW.

See Arson; Bridge; Complaint; Evidence, 16; Gaming; Indictment; Intoxicating Liquors; Manslaughter; Public Amusement; Trespass, 3, 4.

CRUELTY TO ANIMALS.

See Complaint, 1.

CY PRES.

See Public Charity, 2, 3, 5.

DAMAGES.

1. If it was reasonable for the grantee in a deed containing a covenant against encumbrances to buy off an encumbrance on the land conveyed, and the sum paid was reasonable, he can recover such sum in an action for breach of the covenant, with interest from the time of payment. *Richmond* v. *Ames*, 467.
2. *It seems*, that the amount paid by the grantee in a deed containing a covenant against encumbrances for reasonable counsel fees, in defending, in good faith, a suit for encroaching on a right of way claimed in the land conveyed, may be recovered in an action by him against his grantor for breach of the covenant, if it was the grantor's duty to defend that suit, and he had an opportunity and declined so to do; but whether such fees can be recovered if no opportunity was given the grantor to defend the former suit, *quære*. *Ibid.*
3. In an action for breach of the covenant against encumbrances in a deed, when the encumbrance is a right of way, and has not been relinquished, the damages are that amount of money which is a just compensation to the plaintiff for the real injury resulting from the encumbrance; and such damages are to be assessed as of the date of the trial. *Ibid.*

See Conflict of Laws; Contract, 5, 8, 9; Eminent Domain, 1–7, 9, 11–13, 15–17; Equity, 2; Evidence, 4–7, 23–25; Land Damages; New Trial; Pauper; School, 2; Sewer; Town.

DEATH.

See Action, 4; Beneficiary Association, 2, 3; Employers' Liability Act, 6, 8, 10, 11; Evidence, 27, 29; Infant, 1; Insurance, 2, 4; Negligence, 8, 12.

DECLARATION.

See Action, 4; Corporation, 1; Slander, 2.

DECREE.

Where, in a suit in equity, the plaintiff obtained a decree in his favor for one only of two distinct claims which were the subject of that suit, and the record is silent on the question whether the other claim was passed upon by the court, such record is not conclusive evidence in favor of the defendant in a subsequent suit between the same parties to recover upon the other claim, and the plaintiff is not estopped by the decree in the former suit, if in fact such other claim was not adjudicated upon in that suit. HOLMES, KNOWLTON, & LATHROP, JJ., dissenting. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 222.

See COUNTY COMMISSIONERS, 2; EQUITY, 5–7; FERRY, 2; PRINCIPAL AND SURETY.

DEED.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself and the circumstances existing at the time of its execution. *Whittenton Manuf. Co.* v. *Staples*, 319.

2. A deed to A. of a mill site, for the use of which and four others on the same stream the grantor had built a reservoir dam, conveyed "all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power and privileges, and head and fall of water," with all "the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith"; and also provided that A. and his assigns should pay to the grantor and his assigns one fifth of the flowage damages caused by the reservoir dam. B. acquired the mill site by mesne conveyances, the deed to him conveying "all rights of flowage appurtenant to said estate." All parties in interest, after the deed to A., treated the reservoir as existing for the common benefit of all the mill privileges. *Held*, that a right to have the use and benefit of the reservoir was included in the deed to A., and that such right descended to B. *Ibid.*

3. A stipulation in the deed of a mill site, for the use of which and four others on the same stream the grantor had built a reservoir dam, that the grantee and his assigns shall pay one fifth of the flowage damages caused by the dam, imposes an obligation in the nature of an easement or servitude upon the estate, which may be enforced in equity, though not as a personal obligation, against a subsequent grantee, and a servitude may also be imposed on the land by prescription for one fifth of the cost of repairing the dam and one fifth of the compensation for drawing the water from the reservoir, which may be enforced in like manner. FIELD, C. J., HOLMES & LATHROP, JJ., dissenting. *Ibid.*

See COLLECTOR OF TAXES; DAMAGES; FERRY, 3; NEW TRIAL; SURVIVORSHIP; TRUST AND TRUSTEE, 2–6, 8.

DEFINITIONS.

See WORDS.

DELIVERY.

See CONTRACT, 5; INSURANCE, 18; INTOXICATING LIQUORS, 2; SAVINGS BANK, 2.

DEMAND.

See INSURANCE, 2, 21; PROMISSORY NOTE.

DEMURRER.

See SLANDER, 2.

DEPOSITION.

The deposition of a party to an action is not rendered inadmissible because he refused to answer a cross-interrogatory, if it appears to have been immaterial. *White* v. *Solomon*, 516.

DEVISE AND LEGACY.

1. A testator by his will gave the residue of his estate in trust for his son F., and provided that "anything remaining at his decease shall be equally divided among my three daughters." One of the daughters, B., died after the death of the testator, and F., the life tenant, died after the death of B. *Held*, that the remainder was vested, and that it should be distributed, one third each to the daughters, the third which would have gone to B. if living to go to her legal representatives so far as it was personal property, and to her heirs by the statute so far as it was real estate. *Bancroft* v. *Fitch*, 401.
2. A testator gave by will various pecuniary legacies to certain relatives, including three nieces, A., B., and C., to each of whom he gave ten thousand dollars, and then divided the residue among those relatives in proportion to the respective amounts given. By clause second of the codicil he revoked the legacies to A., B., and C., and in place thereof gave each the sum of five thousand dollars, and by clause third of the codicil he gave to three other nieces not named in the will five thousand dollars each. The first clause of the codicil appointed an executor and trustee in place of one deceased, and the fourth ratified the will in all other respects than those named in the codicil. *Held*, that the change made by the codicil in the legacies to A., B., and C. did not affect their shares under the residuary clause of the will, and that the legacies given by clause third of the codicil to the three other nieces did not entitle them to come in under the residuary clause of the will. *Pendergast* v. *Tibbetts*, 270.

See ESTATES OF PERSONS DECEASED, 2; JURISDICTION; PUBLIC CHARITY; TAX, 3.

DISCHARGE.

See INSOLVENT DEBTOR, 2.

DISCONTINUANCE.

See EQUITY, 4; SUPERIOR COURT.

DISTRICT COURT.

See INDICTMENT, 1; MECHANIC'S LIEN, 1.

DUE CARE.

See EMPLOYERS' LIABILITY ACT, 10; INFANT; MASTER AND SERVANT, 8, 9, 11–13; NEGLIGENCE, 1, 2, 4, 7, 9, 10, 12; TRESPASS, 4; VERDICT, 3.

DYING DECLARATIONS.

See EVIDENCE, 29.

EASEMENT.

See DEED, 2; HIGHWAY, 2; SEWER.

EDUCATION.

See PUBLIC CHARITY, 1, 2, 5; SCHOOL.

ELECTION.

While a court of law will not permit a defendant to be vexed at the same time, in the same jurisdiction, by the prosecution of two suits for the same cause of action by the same plaintiff, a court of equity, instead of dismissing the second suit, usually permits the plaintiff to elect which suit he will proceed with, and when the plaintiff has brought an action at law and afterwards a suit in equity, if the plaintiff elects to discontinue the action at law, he usually is permitted to prosecute the suit in equity. *Sandford* v. *Wright*, 85.

ELECTIONS.

See CONSTITUTIONAL LAW, 2.

ELECTRICITY.

See INFANT, 1; NEGLIGENCE, 10, 11.

ELEVATOR.

See MASTER AND SERVANT, 13.

EMINENT DOMAIN.

ground main sewer," a person whose property is injured by the temporary drying up of a pond, which is his source of water supply on his land in the vicinity, caused by the work of constructing the sewer, the water returning to the pond after the work is finished, cannot maintain a petition for an assessment of damages, under § 1 of St. 1890. *Chelsea Dye House & Laundry Co.* v. *Commonwealth*, 350.

8. The Commonwealth, as owner in fee, after the taking by the Metropolitan Park Commission, under St. 1893, c. 407, § 4, of land and rights in land, including ponds and streams of water within the limits of such land, has the rights which belong to a private owner of land and of ponds and streams on the land. *Proprietors of Mills on Monatiquot River* v. *Commonwealth*, 227.

9. The taking by the Metropolitan Park Commission, under St. 1893, c. 407, § 4, of land and rights in land, including streams of water within the limits of such land, does not take or impair the water rights of those persons who own land not taken, but to or through which the streams of water flow from the land so taken, and such persons have no foundation for a petition for an assessment of damages under § 7. *Ibid.*

10. The St. 1818, c. 35, incorporating the proprietors of mills on a river, and authorizing them to make reserves of water in certain great ponds, to erect suitable dams for the purpose of raising the water in the ponds, to lower the outlets of the ponds, and to draw off the waters from the ponds, did not confer upon the corporation the right of eminent domain. *Ibid.*

11. A statute incorporated the proprietors of mills on a river, and authorized them to make reserves of water in certain great ponds, to erect suitable dams for the purpose of raising the water in the ponds, to lower the outlets of the ponds, and to draw off the waters from the ponds. Before the corporation had exercised the powers given by the statute as to one of the ponds, the land at the outlet and around the pond, which was never owned by the corporation, was taken by the Metropolitan Park Commission under St. 1893, c. 407, § 4. *Held*, that the corporation, by the statute creating it, acquired no rights of property in the pond, and could not maintain a petition for an assessment of damages under St. 1893, c. 407, § 7. *Ibid.*

12. A petition cannot be maintained against a city for an assessment of damages, under Sts. 1890, c. 428, § 5, and 1891, c. 123, § 1, for diminishing the market value of the petitioner's land, obstructing its light and air, and causing dust to be blown upon it, by building an embankment and bridge on land taken from a third person on the opposite side of the street from the petitioner's land, no part of which is taken, for the purpose of abolishing a crossing of the street by a railroad at grade. KNOWLTON & MORTON, JJ., dissenting. *Rand* v. *Boston*, 354.

13. At the trial of a petition for an assessment of damages sustained by the taking, for the purposes of a railroad, of a portion of a large tract of land, if it appears that the other land of the petitioner not taken had been made separate and distinct parcels by transforming the locality into a village with wrought and travelled streets, and making all the land not included in the streets into exactly defined house lots, some of which had been sold to other persons, and each of which then owned by the petitioner was held

EMPLOYERS' LIABILITY ACT.

ENCUMBRANCE.

EQUITY.

I. *Jurisdiction and General Principles.*

ment leading him to take said lease, and to purchase the property therein, and in said shop and the good will of the business, — I hereby agree with said A. . . . under penalty of one thousand dollars (to be forfeited and paid said A. or his legal representatives, in the event of my committing any breach of this agreement) not to engage directly or indirectly, or become in any manner interested, in the drug business within at least two miles of said apothecary shop, whose lease said A. takes from me, without first obtaining the written consent of said A. thereto." *Held*, on a bill in equity for an injunction for a violation of the contract, and for the payment of one thousand dollars as liquidated damages, that the contract was valid; that, as there was evidence of laches on the part of A., an injunction was rightly refused; that the sum named was a penalty, and that the judge was warranted in finding substantial damages. *Smith* v. *Brown*, 584.

See CAPE COD SHIP CANAL, 1; CREDITORS' BILL, 1, 3, 4; DEED, 3; ESTOPPEL, 2; FERRY, 1, 5; PART OWNERS, 1; PUBLIC CHARITY, 5; SPECIFIC PERFORMANCE; TRADEMARK.

II. *Pleading and Practice.*

3. On a bill in equity for instructions as to the interpretation of a deed of trust, questions will not be considered if enough does not appear in the bill to enable the court to pass upon them. *Wardens & Vestry of St. Paul's Church* v. *Attorney General*, 188.
4. After issue is joined in a suit in equity, if the plaintiff moves for leave to amend his bill by striking out one of several claims included therein, which motion is denied, and thereupon, without leave of court, he files a discontinuance of his bill as to such claim, upon which no order of court is made, the plaintiff's action is nugatory, and the defendant is entitled to treat the claim as a part of the matter to be heard and determined in the suit. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 222.
5. If during the trial of a suit in equity exceptions are taken by the defendant to the admission of evidence, and after a decree in favor of the plaintiff, from which no appeal is taken, the case is reported for the determination of this court upon the questions of law presented by the report, the court will not revise the findings of fact necessarily involved in the decree, although all the evidence is reported. *Riley* v. *Hampshire County National Bank*, 482.
6. A writ of error does not lie to reverse or revise a decree in equity. *Evans* v. *Hamlin*, 239.
7. A bill of review is the customary remedy to reverse a final decree in equity for errors of law apparent on the record, but it is suggested by the court, although not decided, that that remedy is not open where the final decree has been affirmed by the full court, and especially where it has been so affirmed by the consent of all the parties. *Ibid.*

See CAPE COD SHIP CANAL, 2; CREDITORS' BILL, 2; DECREE; ELECTION; PUBLIC CHARITY, 5.

ESTATES OF PERSONS DECEASED.

1. Where a mortgage upon the real estate of the wife is made by the husband and the wife in her right, to secure their joint and several promissory note, the note will be regarded after his death, upon the petition of his executor to obtain the instructions of the court, as his own personal debt, if that conclusion seems justified by the facts, though meagre, with the inferences that may be drawn from them. *Minot, petitioner*, 38.
2. A testator by will gave all his real and personal estate to his nephew in trust for the benefit of his insane daughter, the same to be conveyed to her if her reason was restored and to pass by her will, but if she died intestate to pass by the testator's will as follows: "four undivided fifth parts of the same rest and residue of my real estate" to the nephew, "in trust for the use and benefit of his brothers and sisters and their respective heirs, namely: W., B., M., wife of I., and S.; but said rest and residue of my real estate is to be holden upon the condition that the fee simple in the same shall never be sold, but the same be built upon or continue to be used as a farm." After giving numerous legacies, the will concluded with the provision that the residue of the real and personal estate remaining after the decease of the daughter intestate should go to the testator's nephews and nieces and others. The testator died during the life of the daughter, who died during the lives of the other beneficiaries, and the nephew died without having qualified as trustee before the filing of the plaintiff's bill to compel specific performance of an agreement to purchase a portion of the real estate. *Held*, that the condition against alienation was void, and that the provision as to building upon the real estate or continuing to use it as a farm formed part of the condition; that the trustee took the estate for the use and benefit of the devisees and the statute of uses immediately executed the use in them except as to M., who, being a married woman, took an equitable estate in fee simple during coverture, and upon the death of the husband the trust terminated, and the statute executed the use in her so as to give her the legal estate; that the appointment of a trustee was not necessary, and that the real estate in question was not included in the last residuary clause. *Cushing* v. *Spalding*, 287.

See DEVISE AND LEGACY; JURISDICTION; WILL.

ESTOPPEL.

1. In order to establish an estoppel on the part of the plaintiff in an action, it is necessary that there should be evidence tending to show that the defendant was induced by the plaintiff's conduct to do something different from what he would otherwise have done, and that the plaintiff knew or had reasonable cause to know that the defendant would so act. *Lincoln* v. *Gay*, 537.
2. That a married woman, who has indorsed a promissory note given by her husband to a bank for a loan to him and pledged to the bank shares of stock owned by her as collateral security for the note, subsequently indorses

EVIDENCE.

EXCEPTIONS.

1. A point not taken at the trial is not open upon a bill of exceptions. *Hicks* v. *New York, New Haven, & Hartford Railroad*, 424.

2. A contention which is not shown by the bill of exceptions to have been made in the Superior Court is not open in this court. *Farnsworth* v. *Mullen*, 112.

3. An exception to a refusal to give a request for a ruling that a statute is unconstitutional will not be considered if the instruction to the jury, which was sufficiently favorable to the party asking the request, renders the exception immaterial. *Commonwealth* v. *Gorman*, 549.

4. While, in an action to recover damages for an assault in being ejected from the train of a railroad company, the defendant should be permitted to introduce in evidence one of its rules as to the manner in which passengers should conduct themselves to support its contention that the conductor was justified in ejecting the plaintiff, yet it cannot be said that the defendant is harmed by its exclusion if the rule of law given by the judge to the jury for their guidance was more specific than the rule of the company, but was the same in substance. *O'Laughlin* v. *Boston & Maine Railroad*, 139.

5. An exception to the exclusion of evidence, offered to contradict the testimony of another witness, will not be sustained if the excepting party fails to show that the excluded evidence, if received, might properly have been considered upon the issue. *Chalmers* v. *Whitmore Manuf. Co.* 532.

6. The excepting party has no ground of exception to the refusal to permit him to cross-examine a witness as to his qualifications as an expert before

EXECUTION.

EXPERT.

1. One acquainted with the handwriting of another may testify concerning it. *Commonwealth* v. *Hall*, 152.
2. It is not necessary, in order to qualify a witness as an expert as to value of real estate, that he should have lived in the locality about which he is testifying, or should have bought, or sold, or owned land there. His competency depends upon other considerations, such as his knowledge of values in the particular locality, the extent of his experience regarding real estate in the city or town where the property is situated, and the attention which he has given to the subject generally. *Lyman* v. *Boston*, 99.
3. A question to an expert witness at the trial of an action, which assumes as an absolute fact, and not as a hypothesis, a matter which is in dispute, is properly excluded. *Chalmers* v. *Whitmore Manuf. Co.* 532.
4. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the breaking of a bolt in a machine upon which he was at work, an expert witness may give his opinion in regard to the relative fitness of steel and iron or other metals for use in the construction of a bolt for such a machine, but he cannot give an opinion which includes his views upon any conflicting evidence. *Ibid.*

FALSE IMPRISONMENT.

FEE.

FERRY.

1. Where a railroad corporation whose charter is subject to alteration by the Legislature has, under legislative sanction, acquired an existing ferry franchise as an extension and part of its railroad line, the Legislature may require such railroad corporation and its successors to operate the ferry,

FIRE INSURANCE.

See EVIDENCE, 9, 10; INSURANCE, 7-21.

FISH AND FISHERIES.

1. The provisions of Pub. Sts. c. 91, § 51, are intended to prohibit an owner of land on a stream not navigable from taking trout with a net from the stream on his own land, as well as to prohibit other persons from doing so. *Commonwealth* v. *Follett*, 477.
2. Trout are not a class of animals which can become the absolute property of anybody while in an open unenclosed stream. *Ibid.*

FORFEITURE.

See BENEFICIARY ASSOCIATION.

FORGERY.

See PRINCIPAL AND AGENT, 3, 4.

FRAUD.

See EVIDENCE, 15, 16; FRAUDULENT PREFERENCE; PRINCIPAL AND AGENT, 3, 4.

FRAUDULENT PREFERENCE.

1. In an action by an assignee in insolvency to recover certain property, or the value thereof, mortgaged by the plaintiff's insolvent to the defendant, in fraud of the insolvent law, it is enough, under the Pub. Sts. c. 157, § 96, to show that the debtor was insolvent; that the conveyance was made within six months before the filing of the petition, and was with a view to give a preference; and that the person to whom the conveyance was made had reasonable cause to believe the person making the conveyance to be insolvent, and that it was made in fraud of the laws relating to insolvency; and the fact that the defendant assumed a new liability by taking the mortgage cannot avail him, if the mortgage was also given as security for a pre-existing liability. *Whipple* v. *Bond*, 182.
2. In an action by an assignee in insolvency to recover certain property, or the value thereof, mortgaged by the plaintiff's insolvent to the defendant, in fraud of the insolvent law, the defendant has no ground of exception to the refusal to instruct the jury that, if they "find that the conveyance was made in good faith by the debtor, with the intent solely to obtain means for the continued prosecution of his business, and that the intention and expectation that he would be able to do so, the same is valid, and will not be invalidated by the fact that the person to whom such conveyance is made is a person having a claim against the debtor, or is under liability for him to the amount of a part of the price, which claim or liability is discharged as a part of the consideration for the conveyance, and the plaintiff cannot recover." *Ibid.*

GAMING.

The offence of having policy slips in one's possession can be committed at any time, and therefore, at the trial of a complaint under St. 1895, c. 419, possession at any time may be proved, although the slips were not found in the defendant's possession when arrested on the complaint, nor when arrested for any violation of law mentioned in § 3 of the statute. *Commonwealth* v. *Gorman*, 549.

GIFT.

See PUBLIC CHARITY; SAVINGS BANK, 2; TRUST AND TRUSTEE, 3, 4.

GOODS SOLD AND DELIVERED.

See BURDEN OF PROOF; CONTRACT, 5.

GRADE CROSSING.

See ACTION, 3; EMINENT DOMAIN, 12; NEGLIGENCE, 1–7, 9.

GUARANTY.

1. A guaranty of "my willingness and intention to become responsible for the work of the new pattern, size No. 7, of the Duplex Stove Company, to the amount of $500, in the event of any such action on my part becoming necessary for any cause," means that if for any cause the company should be unable to pay for the new pattern, and it should become necessary for the guarantor to pay for it, he would do so to the extent of $500. Knowledge of the acceptance of a guaranty is equivalent to notice. *Bascom* v. *Smith*, 61.
2. In an action upon a guaranty of the cost of a set of patterns to be made for a corporation, the defendant contended that he was not bound by the guaranty because he understood that the contract between the plaintiff and the corporation was to be for a set of patterns of wood and another set of iron, whereas the order actually given by the agent of the company, and executed by the plaintiff, was for a set of wooden patterns only. The defendant was a shareholder in the company, was familiar with its affairs, and had seen the correspondence between the plaintiff and the company, wherein, although nothing was said as to whether the patterns were to be of wood or of iron, the cost of wooden patterns only was estimated. The defendant also knew that the cost of iron patterns would largely exceed the amount which he had guaranteed. On this point the judge instructed the jury: "There is another matter to which I ought to refer, and that is the claim of the defendant that there was no guaranty of this contract, because he did not understand that the contract between the company and the plaintiff was a contract to make wooden patterns alone, but that he understood that the contract was to make a complete set of patterns, wood and iron both; and that, inasmuch as he understood it that way, that was the contract, and not the contract to make a set of wooden patterns alone, and he agreed to guarantee a contract which, it appears upon the plaintiff's own showing now, was not the contract which he understood he was guaranteeing, that therefore he is not bound. The claim is not correct. If a man undertakes to guarantee a contract which he may know the terms of upon inquiry, and he makes no effort to find out what the terms are, but guarantees it, and says, 'I will guarantee that contract,' and nobody misleads him about it, and he has an opportunity to know what it is if he sees fit, but does not take pains to find out, but guarantees it without knowing, he is bound. Now, whether that applies in this case you will determine upon the evidence." *Held*, that the instructions were correct. *Ibid.*

GUARDIAN AND WARD.

The reasonableness of payments by a guardian to the mother of the ward, who is a minor, for board furnished the ward, and for the kitchen fire, which was the only fire furnished the ward, may be determined on the guardian's accounting, and a finding in his favor will not be disturbed if it was warranted by the evidence. *Melanefy* v. *O'Driscoll*, 422.

See LIMITATIONS, STATUTE OF; PRINCIPAL AND SURETY.

HANDWRITING.

See EXPERT, 1.

HEIR.

See TRUST AND TRUSTEE, 8; WILL.

HIGHWAY.

1. A relocation of a public way, establishing its termini, is conclusive, and evidence in a subsequent proceeding that a road included in such termini had not originally been a part of the public way, and the testimony of one of the petitioners for the relocation that, when the petition was signed, there was no controversy as to the termini of the public way, is not admissible to impeach the adjudication. *Lincoln* v. *Commonwealth*, 1.
2. A highway by prescription may be relocated as well as a way laid out by a town. *Ibid.*

See ACTION, 3; BETTERMENT, 1, 2, 4; BRIDGE; COUNTY COMMISSIONERS; EMINENT DOMAIN, 5, 7; EVIDENCE, 1, 8, 26; INDEMNITY; NEGLIGENCE, 1–7, 9; SEWER; TOWN.

HUSBAND AND WIFE.

See COLLATERAL SECURITY, 2, 3; ESTATES OF PERSONS DECEASED; ESTOPPEL, 2; NOTICE; SURVIVORSHIP; USE AND OCCUPATION, 2.

ILLEGALITY.

See CONSTITUTIONAL LAW; CONTRACT, 2; EVIDENCE, 12, 13; MONEY HAD AND RECEIVED; PRINCIPAL AND AGENT, 5; PUBLIC CHARITY, 1, 5; RAILROAD, 2.

INCOME.

See BOND, 1; TRUST AND TRUSTEE, 2, 6, 8.

INDEMNITY.

INJUNCTION.

See EQUITY, 2; TRADEMARK.

INSANITY.

See LIMITATIONS, STATUTE OF; PAUPER; PRINCIPAL AND SURETY.

INSOLVENT DEBTOR.

1. If A., the creditor to the amount of five hundred dollars of B., who is one of two partners, gives his check for that amount to the firm, and gives B. a receipt for five hundred dollars, and B. gives A. the firm's note for one thousand dollars, without the assent or knowledge of the other partner, and there is nothing in their dealings with each other, or in B.'s dealings with A. or other parties, which expressly or impliedly authorizes B. to give the firm's note in payment of his own private indebtedness, the transaction is, in substance, paying the private debt of B. to the extent of five hundred dollars, and A. can only prove his claim for five hundred dollars with interest against the estate of the firm in insolvency. *Rice* v. *Doane*, 136.
2. Where, after B. has received his discharge in insolvency, A. brings an action against him on a claim which was provable against B.'s insolvent estate, but which A. did not prove against it, the failure of B. to appear and plead his discharge in insolvency under Pub. Sts. c. 157, § 83, is not a waiver of his rights, but after execution has issued the discharge may be set up as a bar to an application for a certificate authorizing the arrest of B. *Hall* v. *Justices of the Municipal Court*, 155.

See FRAUDULENT PREFERENCE.

INSTRUCTIONS.

See COLLATERAL SECURITY, 4; EMINENT DOMAIN, 3, 4; EQUITY, 3; ESTATES OF PERSONS DECEASED, 1; EXCEPTIONS, 3, 4; FRAUDULENT PREFERENCE, 2; GUARANTY, 2; INSURANCE, 5; LAND DAMAGES; MANSLAUGHTER, 4; MASTER AND SERVANT, 7, 15, 16; PART OWNERS, 5; PRINCIPAL AND AGENT, 3; TRIAL, 1.

INSURANCE.

1. An action upon a policy of life insurance issued before the passage of St. 1894, c. 225, should be brought by the administrator of the estate of the insured, and not by the beneficiary. *Wright* v. *Vermont Life Ins. Co.* 302.
2. If the promise in a policy of life insurance is to pay the sum named therein at the office of the insurance company in a certain city within ninety days after satisfactory proof of the death of the insured, a right of action accrues at the expiration of ninety days after such satisfactory proof is furnished, without any formal demand of payment. *Ibid.*

See CONTRACT, 4; EVIDENCE, 9–11.

INTEREST.

See BOND, 1, 2; DAMAGES, 1.

INTOXICATING LIQUORS.

1. In order to justify the jury in finding a verdict of guilty on a complaint for bringing intoxicating liquors into a town to be there sold in violation of law, it is not necessary that they should be satisfied that the defendant began and completed the transportation, but only that he knowingly aided and assisted in bringing the liquor into the town for illegal sale there. *Commonwealth* v. *Currier*, 544.
2. On the trial of an indictment for exposing and keeping for sale intoxicating liquors in a town in the neighborhood of Boston, A., a licensed dealer in intoxicating liquor in Boston and the owner of an express run by him between Boston and the town, and B. and C., who were his servants in running the express and were paid by him to deliver liquors in the town, may be properly convicted if there was evidence on which the jury might find that the liquors were not delivered until they reached in the town the hands of those ordering them, and that until then they were at the risk of the defendant A. *Commonwealth* v. *Hugo*, 157.
3. A defendant may be convicted on a complaint charging him with illegally keeping intoxicating liquors with intent to sell the same, if his conduct when the house in which he lived was visited by officers with a search-warrant was such as to warrant an inference that the liquors found secreted in the building were kept by him for unlawful sale. *Commonwealth* v. *Lynch*, 541

See COMPLAINT, 2.

ITINERANT VENDORS.

1. Persons who are a part of a travelling troupe composed of Indians, a comedian, and a physician, which troupe gives entertainments consisting of songs, dances, farces, Indian ceremonies, and lectures, the purpose of which and its entertainments is to advertise certain proprietary medicines, and which hires and occupies for two weeks a public hall in a town, and there offers for sale, and sells, both during the entertainments, which are in the evenings, and during the daytime, bottles of the medicines to such parties as call for them, may be found to be itinerant vendors within St. 1890, c. 448, § 1. *Commonwealth* v. *Newhall*, 338.
2. The St. 1890, c. 448, as to itinerant vendors, as amended by St. 1894, c. 525, is not a revenue act, but a statute passed under the police power of the Commonwealth, and does not impose a tax upon interstate commerce. *Ibid.*

JUDGE.

See EVIDENCE, 24, 25; EXCEPTIONS, 3, 4, 6; FRAUDULENT PREFERENCE, 2; GUARANTY, 2; INSURANCE, 5; LAND DAMAGES; LAW AND FACT; MANSLAUGHTER, 4; PART OWNERS, 5; POOR DEBTOR, 1; SAVINGS BANK, 1; TRIAL.

JUDGMENT.

JURISDICTION.

The jurisdiction of the Probate Court to determine all questions in relation to a tax that may arise affecting any devise, legacy, or inheritance, under St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," is not exclusive, and does not take away the right of a legatee to sue at common law in the Superior Court for his legacy. *Essex* v. *Brooks*, 79.

JURY.

LACHES.

LAND DAMAGES.

On the assessment of damages for the taking of land by a city in December, 1892, under a statute for a public park, the petitioner has no ground of exception to an instruction to the jury that, if the scheme of public improvement existing in April, 1892, when all the land in the neighborhood except the petitioner's estate and two adjoining estates had been taken, did not contemplate the taking of the petitioner's land, he would be entitled to recover damages for the enhanced value resulting from such scheme, but that if it did he would not; and it is competent for the jury to find that the scheme contemplated the taking of the petitioner's land from facts presented and from inferences to be drawn therefrom, although there is no direct evidence to the point. *Bowditch* v. *Boston*, 107.

LANDLORD AND TENANT.

LAW AND FACT.

After the judge has construed a written contract with reference to facts assumed to exist when it was made, his leaving to the jury the determination of such facts is not a submission to them of the construction of the contract. *Bascom* v. *Smith*, 61.

See EMPLOYERS' LIABILITY ACT, 10; EQUITY, 5; INSURANCE, 5, 15; MASTER AND SERVANT, 9, 11, 12; NEGLIGENCE, 3–5, 7, 9, 10; VERDICT.

LEGACY.

See DEVISE AND LEGACY.

LEGISLATURE.

See CONSTITUTIONAL LAW; EMINENT DOMAIN, 1; PRINCIPAL AND AGENT, 5, 6.

LICENSE.

See EVIDENCE, 26; INDEMNITY; INDICTMENT, 2.

LIEN.

See MECHANIC'S LIEN.

LIFE ESTATE.

See SURVIVORSHIP; TRUST AND TRUSTEE, 1, 8.

LIFE INSURANCE.

See EVIDENCE, 11; INSURANCE, 1–6.

LIMITATIONS, STATUTE OF.

An action by an insane ward by his guardian, brought more than six years after the date when the transaction in question occurred, is not barred by the statute of limitations, if it comes within the provisions of Pub. Sts. c. 197, § 9. *Hervey* v. *Rawson*, 501.

MANSLAUGHTER.

1. At the trial of an indictment for manslaughter by shooting, even if the exclusion of the question to the defendant by her counsel, "In October did you have a miscarriage?" was wrong, in the absence of an offer to connect the fact with the defendant's condition in the middle of December,

MARINE INSURANCE.

See INSURANCE, 22-26.

MARRIED WOMAN.

See COLLATERAL SECURITY, 2, 3; ESTATES OF PERSONS DECEASED; ESTOPPEL, 2; USE AND OCCUPATION, 2.

MASTER AND SERVANT.

4. A person assumes the risk of such dangers as ordinarily are incident to the service in which he is engaged, and if after he has entered the service no change is made in the mode of doing the business so as to increase its dangers, he cannot be heard to complain that it might have been made safer, or that it was conducted in a hazardous manner. *Caron* v. *Boston & Albany Railroad*, 523.
5. An employee, who, while attempting with another to place a heavy iron casting on a truck, is injured by the jarring of the floor occasioned thereby, causing other castings to fall in the direction of the truck, cannot recover for the injuries from his employer, if he fails to prove that the castings were in a dangerous position, and that the employer knew it, or that they had remained in this position so long a time that the employer ought to have known it. *Reed* v. *Boston & Albany Railroad*, 129.
6. Where a person is injured by the sudden starting of a machine which he is cleaning, if there is no defect in the machine, and it does not differ from similar machines in use elsewhere, and is in the same condition as it was when he entered upon his employment, the mere fact that certain contrivances, if on the machine, might have prevented its starting, is not sufficient to show a breach of duty on the part of his employer. *Ross* v. *Pearson Cordage Co.* 257.
7. In an action for personal injuries caused by the fall of an iron block from a derrick upon an employee, which fall was due to the breaking of a rope at a point where it had been spliced, the weight attached to the rope not being sufficient to break or to endanger the apparatus, if in proper condition, the defendant has no ground of exception to a refusal to rule that the mere breaking of the rope was not *prima facie* evidence of negligence on the part of the defendant, and to an instruction to the jury that if they found that the rope was defective while in the defendant's care, that fact was evidence which, unexplained, would warrant them in finding that the defendant was negligent. *Res ipsa loquitur*. *Graham* v. *Badger*, 42.
8. If an employee had a right to expect due care from his employer as to his permanent appliances, and there was evidence that he was employed to do what he was doing, and that his position was seen by his employer, and it may be that the doing of his work required him at moments to be in the position he was in when injured, it cannot be said as matter of law, in an action for his injuries, that he was negligent in being where he was. *Ibid.*
9. In an action for personal injuries occasioned to the plaintiff, while in the defendant's employ, by the alleged negligence of the defendant in failing to furnish suitable appliances and safeguards, if the evidence is conflicting upon the question whether certain appliances and safeguards for the work in question, which he did not furnish, were necessary or customary, and the evidence shows that the plaintiff was of more than ordinary skill and experience in his trade, but that he never had any experience in this particular work, the questions whether the defendant was at fault, and whether the plaintiff had assumed the risk, or was not in the exercise of ordinary care, are for the jury. *Gibson* v. *Sullivan*, 557.
10. An employer is not liable for the negligence of an employee whose daily duty it is to oil machinery, and who, on a single occasion, after oiling it,

MECHANIC'S LIEN.

NEGOTIABLE INSTRUMENTS.

NEW BEDFORD.

See BETTERMENT, 3; FERRY, 2, 3, 5.

NEW TRIAL.

If an action for breach of the covenant against encumbrances in a deed is reported by the Superior Court for the determination of this court, which is to enter such judgment "as shall be deemed proper," and it does not appear from the report upon what principles of law the damages were assessed, a new trial will be ordered upon the question of damages only. *Richmond* v. *Ames*, 467.

NOTICE.

1. A notice to a grantor of land, that the grantee has been sued by a third person claiming a right of way in the land upon which the grantee has encroached with a building, should be such as to give the grantor information that he is called upon to come in and defend the suit, if he desires, and that he is to be held responsible for the result of the suit. *Richmond* v. *Ames*, 467.
2. Evidence that a husband, who acted as the agent of his wife in the management of her real estate, was informed orally by the grantee in a deed from her that such grantee had been sued by a third person claiming a right of way in the land conveyed upon which the grantee had encroached with a building, and that the husband might be needed as a witness in such suit, without any intimation that his wife should be informed of it and should take upon herself the defence of the suit, will not warrant a finding that the notice was intended as a notice to the wife to come in and defend the suit, or was so understood by the husband. *Ibid.*

See ACTION, 3; BENEFICIARY ASSOCIATION, 1; CONSTABLE; GUARANTY, 1; INSURANCE, 8, 20, 21; MASTER AND SERVANT, 11; NEGLIGENCE, 2–5; PAUPER; PROMISSORY NOTE; SCHOOL; TRESPASS, 1, 2, 4.

OBSCENE PUBLICATION.

See INDICTMENT, 3.

PARENT AND CHILD.

See GUARDIAN AND WARD; INFANT, 1; SCHOOL, 2.

PARK.

See EMINENT DOMAIN, 8, 9, 11; EVIDENCE, 6, 7, 25; LAND DAMAGES.

PARTIES.

See CAPE COD SHIP CANAL, 2; CONTRACT, 6; FERRY, 5; INSURANCE, 1; PART OWNERS, 1–4.

PARTNERSHIP.

See CONTRACT, 6–8; INSOLVENT DEBTOR, 1.

PART OWNERS.

1. A ship's husband made disbursements above earnings for whatever was necessary for the business during a series of voyages. He was a part owner of the vessel at the time, but had sold his share. He sued one part owner at law for his proportion, there being other part owners not settled with. *Held*, that the action could not be maintained, but that the only remedy was in equity, notwithstanding St. 1887, c. 383. *Smith* v. *Butler*, 37.
2. In an action against two of several owners of a steamer, one of whom was the managing agent, for expenses incurred and services rendered in the superintendence of the building of the steamer, the contention that an action at law will not lie as the plaintiff was a part owner of the steamer cannot be maintained if the jury are warranted in finding, either that the plaintiff never actually became a part owner, or that, if his ownership was complete, a new arrangement was made which left him as if it had never existed. *Nickerson* v. *Spindell*, 25.
3. Two of the owners of a steamer who are sued for expenses incurred and services rendered relative thereto are liable as if they were the sole owners, if they fail to plead in abatement the nonjoinder of the other owners. *Ibid.*
4. In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, the signing by A. and B. with others of an agreement to take the amounts in the ownership set against their respective names, "the same to be under the management of A. & Co.," and of an agreement to pay "A., managing owner, the sums set opposite our names for the purpose of paying outstanding bills against said boat to date, the surplus amount to be used as working capital for the said boat," and the testimony that B. visited the steamer and suggested a certain name for her, warrant a finding that both A. and B. were part owners in her. *Ibid.*
5. In an action against A. and B., two of several owners of a steamer, for expenses incurred and services rendered in the superintendence of the building of the steamer, an instruction to the jury, "that if the plaintiff rendered the services and incurred the expenses in question at the request of A., acting in his own behalf and representing the defendant B., and if the plaintiff rendered said services expecting to be paid for them, he would be entitled to recover the value of his services and the expenses incurred

by him," not given as the whole law of the case, but to be considered in connection with the other instructions, which required the jury to determine the relation of the plaintiff to the transaction and to the defendant at the time of bringing the suit, is correct. *Nickerson* v. *Spindell*, 25.

PAUPER.

A city, having given the notice required by the Pub. Sts. c. 84, § 14, is entitled to recover from the town of a pauper's settlement the full amount paid by the city for the support of the pauper in a State lunatic hospital, from three months prior to the notice down to the date of the writ, provided the writ is brought within two years from the date of the notice. *Northampton* v. *Plainfield*, 506.

PAYMENT.

In an action of contract, the defence of payment is open under an answer to a declaration in set-off alleging "that, if the defendant shall prove that plaintiff ever owed the defendant the amounts set forth in said counts, he has paid the same in full." *Goss* v. *Calkins*, 546.

See Action, 1; Burden of Proof; Creditors' Bill, 4; Estoppel, 2; Guardian and Ward; Insurance, 2, 3; Principal and Agent, 2, 6; Trover.

PENALTY.

See Contract, 9; Equity, 2; Ferry, 5.

PENDING SUIT.

See Trover.

PERJURY.

See Indictment, 1, 2.

PERPETUITY.

See Trust and Trustee, 2, 8.

PERSONAL PROPERTY.

See Devise and Legacy, 1; Tax, 1, 2.

PLAN.

See Evidence, 1.

PLEADING.

See ACTION, 4; COMPLAINT; CORPORATION, 1; CREDITORS' BILL, 2; EQUITY, 3, 4; INDICTMENT; INSOLVENT DEBTOR, 2; MECHANIC'S LIEN, 3; PART OWNERS, 3; PAYMENT; SLANDER, 2.

PLEDGE.

See COLLATERAL SECURITY; ESTOPPEL, 2; EVIDENCE, 14, 15, 28; PRINCIPAL AND AGENT, 3.

POLICE POWER.

See ITINERANT VENDORS, 2.

POND.

See EMINENT DOMAIN, 7, 8, 10, 11, 14.

POOR DEBTOR.

1. The magistrate, in pursuance of a previous request of the creditor's counsel, has a right to postpone the examination of a poor debtor. *Manning* v. *Reynolds*, 150.
2. The presence of the citation at a poor debtor hearing is not necessary, if the debtor has been ordered to appear and is in court, and his counsel has entered a general appearance. *Ibid.*
3. A debtor departs without leave and without justification if no fact appears in the record of the court or outside of it to justify the departure. *Ibid.*

POWER.

See TRUST AND TRUSTEE, 1.

PRACTICE.

See ACTION, 1, 3; AGREED FACTS; BETTERMENT, 4–7; BOND, 3; BURDEN OF PROOF; COLLATERAL SECURITY, 2; CONSTABLE; CORPORATION, 2; CREDITORS' BILL, 1–3; DECREE; DEPOSITION; ELECTION; EMINENT DOMAIN, 16; EQUITY, 3–7; EXCEPTIONS; FERRY, 5; INSOLVENT DEBTOR; INSURANCE, 1–3, 6, 17; MANSLAUGHTER, 4; MECHANIC'S LIEN; MONEY HAD AND RECEIVED; NEW TRIAL; NOTICE; PART OWNERS, 1–3; PAYMENT; POOR DEBTOR; PRINCIPAL AND AGENT, 1; PRINCIPAL AND SURETY; SAVINGS BANK, 1; SCHOOL; SUPERIOR COURT; SUPREME JUDICIAL COURT; TRIAL; VERDICT.

PRESCRIPTION.

See DEED, 3; HIGHWAY, 2.

PRESUMPTION.

See MASTER AND SERVANT, 7.

PRINCIPAL AND AGENT.

1. It is not within the ordinary scope of the duty of an agent, appointed to manage real estate, to appear for his principal in a suit between other persons relating to real estate not belonging to the principal, but which has been conveyed by the principal, and to take upon himself the defence of such suit. *Richmond* v. *Ames*, 467.
2. An agent who merely solicits orders for goods, sending these orders to his principal to be filled, has no implied authority to receive payment for the goods; and a payment to him will not discharge the purchaser except on proof of some authority to the agent other than that of making sales. *Clark* v. *Murphy*, 490.
3. If A. obtains goods from B. by means of false and fraudulent representations that he has reliable customers for them, and by means of forged conditional contracts of sale, and then pawns the goods to C., who takes them in good faith, B. may maintain an action against C. for the conversion of the goods; and an instruction to the jury that, in order to protect C. under Pub. Sts. c. 71, the goods must have been intrusted to A. "to sell and dispose of in the ordinary course of business as a common law sale," is harmless. *H. A. Prentice Co.* v. *Page*, 276.
4. Where an agent or factor procures goods to be intrusted to him for delivery to third persons under forged conditional contracts of sale, the goods are not intrusted to him for sale, within the meaning of Pub. Sts. c. 71. *Ibid.*
5. A contract made by the Commonwealth, under the authority of a legislative resolve to employ a person who is the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under an act of Congress, and whose compensation is to be paid out of any amount so collected by him, cannot be declared void as against public policy. *Davis* v. *Commonwealth*, 241.
6. The Commonwealth, under the authority of a legislative resolve, employed A., who was the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the Commonwealth for a refund of the direct tax paid under an act of Congress, and fixed his compensation, which was to be paid out of any amount received therefrom. A. rendered services in procuring the passage of an act of Congress, which appropriated a sum for the refund of the tax, and provided, among other things, that no part of the money so appropriated should be paid out to any agent under any contract for services existing or previously made between any State and agent. A. also rendered further services in preparing the form of a resolve to be passed, in accordance with the requirements of the act, accepting the sum appropriated, and also the form for obtaining payment of the money. The Commonwealth, under a

PRINCIPAL AND SURETY.

PROBATE COURT.

PROMISSORY NOTE.

PUBLIC AMUSEMENTS.

PUBLIC CHARITY.

1. A devise in a will of a sum in trust, "as a fund forever," the income of which is to be appropriated for the support of a school in a certain school district in a town, the sum being in addition to the land and schoolhouse thereon already given to the district by the testator, creates a good public charitable bequest. *Attorney General* v. *Briggs*, 561.
2. If it becomes impracticable to administer a bequest for the support of a school in a certain school district in a town precisely according to the terms of the will creating it, the charity is of such a kind that the testator's purpose must be carried out as nearly as possible in accordance with his design, even though the result reached differs in minor particulars from that intended. *Ibid.*
3. The fact that the residue of an estate is given by will to a charity does not defeat the application of the doctrine of *cy pres* to another charitable bequest which it becomes impracticable to administer precisely according to the terms of the will. *Ibid.*
4. The residuary clause of a will, which in another clause gives a sum to a public charity, is to be considered only as other parts of the will are considered, to aid in ascertaining the general purpose of the testator in regard to the gift in question. *Ibid.*
5. Where it has been found impracticable to administer the gift in a will of the income of a fund for the support of a school in a certain school district in a town precisely according to the terms of the will, even if the benefits from the fund shall be shared by all the inhabitants of the town, it will not be extending the effect of the gift beyond the proper scope of the doctrine of *cy pres* in its application to such a case; and, if it is plainly within the testator's general intent that the town as a whole shall share his bounty, if it cannot otherwise be made available by those residing in the district specified, this court will frame a scheme for applying the income of the fund to educational purposes for the benefit of persons living within the territory which was formerly such district, and in that vicinity, and of such other persons in the town as in the exercise of their legal rights may incidentally derive advantage from it. *Ibid.*

See TAX, 3; TRUST AND TRUSTEE, 2-4, 6.

PUBLIC LIBRARY.

See TAX, 3; TRUST AND TRUSTEE, 4, 6.

PUBLIC OFFICER.

See ACTION, 2.

RAILROAD.

1. The decision in *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 157 Mass. 268, as to the amount recoverable, is affirmed. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 222.

SCHOOL.

1. The school committee of a town not required by law to maintain a high school may withdraw its approval, given under St. 1891, c. 263, of the attendance of a child residing in that town at the high school in another town, and the child's parent is entitled to due notice of such withdrawal. *Millard* v. *Egremont*, 430.
2. A person residing in a town not required by law to maintain a high school, who, having obtained the approval of the school committee of that town, sends his child to the high school in another town, may, after the withdrawal of such approval, the withdrawal not being for misconduct of the child, maintain an action against the former town, under St. 1891, c. 263, to recover the sum paid by him to the latter town for the tuition of the child before he has been notified by the committee of such withdrawal. If the tuition is payable by the term, he is entitled to recover the amount paid for the whole term during which he is notified of the withdrawal; but if the tuition is payable by the day, he is entitled to recover only the sum payable at that rate from the time when the approval is withdrawn to the time when he is notified by the committee of that fact. *Ibid.*

See PUBLIC CHARITY, 1, 2, 5.

SET-OFF.

See EVIDENCE, 14; PAYMENT.

SEWER.

1. The construction by the Commonwealth of a metropolitan system of sewers under a highway in a town does not create an additional servitude for which damages can be claimed by the owner of the fee. *Lincoln* v. *Commonwealth*, 1.
2. Damages cannot be recovered for the temporary interruption of business caused by the construction of a sewer, which the Commonwealth has a right, without a new taking, to construct under a highway. *Ibid.*

See CITY; EMINENT DOMAIN, 2–7; EVIDENCE, 4, 5; MASTER AND SERVANT, 12.

SHIPS AND SHIPPING.

The owner of a vessel is not liable for bait furnished to the master while sailing under a written agreement by him and the crew, whereby they chartered the whole of the vessel for a stated period, and agreed to furnish all necessary fishing gear, including bait, etc., at their own expense, and to pay the owner a certain proportion of the fish which might be caught in the prosecution of the enterprise; and the right of the owner to terminate the charter at any time does not take the case out of the general rule until the right is exercised. *Rich* v. *Jordan*, 127.

See INSURANCE, 22–26; PART OWNERS.

SIDEWALK.

See EVIDENCE, 26; INDEMNITY.

SIGNATURE.

In an action upon a contract purporting to have been signed by the defendant, his answer to an interrogatory, "The signature resembles mine. I wish to have the contract identified before answering further," coupled with the absence of any later denial, affords sufficient evidence of his signature. *White* v. *Solomon*, 156.

See INDICTMENT, 2; TRESPASS, 2.

SLANDER.

1. The law of slander applies to a case of words privately spoken in order to persuade the person to whom they are spoken to do what he has a legal right to do, namely, to refuse to enter into certain contracts. *Rice* v. *Albee*, 88.
2. A demurrer to a declaration in an action of tort, for damages occasioned by words privately spoken by the defendant in order to persuade the person to whom they were spoken to do what he had a legal right to do, namely, to refuse to enter into certain contracts, is rightly sustained, if the declaration does not set out the words spoken in any form, and does not allege that they were falsely spoken. *Ibid.*

See CORPORATION.

SPECIFIC PERFORMANCE.

A lawful contract made by a city by its water board to supply a person whose land and water it has taken by the right of eminent domain with a quantity of water from its reservoir "sufficient for washing and steam purposes" at his mill, "to take the place of the water heretofore furnished to him by us for such purposes," may be specifically enforced in equity according to its legal import. *Roberts* v. *Cambridge*, 176.

STATE.

See CONSTITUTIONAL LAW, 3; EMINENT DOMAIN, 8; PRINCIPAL AND AGENT, 5, 6; SEWER.

STATUTE.

If a statute recites that a previous statute "is hereby amended so as to read as follows," and then enacts a somewhat different provision from that contained in the prior statute, but upon the same subject matter, the effect of the amendment is to substitute the language of the new statute for that of

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED, EXPOUNDED, ETC.

ENGLISH STATUTES.

39 & 40 Geo. III. c. 98.	Thellusson Act	203
6 Geo. IV. c. 94.	English Factors' Act	281

STATUTES OF THE UNITED STATES.

August 5, 1861.	Tax	243
March 2, 1891, § 3.	"	243

REVISED STATUTES OF MAINE.

1883, c. 49, §§ 20, 21.	Insurance	295

PROVINCIAL STATUTES.

1692–93, c. 28, § 4.	Constable	209
1693–94, c. 22.	Charles River Bridge	589
1699–1700, cc. 11, 27.	" "	589
1716–17, c. 5.	Billerica Great Bridge	590
1736–37, c. 5.	Miles Bridge	590
1746–47, c. 22.	Private Bridges	590
1754–55, c. 12.	Charity	194
1764–65, c. 23.	Great River Bridge	590
1768, c. 12.	" "	590
1770–71, c. 31.	Ware River Bridge	590

STATUTES OF THE COMMONWEALTH.

1785, c. 51.	Charity	195
1786, c. 81, § 1.	Way	268

STENOGRAPHER.

See TRIAL, 4.

STREET.

See BETTERMENT, 1, 2, 4; HIGHWAY.

STREET RAILWAY.

See INFANT, 1; MASTER AND SERVANT, 1.

SUPERIOR COURT.

It is within the power of the Superior Court, after a rescript has been sent down by this court overruling the exceptions of one defendant and sustaining the exceptions of the other defendant, in an action pending in the Superior Court against them as partners, wherein the court found for the plaintiff, to allow the plaintiff to discontinue as to the latter defendant, and to order judgment against the former without amending the finding. *Taft* v. *Church*, 504.

See AGREED FACTS; EQUITY, 4; EXCEPTIONS, 2; INSURANCE, 6; JURISDICTION; NEW TRIAL; SAVINGS BANK, 1.

SUPREME JUDICIAL COURT.

If a case is reserved for the determination of this court, by agreement of the parties, upon petition and answer, it is not open to the petitioner to contend at the argument that the case is not properly before the court. *Boston & Albany Railroad* v. *County Commissioners*, 551.

See CAPE COD SHIP CANAL, 1; EQUITY, 5; EXCEPTIONS; INSURANCE, 6; NEW TRIAL; SUPERIOR COURT; TRUST AND TRUSTEE, 3.

SURETY.

See BOND, 3.

SURVIVORSHIP.

A husband conveyed premises in fee to A. and B. as tenants in common, the survivor upon the death of the grantor's wife, who had a life estate, to take the whole, and a writ of entry was brought by the grantee of A., who died before the wife, to recover an undivided half of the premises from B. *Held*, that the provision regarding survivorship in the deed to A. and B. took effect as a shifting use. *Leonard* v. *Southworth*, 52.

TAKING.

See EMINENT DOMAIN; LAND DAMAGES; SEWER, 2.

TAX.

1. If any part of personal property assessed to the owner in the town of which he is an inhabitant, and also in the city in which it is situated, is properly taxable to him in the town of which he is an inhabitant, the remedy against that town is by an application for an abatement, and not by a suit at law to recover the alleged excess. *Wellington* v. *Belmont*, 142.
2. Quarrying stone and breaking it up for use on roads and other similar purposes is not a manufacturing business within the meaning of Pub. Sts. c. 11, § 20, cl. 2, which provides that "all machinery employed in any branch of manufactures shall be assessed where such machinery is situated or employed." *Ibid.*
3. A legacy to a town which contemplates the establishment and maintenance of a free public library for the use of the inhabitants of the town, and the erection of a library building and town hall, comes within the exemption of § 1 of St. 1891, c. 425, entitled "An Act imposing a tax on collateral legacies and successions," and is not subject to be taxed thereunder. *Essex* v. *Brooks*, 79.

See COLLECTOR OF TAXES; CONSTITUTIONAL LAW, 3; EVIDENCE, 8; ITINERANT VENDORS, 2; JURISDICTION; PRINCIPAL AND AGENT, 5, 6.

TELEGRAM.

See EVIDENCE, 3.

TENANTS IN COMMON.

See SURVIVORSHIP.

TENDER.

See INSURANCE, 3.

TORTS.

See ACTION, 2–5; CORPORATION; EMPLOYERS' LIABILITY ACT; EVIDENCE, 17, 27; INFANT; MASTER AND SERVANT; SLANDER; TROVER; VERDICT.

TOWN.

Even if the action of those present at a town meeting upon the question of establishing certain streets as town ways is to be deemed the acceptance and allowance of those streets as such ways, no action lies to recover damages awarded by the road commissioners in laying out the ways, if there have been no entry and possession for the purpose of construction under Pub. Sts. c. 49, § 69; and the fact that the town, after establishing as town ways those streets already constructed and in public use, permitted the public to continue to use them for a year and a half without doing anything to indicate that the streets were not public ways, does not constitute an entry and possession for the purpose of construction within the meaning of the statute. *Corey* v. *Wrentham*, 18.

See ACTION, 2; BRIDGE; CONSTITUTIONAL LAW, 2; HIGHWAY; PAUPER; PUBLIC CHARITY, 1, 2, 5; SCHOOL; TAX, 1, 3.

TRADEMARK.

A manufacturer who, for the purpose of presenting his goods to the public, has adopted a particular combination of features in part old and in part new, is entitled to an injunction against a palpable imitation thereof. *Hildreth* v. *D. S. McDonald Co.* 16.

TRAVELLER.

See NEGLIGENCE, 1–7.

TRESPASS.

TRIAL.

See EXCEPTIONS; EXPERT; INSURANCE, 20, 21; MANSLAUGHTER; NEW TRIAL.

TROUT.

See FISH AND FISHERIES.

TROVER.

The consignees, who are partners, of goods, having the rightful possession of them, with the right to sell them and to pay for them as they are sold, the title remaining in the consignor until the purchase price has been paid, may maintain trover for the conversion of the goods by an officer, who seizes them upon an execution against one of the consignees; and the pendency of a previous action in the same court by the consignor against the officer for the conversion of the same goods is no defence. *Aldrich* v. *Hodges*, 570.

TRUST AND TRUSTEE.

1. A bill in equity to compel an absolute transfer to the plaintiff of a fund held for him by the trustee under a will cannot be maintained, if his interest in the fund is only a life interest coupled with a power of testamentary disposition. *Sise* v. *Willard*, 48.
2. Where a grantor, by the terms of a trust deed, confers upon the grantees discretion to apply one half of the income either to the accumulation of the fund, one half of the income of which is intended for the benefit of the grantor or his descendants, or to apply it to charitable or pious uses, there is as to one half of the fund a valid charitable trust, subject to an illegal discretion as to accumulation for the benefit of the grantor or his descendants which will be rejected; and as to the other half of the fund, an invalid trust being created, the beneficial interest results to the donor; and other trust deeds not delivered to the grantees until after the delivery to and acceptance by them of the first deed cannot affect the interpretation of the first deed, or make the invalid trust valid. *Wardens & Vestry of St. Paul's Church* v. *Attorney General*, 188.
3. If a grantor makes a gift of a certain sum of money, to be appropriated for the foundation of a trust fund established by him by deed nearly two years previous thereto for charitable uses, and the gift is formally accepted by the grantees as a "donation . . . towards a fund for charitable uses," the gift becomes a part of the fund, and is subject with it to the legal interpretation of this court. *Ibid.*
4. A gift to a library, which first mentions a limited and definite class of beneficiaries, but finally provides that the library is to be used by the public generally, creates a valid charitable trust. *Ibid.*
5. A deed does not convey or purport to convey any right of reverter remaining in the founder of a trust, if such appears to be the intention from the construction of the language of the deed as a whole. *Ibid.*
6. While the effect of a deed cannot alter a charitable trust created by the grantor by another deed executed more than thirty years before, yet if the intention is clear it may operate as a release as to matters of account prior

See CAPE COD SHIP CANAL, 2; EQUITY, 1, 3; ESTATES OF PERSONS DECEASED, 2; PUBLIC CHARITY; WILL.

TRUSTEE PROCESS.

See SAVINGS BANK, 1.

ULTRA VIRES.

See RAILROAD, 2.

USAGE.

See INSURANCE, 19.

USE AND OCCUPATION.

1. An action for use and occupation of a tenement does not depend on privity of estate, but on contract, express or implied, between the landlord and tenant, and occupation, actual or constructive, by the latter. *Rogers* v. *Coy*, 391.
2. In an action against a married woman for use and occupation of a tenement, the fact that she was living there with her husband does not affect her liability, if the jury find that she was occupying as a tenant with his assent under an agreement to pay the rent herself. *Ibid.*

USES.

See ESTATES OF PERSONS DECEASED, 2; SURVIVORSHIP.

VARIANCE.

See BRIDGE; CORPORATION, 2.

VERDICT.

1. It is competent for the jury, at the trial of an action, to compare the testimony of different witnesses, and to accept a part and reject a part, and if the verdict was or might have been reached in that manner it must stand, if there was any evidence beyond a scintilla to support it. *Springfield* v. *Boyle*, 591.
2. While, in an action for personal injuries, there may be contradiction in regard to the question whether the defendant's agent invited the plaintiff to the place of danger immediately before the accident, yet, if there is direct evidence to warrant answering the question in the affirmative, a verdict for the plaintiff will not be disturbed. *Baker* v. *Tibbetts*, 412.
3. Even if in the report of an action for personal injuries there are material errors prejudicial to the plaintiff in a ruling in regard to the admission of testimony, a verdict directed for the defendant on the ground that the plaintiff was not in the exercise of due care will be set aside only in case there is evidence to warrant a finding of due care on his part. *Degnan* v. *Jordan*, 84.

See INSURANCE, 6; INTOXICATING LIQUORS, 1.

VESTED INTERESTS.

See DEVISE AND LEGACY, 1.

WAGER.

See CONSTITUTIONAL LAW, 1; EVIDENCE, 12, 13; MONEY HAD AND RECEIVED.

WAIVER.

See Beneficiary Association; Evidence, 9; Insolvent Debtor, 2; Insurance, 9, 21; Principal and Agent, 6.

WAR.

See Constitutional Law, 3; Principal and Agent, 5, 6.

WARRANTY.

See Insurance, 11, 14.

WATER AND WATERCOURSE.

See Deed, 2, 3; Eminent Domain, 7–11, 14–17; Fish and Fisheries.

WAY.

See Damages, 2; Highway; Notice; Town.

WILL.

There is no omission to provide by will for children if there should be any living at the testator's decease, within the meaning of Pub. Sts. c. 127, § 21, if, after a bequest to his wife, whom he knew to be pregnant at the time of making the will, he gave the whole of the rest of his property to a trustee to pay the whole income to the wife during life, and the reversion to those who at the time of her death would be his heirs at law by blood. *Minot, petitioner*, 88.

See Devise and Legacy; Estates of Persons Deceased, 2; Public Charity; Trust and Trustee, 1, 8.

WITNESS.

See Evidence, 5; Exceptions, 6; Expert; Notice, 2.

WORCESTER.

See Eminent Domain, 18.

WORDS.

"Accepted and allowed." See *Corey* v. *Wrentham*, 18, 20.

"All damages that shall be sustained . . . by reason of such taking." See *Lincoln* v. *Commonwealth*, 868, 877.

WRIT OF ERROR.

See EQUITY, 6.

WRITTEN INSTRUMENTS.

See BOND; CONTRACT; DEED; GUARANTY, 1; LAW AND FACT; PRINCIPAL AND SURETY; PROMISSORY NOTE.