MAINE REPORTS

112

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

MAY 7, 1914—JANUARY 12, 1915

WILLIAM P. THOMPSON

REPORTER

PORTLAND, MAINE

WILLIAM W. ROBERTS

1915

887

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

Justices of the Superior Courts

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

ATTORNEY GENERAL

SCOTT WILSON

REPORTER OF DECISIONS

WILLIAM P. THOMPSON

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1915

LAW TERMS

BANGOR TERM, First Tuesday of June.

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

PORTLAND TERM, Fourth Tuesday of June.

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

AUGUSTA TERM, Second Tuesday of December.

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

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CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

WILLIAM MCCARTHY, pro ami.

vs.

BANGOR AND AROOSTOOK R. R. CO.

Aroostook. Opinion May 7, 1914.

Contributory Negligence. Damages. Look and Listen. Negligence. Obstructed View. Plan. Railroad Crossing. Signals.

1. It is negligence per se for a person to cross a railroad track without first looking and listening for a coming train. And if one is injured at a railroad crossing by a passing locomotive, which might have been seen, if he had looked, or heard, if he had listened, he is guilty, presumptively of contributory negligence.
2. In this case, the court is of opinion that the plaintiff, who was struck by the defendant's locomotive at a crossing, was clearly guilty of contributory negligence, and that the jury were not warranted by the evidence in finding the contrary.

On motion by the defendant for a new trial. Motion sustained. New trial granted.

This is an action on the case in favor of William McCarthy, who sues this action by next friend, against the defendant corporation to recover damages for injuries received by him because of the alleged negligence of the defendant. The plaintiff, while crossing the defendant's railroad track in Van Buren on September 29, 1910, was struck by the locomotive of said defendant's train and received the injuries complained of.

The defendant pleaded the general issue. The jury rendered a verdict for the plaintiff for ten thousand dollars, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

John R. Pelletier, and F. W. Halliday, for plaintiff.

P. C. Keegan, Powers & Archibald, and Stearns & Stearns, for defendant.

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

SAVAGE, C. J. The plaintiff, a boy of fourteen years, while driving a milk cart in the highway across the defendant's railroad was struck by the locomotive of a train and severely injured. In this action, in which he seeks to recover the damages sustained by him on account of the injuries, he counts on the defendant's negligence in the following particulars only; that the train was "driven negligently and carelessly by said defendant," that no whistle was blown before reaching the crossing; that the defendant was unmindful of its duties to the plaintiff, and that the defendant "was negligent, careless and unmindful of its duty in that it did not keep a careful lookout for such danger, that it did not use the care of a reasonable and prudent man under such circumstances." The verdict was for the plaintiff, and the case comes up on the defendant's motion for a new trial.

In argument the plaintiff contends that the defendant's servants upon the locomotive were negligent in not keeping a careful lookout when approaching the crossing, which is claimed to have been a blind and dangerous one, and that they did not sound the whistle and ring the bell while approaching the crossing as required by statute and by common prudence. Seven witnesses testified for the plaintiff, in effect, that the whistle was not blown and that the bell was not rung, four for the defendant to the contrary. Not to be on the lookout and not to blow the whistle and ring the bell in approaching a blind crossing is certainly negligence.

But it is unnecessary to analyze the testimony respecting the defendant's negligence even if we thought, as we do not, that the jury were justified in finding that the defendant's servants were negligent, and that their negligence was a cause of the collision, for we are

forced by the evidence to the conclusion that the plaintiff was guilty of contributory negligence, and that he cannot recover damages in any event.

In the first place, it is proper to observe that the plaintiff, though a boy, was an intelligent one, and his own testimony shows beyond question that he perfectly appreciated the danger, such as it was, of being run over at the crossing. He was engaged in driving a milk cart upon a milk route, and had been so engaged for nine months prior to the accident. And each day he had driven over this crossing twice. This case, and indeed his own evidence, show that he was perfectly familiar with all the surroundings of the crossing, and with the consequent dangers. He knew when he approached the crossing that it was about train time. He says he stopped his team twice before reaching the crossing to look and listen for the train. He says he saw nothing and heard nothing. One stopping place was about one hundred and fifty feet from the track, and the other was at a point about fifty feet from the track. The railroad for more than half a mile in the direction from which the train was coming was perfectly straight. But the plaintiff says he could not see the approaching train on account of trees and bushes growing on the right of way, and on account of a bank left in grading at the side of the highway. At this point the railroad passes through a cut, and the highway is graded down an incline to cross at grade. By reason of these obstructions to view the plaintiff says he could not, and that he did not, see the train until he actually was on the crossing, and that then the train was not more than fifty feet away. And another witness testified that a train could not be seen until one was on the crossing. The plaintiff contends that not only were there standing trees standing on the right of way, but that some of them leaned over towards the track, so low as to obstruct vision up and down the track. The defendant's right of way at this point was three hundred feet wide.

The defendant contends that the plaintiff had an unobstructed view of the railroad track when he was fifty feet from the track. There is much dispute about this. Assuming the crossing to be as blind and dangerous as the plaintiff describes it, there was all the greater need of watchfulness on the plaintiff's part. The more dangerous the crossing, the more need of care. At ordinary crossings a burden is put upon the traveler to be observant, to look and listen, and to stop, if need be. Much more at a blind crossing. The plain-

tiff, if his testimony is true, appreciated the necessity of watchfulness, even of stopping, for he says he stopped twice, with an interval of one hundred or one hundred and twenty-five feet.

Now if the plaintiff stopped last at a distance of twenty or even fifty feet from the track, and actually listened, it is, in the opinion of the court, incredible that he should not have heard the noise and roar of the onrushing train—a train coming as the plaintiff argues at the speed of sixty miles an hour, but more probably at a speed of thirty-five miles an hour. The train was then only a few hundred feet away. The track was straight. No climatic conditions are shown to have interfered with hearing. From the facts so far stated, it seems to us impossible that he should not have heard, if he stopped still and listened. And as he approached the track, the train came nearer, and inevitably the noise was louder.

But there is an additional fact. Following behind the plaintiff's milk cart, before the crossing was reached, was a two horse team hauling a jigger load of empty potato barrels. The driver was a boy. That boy left his own team trailing unguided behind and got into the milk cart with the plaintiff. Both boys testify that when the milk team was stopped the last time before reaching the crossing, the two horse team passed by them. They both testify that while riding together they were talking. Whether the boys were intent upon their conversation, so that they did not hear the coming train, or whether there was a rattle of empty potato barrels so that they could not hear, the case does not disclose. These are suggestions merely of what may account for their not hearing. But true it is that they passed on, both of them apparently oblivious of the danger, until they got onto the crossing. Under the existing conditions, if the plaintiff did not listen with ear and mind both he was negligent. If he listened, but was prevented from hearing the train by the rattling of the barrels or any other noises, there was all the more need of making certain before attempting the crossing. If, contrary to his testimony, he did hear, but attempted to make the crossing before the train, in such a place as he describes this to be, he was negligent. We think the case shows beyond question that if the plaintiff had looked just before the horse went onto the crossing, he would have seen the train where it then was. The defendant contends that he could have seen it when three rods back. We think the necessary conclusion is that he did not listen or that

listening, he did not hear the train because of other noises, which under the circumstances required further watchfulness, or that he did hear, and took the chances of crossing.

We do not forget that the plaintiff and his boy companion each testified that he did listen, and did not hear the train. We think the story is not credible, except upon the contingency of preventing noises, of which there is no evidence. An inherently incredible story is not made credible by being sworn to. Nor can it be allowed to serve as the foundation of a verdict. *Blumenthal* v. *Boston & Maine R. R.*, 97 Maine, 255.

Before leaving this branch of the case, we will add that a plan and photographs were used at the trial and are before us. If they correctly show the situation at the time of the accident, they demonstrate that the plaintiff could have seen the train when he was fifty feet from the crossing if he had looked. It is admitted that some trees had been cut on some part of the right of way, and some gravel had been moved, between the time of the accident and the time when the plan was made and photographs taken.

The plaintiff contends that these changes materially altered the appearance of the locality, as to ability to see the train. This was controverted. Although we are strongly impressed with the belief that the plaintiff could have seen the train at some distance from the track, yet inasmuch as there had been some change before the plan and photographs were made, we do not base our conclusion upon the failure of the plaintiff to see the train before he reached a point a few feet from the track. In any event, as we have already said, there was a point where if he had looked, he could have seen the train and stopped his team, before he entered upon the track.

We have not overlooked the plaintiff's contention that when, as assumed, the usual signals are not given, a traveler will not be held to that degree of negligence that he would had the company discharged its duty. *Romeo* v. *Boston & Maine R. R.*, 87 Maine, 540. It is unquestionably true that the traveler has a right to expect the company to give the usual signals, and may take into consideration to some extent the absence of signals, but such want of signals does not relieve the traveler of all care. *State* v. *Boston & Maine R. R.*, 81 Maine, 267; *Romeo* v. *Boston & Maine R. R.*, 87 Maine, 540. Not to listen, or having listened and heard, to attempt to cross a blind crossing without seeing, where the plaintiff says a train could not

be seen until the traveler was on the track, is clearly a want of requisite care, even if it be true that no crossing signals were given.

The law is well settled. And we add for illustration various expressions of the Justices of this court, respecting the duties of travelers at railroad crossings. "The rule is now firmly established in this state, as well as by courts generally, that it is negligence per se for a person to cross a railroad track without first looking and listening for a coming train. If his view is unobstructed he may have no occasion to listen. But if his view is obstructed, then it is his duty to listen, and to listen carefully. And if one is injured at a railroad crossing by a passing train or locomotive, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence." *Chase* v. *M. C. R. R. Co.*, 78 Maine, 346; *State* v. *M. C. R. R. Co.*, 76 Maine, 357. "It is not enough to establish negligence and an accident. It must be shown that the negligence was the cause of the accident. An omission to ring the bell or sound the whistle could not have been the cause of the accident if the deceased had notice of the approach of the train by other means. Our belief is that the deceased did have such notice; that he could not have been so unobservant as to neither see nor hear the approach of that train; and, consequently, that the alleged negligence in omitting to ring the bell or sound the whistle could not have been the cause of the accident. But if he did not have such notice; if he drove onto that crossing in total ignorance of the approach of that train; then the conclusion seems to us inevitable that he must have been exceedingly negligent in the use of his eyes and his ears." *State* v. *M. C. R. R. Co.*, 76 Maine, 357. "It is almost incredible that if they had listened carefully they could not have heard the rumbling and jolting of the approaching cars which so many others distinctly heard. If the noise of their carriage and of the pattering rain on the top rendered it difficult to distinguish the sounds, it was their plain duty to stop the team and obtain a better opportunity to hear. No reasonably prudent man under such circumstances would have neglected to do so." *Smith* v. *M. C. R. R. Co.*, 87 Maine, 339. "If the traveler be alert and watchful for the passing train he can usually check his own speed quickly enough to avoid a collision. The obvious peril of collision at such crossings requires that the traveler upon the common road, when approaching a railroad crossing should exercise a degree of care commensurate with the peril. He

should bear in mind that he is approaching a crossing and that a train or locomotive at the same time may be approaching the same crossing at great speed. He should never assume that the railroad track or crossing is clear. He should apprehend the danger, and use every reasonable precaution to ascertain surely whether a train or locomotive is near. He should when near, or at, the crossing, look and listen,—not simply with the physical eyes and ears, but with alert and intent mind,—that he may actually see or hear if a train or locomotive be approaching. He should not venture upon a track or crossing until it is made reasonably plain that he can go over without risk of collision." *Giberson* v. *B. & A. R. R. Co.*, 89 Maine, 337. The traveler "must, therefore, to comply with his duty to exercise ordinary care, be on the alert to ascertain by the use of his senses of sight and hearing, and by other appropriate means, the approach of trains, and to seasonably avoid collision with them. He can usually avoid collision readily, easily and promptly, if he be properly careful and alert while approaching the crossing." *Day* v. *M. & M. R. R.*, 96 Maine, 207.

In view of the principles, of which the foregoing cases are illustrations, and applying them to the facts in this case, it is clear that the plaintiff was guilty of contributory negligence in attempting to cross the track as he did. And this being so, he was not entitled in law to a verdict in his favor. It must be set aside.

Motion sustained.

STATE OF MAINE

vs.

CHARLES W. STARKEY.

Aroostook. Opinion May 8, 1914.

Complaint. Constitution of Maine, Art. IV, part 3d, section I. Contagious and Infectious Diseases. Ordinance. Police Power. Reasonable Regulation. Revised Statutes, chapter 4, section 93.

1. The Constitution of Maine confers upon the Legislature power to make and establish all reasonable laws and regulations for the defense and benefit of the people of the State.
2. The Legislature, R. S., Chap. 4, has provided that towns, cities and village corporations may make and enforce ordinances respecting infectious diseases and health.
3. Individual convenience and profit must be enjoyed in proper subjection to and observance of the laws affecting the public health, which is at the foundation of the public good.
4. The right to pass inspection laws belongs to the police power of the government, and laws to prevent fraud, imposition and extortion in quality and quantity in sales and the power to provide for them has been uniformly recognized as the subject of delegation to municipal corporations.
5. A municipality has power to enact reasonable ordinances only, and that the court will annul ordinances which are unreasonable, illegal, or repugnant to law, is a doctrine uniformly sustained.

On report. Judgment below affirmed.

This is a complaint by A. B. Smart against Charles W. Starkey for a violation of an ordinance of the town of Houlton, in the county of Aroostook. The defendant was arrested on the 21st day of December, 1912, upon said complaint, and a hearing was had before the Judge of the Houlton Municipal Court on said date. The respondent on being arraigned pleaded that he was not guilty. The Judge of said Court adjudged him guilty and sentenced him to pay a fine of ten dollars and costs, from which sentence he appealed to the Supreme Judicial Court for said County.

At the April Term, of said Court, 1913, the case was reported to the Law Court for determination.

The case is stated in the opinion.

Perley C. Brown, County Attorney, for the State.

Shaw, Burleigh & Shaw, for respondent.

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

HANSON, J. This is a complaint for a violation of an ordinance of the town of Houlton, and comes before the court on report.

The material parts of the record are as follows:

On September 29th, 1912, the Board of Health of the Town of Houlton adopted the following rule or regulation:

"Carcasses of neat cattle, sheep or swine wherever slaughtered shall not be sold or offered for sale in the town of Houlton unless they have been inspected at the time of slaughter by an official inspector and bear the stamp of approval of said inspector in like manner as those inspected by the United States Bureau of Animal Industry for Interstate trade."

"On the 21st day of December, 1912, the respondent by virtue of complaint made by A. B. Smart was arrested for violation of this ordinance, and a hearing was held before the Judge of the Houlton Municipal Court on said date. Upon hearing the respondent pleaded not guilty, was adjudged guilty by said Court, and was sentenced to pay a fine of ten dollars and costs, from which sentence he appealed to the Supreme Judicial Court, and the appeal was properly pending in the April Term, 1913."

"It is admitted that this rule was promulgated in accordance with the provisions of the statute."

"This case is reported to the Law Court for determination of the questions, whether the rule or regulation above promulgated, is reasonable, and constitutional." If the decision is for the State, judgment of the lower court is to be affirmed."

The respondent contends that the "ordinance is unreasonable and illegal, because it is against ancient custom, is indefinite and does not provide for the payment of the inspection called for in the same, that it interferes with the rights of private property and the freedom of the people to trade with one another."

The attorney for the State contends that it is a proper exercise of the police power of the State as delegated by the statute.

The Constitution of the State, Art. IV, part 3rd, Sec. 1, provides that the legislature shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of the State.

The legislature, in R. S., Chap. 4, Sec. 93, clause 3, has provided that towns, cities and village corporations may make and enforce ordinances, "respecting infectious diseases and health."

Salutary laws relating to contagious diseases, and the enforcement of proper restraints in relation thereto, have been passed from time to time, the wisdom of which cannot be questioned. In such cases, as in the case at bar, individual convenience and profit must be enjoyed in proper subjection to and observance of the laws affecting the public health, which is at the foundation of the public good. These laws affect the commonwealth, are of the highest importance, and the necessity for additional safeguards has increased with increasing population and the many new agencies and methods of distributing meats and other articles of food to the consumer. The subject has engaged the attention of all legislative bodies, State and national, and the end sought justifies a continual active interest in this essential element of the public good.

The right to pass inspection laws belongs to the police power of the government. Cooley's Const. Lim. (1st ed.) 584-5. Inspections are necessary incidents to the execution of quarantine and health laws, and laws to prevent fraud, imposition and extortion in quality and quantity in sales, and the power to provide for them has been uniformly recognized as the subject of delegation to municipal corporations. Ibid. Sedgwick on Stat. and Const. Law, 463; 22 Cyc., 1364; 19 Cyc., 1090.

A statute providing for inspection of kerosene and other oils, to prohibit the sale of such as ignite below a certain degree of heat, is a plain and reasonable exercise of the police power of the State. *Patterson* v. *Kentucky*, 97 U. S., 501. So would be any law, providing for the inspection of fresh meat, and other provisions, in order that the public welfare may be protected from danger, arising from the consumption of unwholesome food. Tiedman Lim. of Police Power, Sec. 89.

It is true, as contended by the respondent, that all by-laws made in restraint of trade, or which tend to create a monopoly, are void, but a city or town, by reasonable general provisions, by ordinance, may regulate and restrain all noxious and injurious callings within its limits, and that they may prevent animals from being slaughtered in designated localities within the city, and may designate a particular quarter of the city or town within which the business may be conducted, and prohibit it in others, and regulate and restrain them so as to prevent their becoming offensive or injurious; but in doing so all persons should be free to engage in the business within those localities by conforming to the municipal regulations. *Chicago* v. *Rumpff*, 45 Ill., 90.

A municipality has power to enact reasonable ordinances only, and that the court will annul ordinances which are unreasonable, illegal or repugnant to law is a doctrine uniformly sustained. *Jones* v. *Sanford*, 66 Maine, 585; *State* v. *Robb*, 100 Maine, 180. And any regulation, whatsoever its character, which is instituted for the purpose of preventing injury to the public, and which does tend to furnish the desired protection, is clearly constitutional. Tiedman's Limitation of Police Power, Sec. 89; *Lake View* v. *Rose Hill Cemetery Co.*, 70 Ill., 191; Cooley's Const. Lim., Sec. 200.

That the expense of inspection is not provided for is raised as an objection to the validity of the ordinance, and *People* v. *Harper*, 91 Ill., 357, is cited as sustaining the objection, but that case expressly holds that the officers in respect to whom the Constitution speaks of fees and salaries fixed by law, are only those specifically named in that instrument, and do not embrace officers appointed under the inspection laws of the State.

That no fee is required or provided for is in favor of the respondent. So long as an inspection fee is not so much in excess of what appears to be reasonably required for inspection as to make it appear to be an act designed for revenue instead of regulation, it presents no legal question. 22 Cyc., 1365, Note 7.

Statutes in relation to inspection of articles intended for sale as food have been enacted as occasion required since the formation of our government. Laws requiring inspection of flour, beef, pork, butter, lard and fish are of this class. The obvious purpose of the ordinance under consideration was to prevent the sale and use of meats unfit for consumption, and to protect the people against

deception. Such provision is not only within the legislative right, but is an imperative legislative duty.

The police power of the State is co-extensive with self-protection, and is not inaptly termed "the law of overruling necessity." It is that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety and welfare of society. *Lake View* v. *Rose Hill Cemetery*, 70 Ill., 191, supra; *Commonwealth* v. *Wheeler*, 205 Mass., 384; *Pittsburg & Southern Coal Co.* v. *Louisiana*, 156 U. S., 590, 599.

The regulation of the place and manner of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power. *Slaughter-House Cases*, 16 Wallace, 36.

It is the opinion of the court that the ordinance is a valid police regulation, and the entry must be,

Judgment affirmed.

PHILLIPPE ROBICHAUD

vs.

JAMES M. SPENCE.

Somerset. Opinion May 8, 1914.

Automobile. Bicycle. Collision. Highway. Negligence. Unobstructed View.

The plaintiff approaching saw the defendant before he attempted to turn and saw him turn from the opposite side of Madison Street, tried to "shoot right across to keep clear of the automobile," and in doing so, miscalculated and came in contact with the automobile on the inside of the crossing on Bean Street.

Held: That the testimony convinces the Court that there was no negligence on the part of the defendant, and that the plaintiff was injured solely by reason of his own negligence and that the verdict for the plaintiff was manifestly wrong.

On motion for new trial by defendant. Motion sustained.

This is an action on the case to recover damages for injuries to the plaintiff's bicycle, caused by a collision with the defendant's automobile on Madison Street, in Madison, in the County of Somerset, in the evening of May 1, 1912. The defendant pleaded the general issue.

The jury returned a verdict for the plaintiff for $39.55 and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

W. B. Brown, for plaintiff.

Bernard Gibbs, and Charles O. Small, for defendant.

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

HANSON, J. Action to recover damages sustained by the plaintiff in a collision between his bicycle and the defendant's automobile on the evening of May 1, 1912. The jury returned a verdict for the plaintiff in the sum of $39.55, and the case is before the court on general motion to set aside the verdict.

The defendant was driving his automobile in a southerly direction on Madison Street, in the town of Madison, and was on the right side of the street. This street runs north and south and is three rods wide. Bean Street intersects Madison Street nearly at right angles, and is also three rods wide. The defendant was approaching Bean Street. The plaintiff on his bicycle was riding northerly on Madison Street, and also approaching Bean Street. All the lamps on the automobile were lighted. There was no light on the bicycle. The plaintiff was on the right side of the street as he travelled. The defendant, desiring to turn to his left and enter Bean Street, says that he sounded his horn, gave the usual alarm, and made the turn into Bean Street, and while in the exercise of due care, and with no knowledge of the approaching bicycle, collided with it, and immediately applied the brakes and stopped his automobile within four feet of the point of collision. That it was dark enough to require lights is evident.

The plaintiff contends that the injuries complained of were caused solely by the negligence of the defendant, that no alarm was sounded, and that the defendant was driving at an unlawful rate of speed, and was not in his proper place on the street at the time of the collision. The plaintiff's counsel insists that "if the horn was blown it was no notice to the plaintiff that the defendant intended to turn to his left into Bean Street, and finally when he did see him turn, the plaintiff had no reason to believe that the auto would persist in trying to pass in front of his course, instead of swinging to the right and passing by and behind the bicyclist—the obviously safe and sane course for the autoist to follow under all the circumstances."

The case shows that the plaintiff saw the defendant's automobile approaching him on Madison Street while at least two hundred feet distant; the automobile was on the right side of the street, the plaintiff crossed to the other side of Madison Street on seeing the defendant and kept on his way. Bean Street was between the two and on the plaintiff's right, and they were approaching that street with the automobile in plain view of the plaintiff. The defendant sounded his horn before turning into Bean Street, and the plaintiff's actions thereupon may be stated in his own language: "Well, when I started down on Madison Street, and then I got to Bean Street; I seen that automobile come up and when I saw the automobile I turned right on to my right, and before I got across Bean Street this automobile struck

me." He was asked: "Q. Were you expecting to go down Bean Street at all? A. No I didn't; I did not; he never blowed, he never tooted his horn at all. The first thing that noticed me was his light; then it was too late to turn, so I had to keep on going. Q. Weren't you trying to make the sidewalk ahead of the machine? A. I was trying—when I see him coming across there I see that he was going to run pretty close to me, and I sheered off that way to go clear of him towards the sidewalk; it was too late to turn around: I could not get off; I was right in the middle of the road. Q. You weren't intending to take the sidewalk? A. No, until that automobile struck me, I shoot right across to keep clear of this automobile."

The theory advanced by the plaintiff's attorney is that the defendant in turning into Bean Street passed within 18 inches of an electric light pole, making a curb turn in the wrong way,—"a left curb turn, keeping to his extreme left in both streets, while, on the contrary, the plaintiff kept to his extreme right until struck;" but the theory is not supported by the testimony. The plaintiff says he was in the middle of the road, the defendant says his automobile was twelve feet from the electric light pole, and they are in substantial agreement upon the point, as Bean Street is 23 feet and 6 inches between the shoulders of the road.

The testimony is overwhelming that the defendant was driving his automobile at a low rate of speed, "not over four or five miles an hour," while on Madison Street and in making the turn into Bean Street. He saw no person or vehicle approaching on Madison Street, and there was no person or vehicle on Bean Street. The plaintiff approaching saw the defendant before he attempted to turn, and saw him turn from the opposite side of Madison Street, as above described by the plaintiff. At that instant the two vehicles were not less than 40 feet apart. The plaintiff seeing the defendant, and appreciating what he intended to do, tried to "shoot right across to keep clear of the automobile," and in doing so miscalculated, and came in contact with the automobile on the inside of the crossing, on Bean Street.

The defendant did not see the plaintiff until the collision occurred, and his judgment of the speed of his automobile is corroborated by many witnesses, and not disputed by the plaintiff. That he stopped his automobile in less than half its length is shown by witnesses on both sides. Two courses were open to the plaintiff, one to do as he says he did, to shoot right across in front of the automobile, the other

to direct his bicycle the other way, and pass the automobile behind, where from his own statement his course was free and unobstructed, and to be attended with no danger if he exercised due care, and too, within the limits of Madison Street, which was all open to him as disclosed by the evidence.

The testimony convinces the court that there was no negligence on the part of the defendant, that the plaintiff was injured solely by reason of his own negligence, and that the verdict for the plaintiff was manifestly wrong. The entry must be,

Motion sustained.

STATE OF MAINE

vs.

FRED W. TROWBRIDGE.

Knox. Opinion May 12, 1914.

Demurrer. Exceptions. Houses of Ill-fame. Indictment. Intoxicating Liquors. Nuisance.

1. When two or more independent offences are joined in the same count, it will be bad for duplicity.
2. When several acts relate to the same transaction and together constitute but one offence, they may be charged in the same count.
3. A conviction for one kind of illegal keeping of the premises as a nuisance would be a bar to any other indictment for any or all the other kind described in the statute for the period of time covered by both indictments.

On exceptions by the respondent. Exceptions overruled.

This is an indictment in which the respondent is charged with maintaining a common nuisance in a certain building occupied by him as a hotel, on Main Street, in Thomaston, in the County of Knox.

At the September Term of Supreme Judicial Court, 1913, the respondent filed a demurrer to the indictment, which the Justice presiding overruled. To this overruling of said demurrer, the respondent excepted and his exceptions were allowed.

The case is stated in the opinion.

Philip Howard, County Attorney, for the State.

J. E. Moore, for the respondent.

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

HANSON, J. This case is before the court on exceptions to the order of the presiding Justice overruling the demurrer to an indictment which charges that the respondent "on the first day of January, in the year of our Lord one thousand nine hundred and thirteen and on divers other days and times between that day and the day of the finding of this indictment, at Thomaston aforesaid, in the County of Knox aforesaid, unlawfully did keep and maintain a certain place, to wit: A certain building occupied by the said Fred W. Trowbridge as a Hotel, situated on Maine Street, in said Thomaston then and on said divers other days and times there used as a house of ill-fame, and then and on said divers other days and times there resorted to for lewdness and gambling, and then and on said divers other days and times there used for the illegal sale and for the illegal keeping of intoxicating liquors, and where on that day and on said divers other days and times intoxicating liquors were sold for tippling purposes, and which said place was then and on said divers other days and times there a place of resort where intoxicating liquors then and on said divers other days and times were there unlawfully kept, sold, given away, drank and dispensed, and which said place, being so used as aforesaid, was then and there a common nuisance, to the great injury and common nuisance of all good citizens of said State, against the peace of said State, and contrary to the form of the statute in such case made and provided."

Section 1 of Chap. 22, R. S., under which the indictment is found, reads as follows:

"Sec. 1. All places used as houses of ill-fame, or for the illegal sale or keeping of intoxicating liquors, or resorted to for lewdness or gambling; all houses, shops or places where intoxicating liquors are

sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided for by law, are common nuisances.

Counsel for the respondent urges "that the indictment is bad for duplicity, because it attempts in one count to charge several offences, and for each there are different penalties," and cites *State* v. *Smith*, 61 Maine, 386, in support of his position, and argues that the "doctrine of that case is conclusive against the validity of the indictment, and that the exceptions are well taken and should be sustained." In that case the ground relied upon to sustain the demurrer was the same as in the case at bar, "that separate and distinct offences are charged in the same count." The indictment was found under R. S., Chap. 27, Sec. 20 (1872) prohibiting pedlars and dealers from "carrying for sale, or offering for sale, or offering to obtain, or obtaining orders for the sale or delivery of any spirituous, intoxicating, or fermented liquors," and the case holds that the statute created distinct and separate offences, a joinder of which in the same count of an indictment is good ground for demurrer, "because each of the acts described is independent of each of the others, and constitutes a complete substantive offence."

In reaching the conclusion the opinion holds "that the construction to be given to this statute is not analagous to that given to the statute against buying, receiving, or aiding in the concealment of stolen goods. The two statutes are clearly distinguishable in respect to the question under consideration. In that case the punishment is the same for one as for all three of the prohibited acts, and though each of the acts were charged separately in different counts, only one punishment could be inflicted. The several acts mentioned in that statute are but so many modes of describing one and the same offence, that offence being established by proof of either of the modes."

While the court reaffirms the doctrine that when two or more independent offences are joined in the same count, it will be bad for duplicity, it at the same time emphasizes the rule that when several acts relate to the same transaction, and together constitute but one offence, they may be charged in the same count.

The counsel for the State relies upon the case of *State* vs. *Lang*, 63 Maine, 215, where the same statute was under consideration, then (1892) Chap. 17, Sec. 1, when it was objected that the first count was double, having charged two or more separate and distinct liquor

offences therein. The court then held: "We are very clear that only one offence is charged in these indictments; and that an alleged statutory nuisance. Several independent causes are set out as constituting it. They are the facts relied on to prove the charge. Proof of either of them proves the nuisance; proof of all can prove no more. If the respondent kept a shop, used for the illegal sale of liquors to be carried away, he kept a nuisance. If he kept a shop, used for the illegal sale of liquors to be drank upon the premises, then he kept a nuisance. If he kept a shop, used for the illegal keeping of liquors merely, in such case he kept a nuisance. And if he kept a shop for all of these purposes, and also for all the other improper purposes enumerated in the nuisance act, he then also kept a nuisance, and no more than a nuisance.

The penalty therefor is not necessarily more upon proof of all, than upon proof of any one, of the various and different matters descriptive of the offence. A conviction for one kind of illegal keeping of the premises as a nuisance would be a bar to any other indictment for any or all the other kinds described in the statute, for the period of time covered by both indictments."

In the case at bar the charge is for keeping and maintaining a certain building . . . . which said place (building) being so used as aforesaid, was then and there a common nuisance. It is not sought to hold or to punish the respondent for any one or all of the independent matters which the statute provides shall constitute a nuisance, but for the nuisance which is caused by each or all of the alleged offences.

Respondent's counsel objects further to the indictment, and claims "that the respondent is not charged personally with committing offence," and urges that the indictment is fatally defective on that account. We assume that counsel means that the respondent is not charged with committing the various offences mentioned constituting the offence of keeping and maintaining a nuisance. It was not necessary to so allege or charge as to the former. He is charged in the language of the statute with the offence of keeping and maintaining a nuisance, and that is sufficient. In *State* v. *Osgood*, 85 Maine, 288, the same statute being under consideration, and the same point raised, the court held: "This indictment charges that the defendant did keep and maintain a certain place, to wit, . . . used as a house of ill-fame, to the common nuisance . . . . in

the precise language of the statute, and is sufficient." In *Commonwealth* v. *Kimball*, 7 Gray, 328, a like statute was under consideration, and the same objections interposed as in the case at bar. There the court held, "there is no duplicity in the second count of the indictment on which the defendant was committed, —it charges only one offence — the maintenance of a common nuisance. The allegation of the various different purposes for which the premises were used, constituting the means by which the nuisance was created, was mere matter of description; and although each of them might be criminal in its nature, yet they are not charged as distinct offences, but only as forming the elements which made up the single offence of a nuisance, which is the misdemeanor charged in the indictment.

The offence of the defendant consisted in keeping and maintaining the house. It was not necessary to allege or to prove that it was used by him, or by whom it was used."

We are of the opinion that the indictment is valid. The entry will be,

Exceptions overruled.

CORA WILLIAMS, EX'X

vs.

MAYNARD S. WILLIAMS.

Knox. Opinion May 14, 1914.

Exceptions. Forgery. Identical Money. Motion. Payment. Receipts. Tenants in Common. Trover.

1. Money may be the subject of an action of trover, and in the declaration it is not necessary to set out the money verbatim, a description of it in general terms being sufficient.
2. All that is required is that the property should be described with as much reasonable certainty as the nature of the case will permit, so that it may be known what property is meant, and that the defendant may be protected against another suit for the same cause of action.
3. An expert witness was asked by the plaintiff, "What do you see under the microscope as indicating the age of ink?" and the question was admitted. Objection was made to the question, but the Court admitted the answer.
4. Various processes and instruments aiding the senses have from time to time been employed and sanctioned as proper to be used in the acquisition of testimonial knowledge, and among them the microscope.
5. Through the question admitted, the witness was permitted to give to the jury information that he acquired by the aid of the microscope indicating the age of ink. It was not reversible error to permit him to do so.

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

This is an action of trover to recover the sum of $18,750 and interest. In March, 1900, the defendant received from the Rockland, Rockport Lime Company $56,250, which belonged in equal shares to him, his brother Warren G. Williams, the testator, and to his sister Mary F. Frohock. This money was the consideration for a lime quarry owned by them in common and sold to said Rockland, Rockport Lime Company. Plea, the general issue, with brief statement of Statute of Limitations. The jury returned a verdict for the plaintiff of $18,750, with interest. The defendant objected to the

admissibility of certain testimony of the experts, which objections were overruled, and the defendant excepted thereto. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

A. S. Littlefield, for plaintiff.

L. M. Staples, for defendant.

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

KING, J. Action of trover to recover the sum of $18,750 with interest. In March, 1900, the defendant received from the Rockland, Rockport Lime Company $56,250, which belonged in equal shares to him, his brother Warren G. Williams the testator, and his sister Mary F. Frohock, it being the consideration for a certain lime quarry which they owned as tenants in common and sold and conveyed to said Company. The defendant was the active agent in making the sale, and with the full consent of his brother and sister deposited the entire sum in his own name with Kidder, Peabody & Co. of Boston on March 19, 1900.

Warren G. Williams died testate in 1910, and this action is brought by his widow, the executrix, to recover one-third of said fund with interest, she claiming that the defendant never paid it to her husband. The defense is payment to the testator in full, in support of which the defendant presents two receipts purporting to be signed by Warren G. Williams, each for $9375, dated respectively September 10, 1901 and April 18, 1903. The plaintiff replies that both receipts are forgeries.

The case has been tried three times. The first trial resulted in a verdict for the defendant which upon motion this court set aside. The second trial resulted in a disagreement of the jury. At the last trial the jury returned a verdict of $24,046.88 for the plaintiff, and the case is now before this court on motion and exceptions by the defendant.

THE MOTION. When the case was before this court on the plaintiff's motion to set aside a verdict in the defendant's favor, after a review of the evidence, the court said: "Without going into further detail it is sufficient to say that it is our opinion, from the testimony, the exhibits, the circumstances and the probabilities that the verdict in this case was so clearly wrong as to indicate bias or prejudice

on the part of the jury, or a failure to appreciate the facts, and for that reason it cannot be allowed to stand." *Williams* v. *Williams*, 109 Maine, 537, 544.

The only issue in the case in the last as in the first trial was whether the signatures to the two receipts of $9375 each, relied upon by the defendant in support of his claim of payment, were forgeries. We have examined with painstaking care all the evidence presented at the last trial, and have compared it, so far as we now have the means to do, with the evidence produced at the first trial, and we do not perceive any material change in it. In no material degree was there any new or additional evidence introduced at the last trial in support of the defendant's contention that the receipts were genuine. On the other hand the evidence at the last trial tending to show that the receipts were forgeries — the testimony of the experts, the receipts themselves, all the exhibits, the situation of the brothers, and the way and manner in which it is claimed the payments were made—was no less, and no less convincing, than that at the first trial.

After a full and careful examination and consideration of all the evidence in this case the court is of the opinion that the verdict rendered is not against the weight of the evidence but in accordance therewith.

The defendant has argued, under his motion, that this action of trover is not maintainable, because the identical money which came into the defendant's hands from the sale of the quarry in 1900 is not specified. The identical money could not be specified in this case. The defendant deposited the money received in his own name on interest with the authority of the testator. It could not thereafter be identified. Money may be the subject of an action of trover, and in the declaration for the alleged conversion of money it is not necessary to set out the money verbatim, a description of it in general terms being sufficient. All that is required we think is that the property should be described with as much reasonable certainty as the nature of the case will permit so that it may be known what property is meant, and that the defendant may be protected against another suit for the same cause of action.

That, we think, was done in this case. The declaration contains such a specification of the property as the plaintiff was able to make, and it is sufficiently definite to show what property is meant, and to render the judgment in this action a bar to any other action against the defendant for the same cause.

THE EXCEPTIONS. 1. The request for a non-suit on the ground of the statute of limitations was rightly refused. The action is trover, to recover the value of property that came into the defendant's control rightfully as the agent of the testator. The cause of action did not accrue until there was a conversion of the property by the defendant. The evidence of conversion relied upon was a demand and refusal, and it was admitted that on March 17, 1910, the plaintiff as executrix under the will of the testator made demand upon the defendant for the property which was refused. There was no evidence of any previous conversion, and, accordingly, the cause of action accrued March 17, 1910, six weeks only before the action was commenced.

2. Albert H. Hamilton, called by the plaintiff as an expert, was asked "What do you see under the microscope as indicating the age of ink?" and the question was admitted against the objection "that microscopes should not be used, because no two sets of eyes will see it under the microscope the same way." We think the question was admissible. The precise reason stated against it might be answered by the suggestion that it is probably true that no two sets of eyes will see the same thing in the same way even when unaided by any particular instrument; but the objection no doubt was intended to raise the point that a witness should be permitted to give to the jury only such information as he has acquired through his own unaided senses, without the use of artificial processes, or instruments. But the rule is not so limited. The source of a witness' testimonial knowledge is not so circumscribed. Various processes and instruments aiding the senses have from time to time been employed and sanctioned as proper to be used in the acquisition of testimonial knowledge and among them the microscope. Wigmore on Evidence, Vol. 1, Sec. 795.

Through the question admitted the witness was permitted to give to the jury information that he acquired by the aid of the microscope indicating the age of the ink. It was not reversible error to permit him to do so.

3. The third exception raises precisely the same question as that involved in the second, and for the reasons above stated, it is not sustainable.

It is therefore the conclusion of the court that the entry should be,

Motion and exceptions overruled.

CALVIN S. LANE

vs.

THE INHABITANTS OF THE TOWN OF HARMONY.

Cumberland. Opinion May 16, 1914.

Auditor. Commissions. Contract. False Representations. Plans. Report. Warranty.

1. Where fraud is set up by the defendants, it must be material, relate distinctly to the contract and affect its very essence and substance.
2. While there is no standard by which to determine whether the fraud be material or not, the accepted rule is that if the fraud be such that, had it not been practiced, the contract would not have been made, or the transaction completed, then it is material to it.
3. If it be shown or made probable that the same thing would have been done by the parties in the same way, if the fraud had not been practiced, it cannot be deemed material.
4. The fraud must be material and must mislead and work an actual injury; otherwise no action lies and no such defense can be maintained.
5. It must appear that the defendant not only did in fact rely upon the fraudulent statement, but had a right to rely upon it, in full belief of its truth.
6. The rule is the same where false representations, though honestly made, are believed to be true and are relied upon by the other party.
7. Fraud may be committed by the artful and intentioned concealment of facts exclusively within the knowledge of one party and known by him to be material, and where the other party had not equal means of information.

On report. Judgment for defendants.

This is an action on the case to recover for services as an architect in drafting plans and specifications for a school house building in the defendant town and for supervising the construction of the same and for purchasing supplies used in the construction of said school house, in the summer of 1911, amounting in all to $1742.90. The defendant pleaded the general issue and filed a brief statement in substance that plaintiff represented and warranted to the defendants that said pro-

posed building, of which he submitted plans, would not exceed in cost the sum of five thousand dollars, and that said plans were accepted and approved upon the strength of and in reliance upon said representations, and that the plaintiff was employed upon such express condition, and that said building cost over fifteen thousand dollars. At the conclusion of the evidence, the case was reported to the Law Court upon the writ, pleadings, auditor's report and so much of the evidence reported as is legally admissible; the Law Court to render such judgment as the rights of the parties require.

The case is stated in the opinion.

Frank I. Moore, and Enoch O. Greenleaf, for plaintiff.

Merrill & Merrill, for defendant.

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

HANSON, J. This is an action on the case brought by the plaintiff, an architect, to recover for services, commissions and expenses, which he claims to be due under a contract with the defendant, for plans and specifications for a school building, and the purchase of material therefor. The contract reads as follows:

"To whom it may concern:

This is to certify that we the selectmen of the Town of Harmony, Me. Sommerset County, State of Maine, do hereby give Calvin S. Lane of Portland, Maine, Cumberland County, State of Maine, full authority to make and let all contracts for labor and materials, etc. to be used in and for the construction of a school building to be built for the town of Harmony, Me. according to plans and specifications as furnished by said Calvin S. Lane.

It is understood and agreed that he is to receive for his services the following commission, 5% per cent for plans, specifications and details and 5% per cent and all expenses as disbursements for making and letting contracts and such other services as will be necessary to complete the said school building.

Witness G. W. CHADBOURNE
E. F. STEVENS E. B. REED
Selectmen of the Town of Harmony, Me."

The plaintiff sues for $1,742.90, being as he claims 10 per cent of the cost of the building and equipment and expenses, and insists that he has in good faith performed the duties required by the contract, and that the charges are such as the contract provided for. The defendants deny liability, and by brief statement say "that the said plaintiff represented and warranted to the defendant that the proposed building of which he submitted plans would not exceed in cost the sum of five thousand dollars, that said plans were accepted and approved only upon the strength of and in reliance upon said representation and warranty and the plaintiff employed only upon such express condition if employed at all. And the defendant avers that said building built in said manner cost over fifteen thousand dollars, which excessive expenditure was wholly caused by said false representation and warranty of the plaintiff, and that by reason thereof the plaintiff is not entitled to receive anything for alleged services. Also that the work done by the plaintiff was performed in such a negligent, careless and unskillful manner that the defendant was damaged far in excess of any amount due the plaintiff for his alleged services and that the alleged services of the plaintiff were worthless. Also that the defendant has fully paid the plaintiff and overpaid him."

At the return term the presiding Justice appointed an auditor, whose report at the trial, after being confirmed, was introduced by the plaintiff and relied on by him to make out a prima facie case. After taking out the testimony, the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible.

The auditor's report not only states the account between the parties, but also deals with conclusions of fact in reference to the scope and tendency of the contract in question, as well as with other facts and circumstances relating to the case. So much of the report as deals with the account stated, we adopt without question as correct. That part of the report devoted to conclusions of fact will be considered in connection with all the other evidence in the case.

The case shows that in June, 1911, the plaintiff, learning that the defendant town had voted to build a school house, called on the town officers and opened negotiations with them with a view to securing employment as an architect. It appears that he made inquiry as to the financial standing of the town, and secured the

information from the town clerk and other town officers. He was told that the town had on hand $2,000, and it appeared of record that the town had voted $1,000 additional for the purpose, having in all $3,000 which could be lawfully used at the date of the conference.

The plaintiff claims that he was employed to design the building and purchase the materials entering into its construction and equipment. That in the first conference he made a sketch of the building and an estimate of the cost of its construction, and submitted the figures to the selectmen. He says the estimate for the building alone "was figured from six to eight thousand dollars." He was asked in direct examination: "Q. Why did you make so large a margin in your estimate," and answered, "Because I was not familiar with the local conditions." And he says he was not told "how expensive a building the town wanted to build," and that he did not ask the town officers for that information. He also says that in the second conference the details leading up to his final employment were agreed upon, and on that date he entered upon the services for which this action is brought, with no further limitation of authority than that "they wanted to build as economically as they could."

The defendant town, through its officers, five of whom at least were parties to the transaction, denies the plaintiff's claim that there was nothing said about the expense involved, or that the plaintiff submitted estimates in which the building alone would cost from six to eight thousand dollars. Their version is substantially this: "Mr. Lane said he heard we were going to build a school house, and that he was an architect and he had come to see us about furnishing the plans, and we told him we were to build a school house that year and were looking for plans for one. He asked us what kind of a school house we were going to build, and we told him, and he asked us how expensive a school house, and we told him we didn't want to build a school house that would cost much over three thousand dollars, and we thought the town wouldn't stand for it; and he wanted to know how many rooms . . . . we wanted, and we told him, and he asked us all about what kind of a building we wanted and if we had ever had any plans or specifications and we told him we had," and that they had further talk with the architect in which he assured them that a building such as they described could be built by him for between four and five thousand dollars, and equipped with light and

heat and plumbing, and that he would guarantee that such a building ready for occupancy could be built at a cost not to exceed $5,000; that upon this assurance and guaranty, they gave him the contract to so build and equip the building, but they say it was not the contract appearing in this case. They claim they did not agree to pay an additional per five cent. for making contracts and disbursing the money, but that the plaintiff volunteered that service, saying in effect that "as he lived in Portland he could do this without trouble or expense."

While there is conflict as to signing the contract in suit, we find it was signed by two of the selectmen. The plaintiff says: "I asked them first in regard to the building, what it was to be used for, and they told me, and then I asked them what the local conditions were as to getting materials, and they gave it to me as nearly as they could and I computed my figures accordingly. They said they had had a building plan from some architect—I think they said from Dexter. I didn't know the man's name was Dexter; and they said they weren't satisfied with it, with the price that the contractor said the building could be built for and what there was in it, and it was not satisfactory to the state authorities or to themselves." This bid appears to have amounted to $7,877. He states further that after the plans had been adopted,—"One of them asked what was the next step to take. I told them they could advertise for bids; that was when we submitted our plans.

Q. What was said further?

A. And they wanted to know how long it would take, and I told them it would take a matter of three weeks I thought, and they wanted to know if it couldn't be done any quicker, and I said no, it couldn't and that brought about the going ahead with the day work.

Q. And was it agreed upon at that time that it should be done by days work under the direction of the superintendent?

A. Yes, sir.

Q. Was any reason given why they didn't want to advertise for bids?

A. They said if they submitted it back to the town they would probably lose the whole proposition, and that they had a very close shave to get it in that year, that they got the building and they wanted to build it as economically as they could, and they read the vote to me."

Mr. Bailey, one of the selectmen, was asked in cross-examination: Q. Had you expected Mr. Lane to build that building and put in everything that the plans call for and fixtures, including heating and plumbing, for a sum not exceeding $5,000? A. Yes, sir, we took his word for it."

It is apparent from the contract that the defendants, relying upon the plaintiff's ability and integrity, employed him to design the building in question in all its parts, and furnish the same with lighting and heating appliances and all necessary equipment, and since the plaintiff has charged in his account the commission on the entire cost of the completed building and equipment, his understanding of the contract needs no comment. But to what kind of building and equipment did the contract relate, and what was to be the expense attending it? On these questions counsel for defendants contends that the plaintiff made false representations to the defendants, and that the defendants relying upon such representations were induced thereby to undertake the erection and equipment of a school building, which they claim would not have been undertaken if the plaintiff had not misled them as to the expense involved. The plaintiff denies that he misrepresented, or that he made representations at all in respect to the cost of the building or its furnishings, and points to the finding of the auditor as confirming his position.

Upon this branch of the case the auditor finds as follows: "After considering all the testimony on both sides, I find that the plaintiff did not guarantee that the building should not exceed any specified sum, but there is nothing to indicate that the town officers at this time anticipated, from the figures given and conversation had, that the building would cost as much as it did when completed. I find that the building committee was anxious to construct a modern, standard school building, and that they wanted to build as cheaply as possible, but were willing to take some chances as to ultimate cost."

The finding that the building "committee were willing to take some chances as to the ultimate cost" does not warrant the conclusion that the committee understood that the cost would exceed $5,000. The only testimony in which reference to "chances" appears, is that of Mr. Merrill, the superintendent of schools, who stated, "that as long as he (the plaintiff) was guaranteeing that it wouldn't cost over $5,000, that I would submit of (to) the plans and take my chances with the town as finding fault with the price."

The building and fixtures and furniture according to the evidence cost $16,610.62.

The town officers, by their contract or agreement, gave the plaintiff full power to purchase the materials and make all contracts necessary in the premises, thus surrendering to him all their power and authority, whether lawfully or not, and all means of knowing definitely, or even approximately, the cost of materials, or the liability of the town as and while the liability was created by the plaintiff.

It appears that during the time in which the larger expenses were incurred, the plaintiff had charge of the pay-roll of the employees on the building, and all the incidental expenses attending the same, and there is nothing in the case to show that, while the cost was exceeding the limit prescribed by the town, that knowledge of the excess cost was brought to the notice of any town officer by the plaintiff, or that they in any manner acquiesced therein. So far as the case shows, such knowledge came too late for remedy on their part, and it is not urged by the plaintiff that any information was given them by him, or that they had means of ascertaining such fact until he came to them late in the season with his account for expenditures, and that account did not include the charges for which this suit is brought. It does not appear that the defendants had knowledge of conditions in season to repudiate the contract, or to stop the excess outlay. From the auditor's report we find that substantially all the materials were purchased during July and August, 1911, and that the pay-roll of employees during those months was paid by the plaintiff, the actual disbursements by him being $2,187.15.

The plaintiff was bound to bring to the performance of his contract reasonable care, an intelligence befitting his profession and undertaking, and a proper investigation and knowledge of the business in hand, in all its details. The representations made to the defendants should be true in fact, as to the general requisites of the contract, and substantially accurate in dealing with the amounts, quantities and values involved. Good faith should characterize his management of the business intrusted to him. The defendants had the right to believe that the plaintiff possessed all those attributes, that he stood high in his profession, and would use his skill and good judgment in making the plans and specifications, and the contracts for materials, and that the cost of the building would be substan-

tially as agreed upon in the several conferences leading up to the contract. The case discloses that the plaintiff made diligent inquiry as to the financial condition of the town, was well informed as to the money on hand, and the vote providing additional funds for the purpose. He was as well informed as any of the town officers, or building committee. Having such knowledge, he knew, or must be held to have known, that any contract or agreement entered into by him with any or all of the committee or town officers having in view a building and equipment to cost in excess of $5,000, would not be valid, and therefore not binding upon the town.

If fraud is set up by the defendants, it must be material, relate distinctly to the contract, and affect its very essence and substance. And while there is no standard by which to determine whether the fraud be thus material or not, the accepted rule is, that if the fraud be such that, had it not been practiced, the contract would not have been made, or the transaction completed, then it is material to it, but if it be shown or made probable that the same thing would have been done by the parties, in the same way, if the fraud had not been practiced, it cannot be deemed material.

Parsons on Contracts, vol. 2, page 771.

It does not follow that the fraud in all cases necessarily implies moral turpitude. Ibid.

The fraud must be material, and must mislead and work an actual injury, otherwise no action lies, and no such defense can be maintained. *Morgan* v. *Bliss*, 2 Mass., 112; *Fuller* v. *Hodgdon*, 25 Maine, 243; *Barrett* v. *Railway*, 110 Maine, 24.

It must appear that the defendant not only did in fact rely upon the fraudulent statement, but had a right to rely upon it, in the full belief of its truth. The rule is the same where false representations, though honestly made, are believed to be true, and are relied upon by the other party. *Collins* v. *Dennison*, 12 Met., 549. So too of concealment of such facts as the party is bound to communicate. *Prentiss* v. *Russ*, 16 Maine, 30; *Kidney* v. *Stoddard*, 7 Met., 252; *Clark* v. *Ins. Co.*, 8 How., 235; *Fletcher* v. *Com. Ins. Co.*, 18 Pick., 419; *Atwood* v. *Chapman*, 68 Maine, 36.

Here there is no point raised as to the statements being mere matters of opinion. There is direct conflict of testimony as to the issue involved. If the plaintiff intentionally suppressed the truth, or stated as a fact matters or things which were untrue, and which

the defendants had the right to believe were matters within the plaintiff's knowledge, on which defendants relied, he cannot recover, whether moral turpitude, or carelessness, or ignorance, or gross inattention to his duties, is the source of such statement. The result is the same, the defendant is injured by the plaintiff's wrongful act or omission, and the law holds him responsible in either case. *Ayers* v. *Hewitt*, 19 Maine, 281; *Nichols* v. *Patten*, 18 Maine, 231; *Braley* v. *Powers*, 92 Maine, 210.

The rule is otherwise when the parties meet upon equal ground, and where with equal diligence, correct information is equally within the power of both parties, and especially where the party to whom the statement is made is not misled. *McDonald* v. *Christie*, 42 Barb., 36; *Palmer* v. *Bell*, 85 Maine, 355.

The authorities are uniform that material misrepresentations which go to the substance of the contract, avoid that contract, whether they are caused by mistake, and occur wholly without fault, or are designed and fraudulent. *Doggett* v. *Emerson*, 3 Story, 700, and cases cited. *Hewin* v. *Libby*, 36 Maine, 350.

A careful reading of the testimony leads to but one conclusion. The defendants were misled by the representations of the plaintiff and injured thereby. He has already received over five hundred dollars for his services, and with that should be content. It is unnecessary to consider the remaining objections of defendants' counsel.

The entry must be,

Judgment for defendants.

WILLIAM A. REID

vs.

EASTERN STEAMSHIP COMPANY.

Cumberland. Opinion May 18, 1914.

Appliances. Assumption of Risk. Contributory Negligence. Damages. Defective Machinery. Exceptions. Fireman. Negligence.

An action to recover damages for personal injuries alleged to have been sustained by plaintiff while in the employ of the defendant as fireman on its steamer "Ransom B. Fuller" by reason of large quantities of sea-water coming into the fire-room through the ash ejector pipe and hopper, alleged to have been defective and out of repair.

Held:

1. It is not established to a reasonable certainty that the jury erred in their conclusion that the ash ejector was defective and out of repair in consequence of which an unreasonable and dangerous quantity of sea-water came into the fire-room making it an unsafe place for the plaintiff to work in.
2. The evidence shows clearly that in rough seas large quantities of sea-water would come into the fire-room, through the ash ejector pipe, unless the cover of the hopper in the fire-room, with which the pipe was connected, was securely fastened down, and the officers of the ship, who had supervision of the fire-room, knew the defective condition of the hopper and that the holding-down bolts of its cover had long before rusted away and had not been renewed.
3. There is no evidence that the plaintiff is chargeable with any act of omission or commission that contributed to his alleged injuries, other than remaining in the fire-room and performing his work as a fireman during his watch under the conditions existing there.
4. But the fact that he so remained in the fire-room does not necessarily, as a matter of law, perclude him from recovering, under the doctrine of the assumption of the risk.
5. The doctrine of the assumption of the risk involves two fundamental questions; first, whether the employee understood and appreciated the risk, and second, if he understood and appreciated the risk, whether he assumed it voluntarily.
6. In the case at bar, both of those questions were submitted to the jury, with full and appropriate instructions, and they were proper questions for the jury.

7. Where a servant has been subjected to a risk and danger, owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows the risk and does not remonstrate, does not necessarily, as a matter of law, preclude him from recovering in respect to that breach of duty of his employer, under the doctrine of the assumption of the risk.
8. Though it appears that the servant was injured by remaining at his post and working on after knowing of a risk arising from his employer's fault, still courts of justice should not turn him away unheard and with an arbitrary pronouncement that he must be held to have voluntarily assumed the risk of being so injured, whatever his explanations might be.
9. In framing a hypothetical question, the practice is for the question to contain the assumption of the existence of such facts and conditions as the jury may be authorized to find upon the evidence as it then is, or as there may be good reason to suppose it may thereafter appear to be.

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

This is an action on the case by the plaintiff to recover of the defendant damages for personal injuries which the plaintiff claims he sustained on the 28th day of July, 1911, while in the employ of the defendant in the capacity of fireman on its steamer, "Ransom B. Fuller," by being exposed to sea-water while working in the fire-room, which came into the fire-room through the defective pipe and hopper. The defendant pleaded the general issue. The jury rendered a verdict for the plaintiff of five thousand and five hundred dollars. The defendant had various exceptions, which are specially considered in the opinion, and filed a general motion for a new trial.

The case is stated in the opinion.

William Lyons, and Benjamin Thompson, for plaintiff.

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

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

KING, J. This is an action to recover damages for injuries alleged to have been sustained by the plaintiff on the night of July 28, 1911, while in the defendant's employ as a fireman on its Steamer "Ransom B. Fuller" then on her regular trip from Portland, Maine, to Boston. A verdict of $5500 was returned for the plaintiff, and the case is before this court on the defendant's motion for a new trial and on exceptions.

THE MOTION. Preliminary to a statement of the specific questions raised by the motion it will be advantageous to point out briefly certain facts which are practically undisputed.

The "Ransom B. Fuller" is a side-wheel passenger and freight steamer of the burden of 2329 gross tons. She is equipped with two boilers, located in the fire-room in the lower hold near the keelson, under each of which are two furnaces with the doors opening toward the after part of the ship. The fire-room proper, or floor space in front of the furnaces where the firemen work, is about 26 feet in length athwart the ship and 12 feet and 10 inches wide from the line of the furnaces back to a steel partition. The floor of the fire-room is constructed of large squares of iron, and it is 8 or 10 feet below the water line of the ship. On both the port and starboard sides of the fire-room are coal bunkers. The main engine-room is on the deck above. Two firemen are in each watch of 4 hours duration, except the dog watch, and each has charge of one of the boilers and the two furnaces under it, and when the ship is underway it is the duty of the fireman to so tend his fires that the required pressure of steam will be kept up. The ashes drop through the furnace grates into large ash pans and these are drawn out onto the fire-room floor by the ash man who throws the ashes back against the steel partition from where they are thrown overboard by the use of an ash ejector, so called. This appliance consists of a cast iron hopper or receptacle about 18 inches square at the top, tapering down to about 12 inches square at the bottom, and being about 18 inches deep, from the bottom of which an 8 inch iron pipe extends across and out through the port side of the ship just under the guard and a little forward of the paddle wheel. The top of the hopper is about 3 feet above the fire-room floor and about $6\frac{1}{2}$ feet below the outboard end of the 8 inch pipe. When ashes are to be ejected they are shoveled into the hopper and from there they are carried outboard through the cast iron pipe by a powerful stream of water forced into the pipe by the pumps. A cast iron cover forms the top of the hopper, being hinged thereto on one side. The cover was designed and constructed to be held down when necessary by means of swinging bolts, called "holding-down bolts," attached to the hopper on three sides and so arranged that they could be swung into "ears" or "slots" on the cover and screwed down making a tight joint between the cover and the hopper thereby preventing sea-water coming into the fire-room through the hopper

when heavy seas submerged the outer end of the 8 inch ejector pipe. It was conceded that the holding-down bolts were not in usable condition on the night in question; in fact they had completely rusted away some years before and had not been renewed, a condition of which the defendant had knowledge through its officers. The plaintiff shipped on the steamer in April, 1911, as a fireman and continued in that capacity until a few days after the night of his alleged injuries. The regular sailing time of the Fuller from Portland was at 7 o'clock in the evening. On the night in question, owing to a heavy easterly sea, she did not sail until 10-36 P. M., and in about half an hour thereafter she was outside of Portland Harbor. The plaintiff's watch began at 12 o'clock midnight at which time he and another fireman went down into the fire-room and relieved the two firemen who had been on the previous watch. The steamer was then out on the high seas and was rolling so badly that each time she rolled the outboard end of the 8 inch ejector pipe was submerged whereby large quantities of sea-water came through the pipe and hopper into the fire-room, and at that time there was water in the fire-room that covered the floor to a depth on a level, as estimated by different witnesses, of from 2 or 3 to 6 or 8 inches which washed back and forth in considerable waves. The temperature of the room was from 115 to 140 degrees, and the plaintiff remained there tending his furnaces throughout his watch of four hours, during which time sea-water continued to come in through the ash ejector as the ship rolled, and the conditions remained, as he claimed, substantially the same.

The plaintiff alleged, and introduced evidence tending to show, that in consequence of his standing and working during his watch of four hours in that sea-water with the rest of his body subjected to the high temperature of the room he became sick and much disordered and contracted acute Nephritis or Bright's Disease and other ailments from which he has ever since suffered and still suffers with little or no prospect of recovery.

The questions involved in the issue, whether the defendant is liable to the plaintiff for his alleged injuries, may be thus briefly stated: (1) Was the ash ejector at the time of the plaintiff's alleged injuries defective and out of repair on account of which an unnecessary and dangerous quantity of sea-water came into the fire-room? (2) Was the defendant negligent in permitting the ash ejector to be thus defective and out of repair? (3) Did the plaintiff

sustain personal injuries resulting in his damage in consequence of the sea-water that was in the fire-room during his watch? (4) Was there any negligence on the part of the plaintiff that contributed to his injuries; or did he, by going into the fire-room and working there during his watch under the existing circumstances, assume the risk of the injuries that resulted to him in consequence of the sea-water?

All these questions were properly submitted to the jury and they decided them in the plaintiff's favor. Is their decision manifestly wrong? In other words, is it so unmistakably contrary to the plain import of the evidence that it should be held clearly erroneous? That is the precise question presented by the motion. The record is voluminous, consisting of about 800 printed pages. We have examined it in detail and with painstaking care, and we are not persuaded from a consideration of all the evidence in the case that the jury obviously erred in their decision as to the defendant's liability.

It would be practically impossible within the reasonable limits of an opinion to make a detailed analysis or extended summary of the evidence introduced in the case, and we shall here make only a brief general reference to some of the proof adduced in support of the issues involved.

1. It was not contended that there was any shuttle valve or other devise by which the outside end of the 8 inch ejector pipe could be closed, or any valve in the pipe to prevent sea-water from flowing through it into the hopper, but the defendant claimed that the ejector was not in fact defective and out of repair, although there were no holding-down bolts, because a "prop," one end of which could be placed up against a beam in the deck above and the other end upon the cover, had been used and was a practical appliance to be used for the purpose of holding the cover in place when necessary in rough seas. Much testimony was introduced on the one side and the other as to the use of a "prop" as an appliance for holding down the hopper cover. It was claimed on the part of the plaintiff that a prop could not be kept in place owing to the springing of the ship as she rolled and pitched in heavy seas, and on the other hand the defendant claimed that by properly wedging the prop it would remain in place and was a fit means to keep the cover down. No particular "prop" had been provided for the purpose, but when one was needed the water tender or some one else would procure a piece of plank or joist

and saw it off the right length and use it as such a prop. Mr. Frazier, an expert marine surveyor and engineer, called by the defendant, testified that when the ship rolled to starboard, assuming the ejector pipe to be full of water, there would be an upward pressure of 1300 pounds on the hopper cover. He also testified that the steamer would roll the outer end of the ejector pipe under water three times a minute in the sea as it was described to be at the time in question, and that with the cover of the hopper off 210 gallons of water a minute would come into the fire-room through the hopper.

On the night in question a prop was used to some extent at least in an attempt to hold down the hopper cover, but the testimony was conflicting as to the length of time it was kept in place, and the fact was that notwithstanding its attempted use large quantities of water came in through the hopper.

Eaton, a fireman on the preceding watch, testified that large quantities of water began to come in through the ash ejector in a few minutes after the steamer got outside of Portland Harbor and that the water was 5 or 6 inches on a level over the floor, and as the ship rolled it would rise "nearly to your knees." Mattocks, a fireman called by the defendant, testified that between 12 and 1.30 o'clock of the night in question he observed "a considerable amount of water over that fire-room floor" and that as the steamer rolled "there would probably be a wash going up against the bunkers of may be four or five inches." Eisner, another fireman called by the defendant, testified that the water would attain a height of five or six inches as it run back and forth across the fire-room floor. Cole, called by the defendant, who was on the watch with the plaintiff, testified that water came in through the hopper every time the ship rolled and that it was five inches high as it went across the floor, and "possibly it might have been" higher. White, called by the defendant, testified that when he came on watch at 4 o'clock at the end of the plaintiff's watch, and after the sea had somewhat subsided, he found "an inch or two" of water on the fire-room floor, and that water was still coming in through the hopper.

The plaintiff testified that when he went into the fire-room the water was 6 or 8 inches deep, and that it would wash nearly to his knees as the ship rolled and that that condition continued about the same during his whole watch, except that the sea became somewhat smoother.

In view of all the evidence we think it is not established to a reasonable certainty that the jury erred in their conclusion that the ash ejector, in its then condition, was defective and out of repair, in consequence of which an unreasonable and dangerous quantity of sea-water came into the fire-room making it an unsafe place for the plaintiff to work in.

2. The evidence shows that the officers of the ship, who had supervision of the fire-room and its appliances and whose duty it was to see that it was maintained in a reasonably suitable and safe condition, knew that great quantities of sea-water would come in through the ash ejector in rough seas unless the hopper cover was securely and tightly held down, and that they knew the condition of the hopper at the time in question, and that the holding-down bolts had long before rusted away and had not been renewed, and that no other appliance had been provided, or was used, to fasten the cover down, except the "prop." It follows, therefore, as a necessary conclusion that, if the ash ejector, in its then condition, was defective and out of repair, the defendant was negligent in so maintaining it.

3. There can be no reasonable doubt that the evidence justified the jury in finding that the plaintiff sustained personal injuries resulting in his damage in consequence of the water that was in the fire-room during his watch. The extent of those injuries may be more properly considered under the question raised as to the amount of damages awarded.

4. There is no evidence that the plaintiff is chargeable with any act of commission or omission, that contributed to his alleged injuries, other than remaining in the fire-room and performing his work as fireman during his watch. But the defendant confidently contends that because the plaintiff so remained and worked during his watch under the existing conditions he is precluded from recovering for any injuries resulting to him from those conditions, either on the ground of contributory negligence, or under the doctrine of the assumption of risk.

There is a distinction between contributory negligence and the voluntary assumption of a risk or danger as defenses in negligence cases. The two defenses are logically independent. The former is predicated on the carelessness of the plaintiff in the employment he has undertaken which carelessness contributed to his hurt, while the latter involves the idea that he voluntarily entered upon, or con-

tinued in, the employment knowing and appreciating the risk and danger of being so hurt. The latter defense is often applicable when there is no carelessness at all. In individual instances it sometimes becomes a close question whether the facts relied upon as a bar to recovery tend to establish the one or the other defense. In the case at bar the defendant contends that the fact that the plaintiff continued his work in the fire-room during his watch knowing the conditions there is a bar to his right of recovery for whatever injuries resulted to him on account of those conditions. And it may not be clearly apparent whether that contention is more logically based on the ground that his act in so continuing to work under the existing conditions was a negligent act that contributed to his injuries, or on the doctrine of the maxim, *Volenti non fit injuria*—the doctrine, that one who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. This doctrine is recognized and adopted by our court in many cases. *Buzzell* v. *Laconia Manf'g Co.*, 48 Maine, 113; *Mundle* v. *Manf'g Co.*, 86 Maine, 400, 407; *Conley* v. *Express Co.*, 87 Maine, 352, 356; *Cunningham* v. *Iron Works*, 92 Maine, pp. 511-512; *Dempsey* vs. *Sawyer*, 92 Maine, 295, 298; *Golden* v. *Ellis*, 104 Maine, 177; *Wiley* v. *Batcherlder*, 105 Maine, 536, 539. It seems not to be of essential importance however in this case to determine with certainty to which of the two defenses the defendant's contention logically belongs, since the fundamental propositions necessary to sustain the contention in this case are the same, whether the act relied upon tends to show contributory negligence or an assumption of the risk. We think, however, that the question, whether the plaintiff's act in continuing his work in the fire-room under the existing conditions precludes his right of recovery, is to be determined with reference to the doctrine of the maxim, *Volenti non fit injuria*, the assumption of the risk, rather than that of contributory negligence.

The doctrine of the assumption of the risk involves two fundamental propositions, first, that the employee knew of the risk, and second, that he voluntarily assumed it. On this branch of the law it is well settled, that an employee is presumed to have assumed the ordinary, obvious and apparent risks that are naturally incident to the service for which he has contracted. As to those risks the presumption includes both knowledge and voluntariness. Such pre-

sumption arises out of the contractual relation of the parties. But the employee is not presumed to have known and voluntarily assumed other risks that are attributable to the employer's negligence, which either did not exist at the time of the employment, or of the existence of which he then had no knowledge. Accordingly when the doctrine of assumption of risk is interposed as a bar to recovery for an injury resulting from a risk of the latter class, a question of fact ordinarily is raised whether he took the risk of the injury received. Concerning such a question, Knowlton, J. in *Mahoney* v. *Dore*, 155 Mass., 513, 519, appropriately said: "The question divides itself into two parts; first, whether he understood and appreciated the risk, which is sometimes a question of law and sometimes a question of fact; secondly, if he appreciated it, whether he assumed it voluntarily, or acted under such an exigency, or such an urgent call of duty, or such constraint of any kind, as in reference to the danger deprives his act of its voluntary character. He may reluctantly, so far as the danger is concerned, and under extraneous pressure which amounts almost to compulsion, expose himself to a danger which originates in anothers fault, and under such circumstances it cannot be said that he assumes the risk voluntarily."

It is not enough that the employee knew of the risk; it must also be shown that he knew and appreciated the danger flowing from the risk, or else such danger must have been so obvious that an ordinary prudent person, under the circumstances, would have appreciated it. *Mundle* v. *Manf'g Co.*, 86 Maine, 400, 406; *Frye* v. *Bath Gas and Elec. Co.*, 94 Maine, 17; *Bowen* v. *Mfg. Co.*, 105 Maine, 31; *Colfer* v. *Best*, 110 Maine, 467; *Fitzgerald* v. *Connecticut River Paper Co.*, 155 Mass., 155, 161; *Thomas* v. *Quartermaine*, 18 Q. B. D., 685; *Yarmouth* v. *France*, 19 Q. B. D., 647. See the very recent case of *Gila Valley G. & N. R. Co.* v. *Hall*, decided January 5, 1914, by the United States Supreme Court.

We think the tendency of recent decisions, both American and English, is to hold that it is a question of fact whether an employee who becomes aware of and appreciates a risk of danger which has arisen from his employer's negligence, and which is not covered by implication in his contract of service, and who yet works on, voluntarily assumes that risk or endures it because he feels constrained to under the exigences of his situation. In *Smith* v. *Baker* (House of Lords 1891) A. C., 325, 354, 60 L. J. Q. B. N. S., 683, Lord Watson

said: "Whether the plaintiff appreciated the full extent of the peril to which he was exposed or not, it is certain that he was aware of its existence, and apprehensive of its consequence to himself; so that the point to be determined practically resolves itself into the question whether he voluntarily undertook the risk. If upon that point, there are considerations pro and contra, requiring to be weighed and balanced, the verdict of the jury cannot be lightly set aside." After commenting on the necessity that it should appear that the workman appreciated or had the means of appreciating the danger, he further says: "But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations which must vary according to the circumstances of each case." See *Thrussell* v. *Handyside*, 20 Q. B. D., 359; and *Yarmouth* v. *France*, 19 Q. B. D., 647. See also *Fitzgerald* v. *Connecticut River Paper Co.*, supra. And in *Kane* v. *Northern Cent. R. Co.*, 128 U. S., 91, it is said: "But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion."

In the case at bar, the presiding Justice submitted to the jury, with full and appropriate instructions, the question whether the plaintiff knew the unsafe condition of the fire-room and appreciated, or by the exercise of reasonable care on his part ought to have appreciated, the danger flowing from that unsafe condition; and he also left it to them to decide as a fact whether the plaintiff, if he knew and appreciated the danger, voluntarily assumed it by remaining at his post during his whole watch. We think those were proper issues for the jury. Accordingly the only question which we are called upon to decide on this branch of the case is whether, upon all the evidence, the jury were warranted in finding in the plaintiff's favor upon those issues.

An examination of the evidence clearly shows that prior to the night in question the plaintiff had little or no practical knowledge of the construction and operation of the ash ejector. He had never

before been on a ship equipped with such an appliance, it was no part of his duty to operate this one, and he had not examined it or received any special information respecting it. It is true that on one previous occasion some sea-water came into the fire-room through this ash ejector while the plaintiff was at work there, but he testified that on that occasion the quantity of water was comparatively small and caused no particular inconvenience. But he did not then, nor at any time prior to the night in question, know that there was no means by which the outboard end of the ejector pipe could be closed when an emergency required it, or that there were no relief valves in the pipe. Accordingly it was an authorized conclusion from the evidence that neither at the time of the plaintiff's contract of service, nor at any time thereafter when the ship was in port when and where he might reasonably have refused to continue in the service and have left the ship, did the plaintiff have knowledge in fact or in law of the defective condition of the ash ejector and the risks and dangers incident to his service in consequence of its being maintained in that condition. Accordingly the question whether the plaintiff knew and appreciated the risk and voluntarily assumed it is to be considered in connection with the fact that the risk came upon him suddenly while he was engaged in his regular service, and was attributable to his employer's negligence.

He did have knowledge of the existing conditions in the fire-room when his watch began; and it is evident that he then apprehended some discomfort to himself on account of that condition, for he remarked, as he testified, to a superior officer, while standing on the deck above looking down into the fire-room and just before going down there, that, "It is pretty tough for a man to go down into that." But whether he appreciated, or should have appreciated, the peril of that condition, the danger flowing therefrom to himself if he remained there at his work during his watch, is a question concerning which intelligent and fair minded men might reasonably doubt, to say the least. Indeed, it would almost seem to be a necessary conclusion that the plaintiff, being an ordinary workman, was not capable of appreciating that peril, that he did not possess the necessary technical knowledge and information to enable him to understand and appreciate the effect upon his system of working for four hours with his feet and legs in cold sea-water and the rest of his body subjected to a temperature of from 115 to 140 degrees of heat. At all events, we

think the jury's finding, so far as it necessarily imports that the plaintiff did not know and appreciate the danger to himself from the condition of the fire-room, is not so plainly and manifestly unwarranted as to require the court to set it aside.

But if the plaintiff did know and appreciate the risk and danger to himself from continuing at his work, did he *voluntarily* assume it? The jury decided that he did not. Is that decision justified? We are fully in accord with the idea, suggested above as the tendency of recent decisions, that, where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk and does not remonstrate, does not necessarily, as a matter of law, preclude his recovering in respect of the breach of duty, under the doctrine of *Volenti non fit injuria.* Though it appears that the servant was injured by remaining at his post and working on, after knowing and appreciating a risk arising from his employer's fault, still courts of justice should not turn him away unheard, and with an arbitrary pronouncement that he must be held to have voluntarily assumed the risk of being so injured whatever his explanation might be. That doctrine is too rigorous. It works injustice. It makes the servant bear an unfair and unequal burden under the pressure of present economic conditions. In such case we think it becomes a question of fact whether the servant did voluntarily assume the risk, determinable from a careful consideration of the exigences of his situation at the time, and of all the circumstances and conditions under which he acted. The weighing and balancing of such considerations and drawing proper inferences therefrom are matters well within the province of a jury.

It is a matter of common knowledge that the duties of the firemen of a steamer when underway at sea are of great importance. Unless the fires are properly tended and sufficient steam pressure kept up the ship may become unmanageable. The neglect of a fireman to perform his duties when the ship is in dangerous seas might imperil the safety of the ship and all on board. In the case at bar when the time arrived for the plaintiff's watch in the fire-room to begin the steamer was underway on the ocean and there was at least a heavy sea running. He then saw there was sea-water in the fire-room, but nevertheless he went in and remained there keeping his fires up during his watch. He conceived that to be his duty which he could

not shun from fear or apprehension of personal discomfort and injury. The defendant contends, however, that the plaintiff, if he appreciated danger to himself, should have left his fires and reported to his superior officer, who might have put some one in his place, and failing to do that he must be held to have voluntarily assumed whatever risk there was. On the other hand he testified that he understood, from what he had read and heard concerning the rules and regulations enforceable on ships at sea, that he was bound to remain at his post notwithstanding the danger, and that if he refused to do so, under those circumstances, it would make him liable to punishment. His statements now made as to the influences that were then operative upon his mind are, of course, not conclusive on the question of the voluntariness of his conduct, and indeed, they may have little or no weight on that question, still they are to be considered for what they are worth with all the other facts and circumstances tending to disclose whether he acted voluntarily or not. We do not perceive that any different rule of law is applicable when considering the question whether an employee on shipboard who continued at his post after knowing and appreciating a risk which arose from his employer's negligence, was himself negligent in so doing or voluntarily assumed the risk, than when considering the effect of similar conduct of an employee engaged in service on land. In each case the important considerations are the employee's situation at the time, the character of his service, his responsibility for the safety of others, the nature of the risk and his relation to it, and all the circumstances and conditions that might have exerted some pressure upon him preventing a free and voluntary exercise of his choice.

This question whether the plaintiff voluntarily assumed the risk to himself involved in continuing at his post tending his fires, under the existing circumstances, or endured that risk because he was constrained to do so by the exigencies of the situation and his relation to it, was submitted to the jury under appropriate instructions. It was a proper question for them to determine and we think their decision upon it must stand.

5. The evidence reasonably justifies the finding, that the plaintiff, a young married man of 37 years of age, was, prior to the time of the accident, enjoying fairly good health, at least; that immediately after his alleged exposure he became ill and developed acute nephritis or acute inflamation of the kidneys, called Bright's Disease;

that he has been sick ever since and wholly incapacitated to perform any manual labor, and that at the time of the trial, April, 1913, his physical condition was most serious with no prospect of any improvement.

Dr. Barrett was called to see him on Aug. 14, 1911, and attended him constantly till the 14th of September when he was removed to the Marine Hospital in Portland. At his first visit the doctor found him ill with headache, cough and general weakness, "due to what he said was taking cold while a stoker in a steamer." His condition became rapidly worse and on the 22nd of August the doctor diagnosed his case as acute nephritis or inflamation of the kidneys. According to the doctor's testimony the plaintiff was then in a serious condition. He was bloated on "all parts of the body, from the crown of his head to the sole of his feet," to use the doctor's words, and he "considered him in a critical condition" at the time he last saw him before he was removed to the hospital. He testified that the plaintiff's condition at the time of the trial was bad, that he could not perform any manual labor, that his chances of recovery were "very poor," and that he was "more feeble than he was when he first came out of the Marine Hospital" eighteen months before.

Dr. Albert F. Small, connected with the Marine Hospital, testified that the plaintiff was brought to the hospital in an ambulance on September 15, 1911; that he was then in a semi-conscious state and critically ill; that his dropsical condition involved his entire body, and he diagnosed the case as acute nephritis or so called Bright's Disease. The plaintiff remained at the hospital until October 22, 1911. Dr. Small saw him on an average of once a week after that time, and examined him in company with other physicians. It was his expressed opinion that the plaintiff "has failed" since he left the hospital, and that his chances of recovery "are very, very poor."

It would be quite impracticable here to comment in detail upon all the evidence introduced tending to show the character and extent of the plaintiff's sickness and present physical condition, and to establish the plaintiff's contention that they are attributable to his alleged exposure. But after a careful examination and consideration of all the evidence, including all the medical testimony, the court is not satisfied that the jury plainly erred in finding that the plaintiff's sickness and present diseased condition are the results of his exposure

to the conditions in the fire-room on the night of July 28, 1911. Nor do we think it can be held that the damages awarded are clearly excessive, for the evidence reasonably warrants the conclusion that the plaintiff is not only totally incapacitated for any manual labor now, and his health seriously and probably fatally impaired, but that there is no ground on which to base an expectation of any improvement in his condition.

THE EXCEPTIONS: It was not error for the presiding Justice to refuse to direct a verdict for the defendant. The court has already expressed its opinion that the evidence reasonably justified a finding in the plaintiff's favor. Accordingly the first exception is without merit.

The second exception was to the admission of the testimony of the plaintiff as to a conversation which he said he had with the second assistant engineer, McGowan, about half an hour before going down into the fire-room at the beginning of his watch, in which he claims to have said to McGowan that he "thought it was pretty tough for a man to go down into that water, and work in that water with the heat that was down there," and that the reply was "they couldn't make blood of one and bone of another." We find no reversible error in the admission of that testimony. The conversation tended to show notice to a superior officer of the ship of the then existing conditions in the fire-room and was competent evidence on the question of the defendant's negligence. It also tended to show a complaint or remonstrance by the plaintiff to his superior officer respecting the dangerous condition of the fire-room and for that purpose we think it was admissible. The only ground urged in argument against its admission is the claim on the part of the defendant that McGowan was not at the time of the conversation in charge of the engine room, but that his watch as an engineer terminated just before the conversation. The plaintiff however testified that at the time of the conversation McGowan was on duty and apparently was in charge of the engine room. The jury might have so found. It would not have been proper, therefore, for the trial court to have determined that question in advance and to have excluded the testimony. The defendant did not request the court to specially instruct the jury as to the effect of that testimony. This exception must accordingly be overruled.

An exception was taken to the admission against objection of a hypothetical question which the plaintiff's counsel asked of Dr.

Stuart. The question assumed among other things that the plaintiff at the time of his injuries "was a strong and vigorous man, in the enjoyment of good health." The objection was stated to be upon the ground that the question assumed "something which has not occurred in the case and which is absolutely disputed by the plaintiff's own evidence, that at that time he was or had always been a rugged man." The objection was based evidently on the claim that there had not been up to that time any sufficient evidence introduced from which the jury could find as a fact the assumption as to the plaintiff's health as stated in the question. Concerning the form and scope of the hypothetical question and the extent and limitations of its assumption of facts and circumstances much must be left to the discretion of the presiding Justice. In framing a hypothetical question the practice is for the question to contain the assumption of the existence of such facts and conditions as the jury may be authorized to find upon the evidence as it then is, or as there may be good reason to suppose it may thereafter appear to be. *Anderson* v. *Albertstamm*, 176 Mass., 87, 91. We have examined the testimony introduced in the case up to the time the question was asked and have compared it with the assumed fact of the question objected to and we think the question as framed was properly admitted. It plainly appears that it was the plaintiff's claim that he had been strong and healthy up to the night in question. He testified that he weighed 165 to 170 pounds when he shipped on the Fuller; that he worked at S. D. Warren's paper mills for about five years prior to that, and lost no time on account of sickness; and in cross examination he stated that since he had "the grippe" some fifteen years before he had never been sick a day. And Dr. Barrett had testified that he had known the plaintiff for five or six years, had treated him a few times for some minor troubles, and that his physical condition and general health was "good," and being asked if it so continued up to July, 1911, he replied "yes, I considered it so."

But it is pertinent here to call attention to the fact that later in the trial a very long hypothetical question, covering more than two printed pages of the record, and containing assumptions as to the plaintiff's good health and strong and physical condition at and prior to the time of his injuries, and fully covering all that was assumed in the question to which the exception was taken, was without objection asked of and answered by Dr. Addison S. Thayer, an

expert physician and surgeon called by the defendant. Because of that fact, if for no other reason, this exception should be overruled. *State* v. *Bennett*, 75 Maine, 590.

Winslow N. Eaton, a fireman on the Fuller, called by plaintiff, was asked in cross-examination if he thought he would be arrested for mutiny if he left the fire-room without permission, and answered "I didn't know anything about it." On re-direct examination his attention was called to that question and he was asked "Did you ever have any intimation from either of the engineers aboard that ship when they were in charge of the watch in regard to anything of that kind?" To that question the defendant's counsel objected on the ground that, "it should be limited to complaints as to the firemen." That objection we think was not infringed upon, for the witness then testified only as to what he claimed to have heard the first assistant engineer tell the fireman why they should not make complaints on the Portland end of the route. The defendant therefore can take nothing by this exception since the answer of the witness was strictly within the question as limited by the defendant's objection.

John J. McRae, who served as a fireman on the Fuller in 1908 and again in 1911, was permitted against objection to testify as to the condition of the holding-down bolts on the hopper in 1908, to the effect that they were then rusted and useless, and that in 1911 they were useless, and "there wasn't any." This testimony was competent and material. It tended to show the length of time the holding-down bolts had been suffered to be out of repair and not in usable condition, a fact which in itself is evidence of the defendant's negligence. *Johnson* v. *Boston Towboat Company*, 135 Mass., 209, 215. Further, it appears that during the trial, Moore, the chief engineer on the Fuller at the time in question, called by the defendant, was questioned in cross-examination without objection as to the condition of the holding-down bolts in 1907 when he came on the steamer; and as to the length of time those bolts had been gone altogether he said: "Well they have been gone four or five years or so." It is immaterial to consider the propriety of rulings first made when it appears that the same question has been substantially answered without objection before the close of the trial. *State* v. *Bennett*, supra.

Charles E. Brower, a marine engineer of 25 years' experience, called by the plaintiff was asked; "On other vessels what other contrivance is there adopted to prevent water coming into the ash ejector?" and against objection he was permitted to answer; "They have a valve on the outside of the pipe to keep the water from coming in." This testimony showing what other means or appliances were in use on other ships to prevent water from coming in through an ash ejector was admissible to aid the jury in determining whether the defendant had exercised reasonable care in maintaining the ash ejector in use on the Fuller. "It does not follow from the introduction of such evidence that the defendant was bound to use the very safest or newest, or any particular machinery or appliances; but, as 'reasonable care' is a relative term, the jury might properly consider what could be done to secure safety, and the evidence was competent." *Myers* v. *Hudson Iron Co.*, 150 Mass., 125, 137. See Labatt, Master and Servant, Sec. 43 (p. 109); *Haines* v. *Spencer*, 167 Fed., 266, 271.

And, again respecting this exception, before the trial was over Robert H. Fuller, an expert consulting engineer and marine surveyor, called by the defendant, in direct examination, testified definitely as to other types of ash ejector appliances, and particularly as to those having "a shuttle valve on the outside of the vessel which they could operate from a chain or other means to close that opening when they were not operating the hopper and prevent water from coming in."

Mr. Brower was also asked; "And when you are at sea if there is water on the floor, or the men are exposed to danger, are they permitted to leave their work?" and against objection he was permitted to answer : "Not if we can help it." As to this exception it need only be said that substantially the same question was fully answered by other witnesses without objection during the trial.

Finding no error in the rulings excepted to, it is the opinion of the court that the motion and exceptions should be overruled.

Motion and exceptions overruled.

RAYMOND S. OAKES, Trustee

vs.

PINE TREE STATE MUTUAL FIRE INSURANCE COMPANY.

Cumberland. Opinion June 3, 1914.

Arbitration. Insurance. Letter. Nonsuit. Waiver.

In this case there was no reference of the amount of the loss to three disinterested men, as provided in the policy. The following letter from the President of the defendant company was received by the plaintiff and introduced in evidence.

"Hallowell, Maine, Feb. 15, 1913.

RAYMOND S. OAKES, Esq.,
Portland, Maine.

DEAR SIR;—Yours re claim E. U. Archibald at hand.
This Company deny all liability and have not done anything about it.

Yours truly,
(Sig.) JAMES T. COLLINS
Pres."

Held:

1. A distinct denial of all liability by the insurance company is equivalent to a declaration that it will not pay if the amount of the loss should be determined.
2. The law will not require the useless and expensive formality of an arbitration, when the insurer, for whose benefit it was provided, has rendered it superfluous.
3. The letter in the case was an unqualified denial by the insurance company of all liability in respect to the Archibald claim that had been made against it for loss under its policy.
4. The letter was at least prima facie evidence of a waiver by the insurance company of the provision in the policy for arbitration.

On exceptions by plaintiff. Exceptions sustained.

This was an action of assumpsit brought by the plaintiff, Trustee in bankruptcy of the estate of E. U. Archibald, to recover the sum of one thousand dollars, the amount of a policy of fire insurance issued by the defendant company on certain buildings owned by

said Archibald, in West Poland, Maine, which were totally destroyed by fire on the 4th day of December, 1911. There was no reference of the amount of the loss.

At the conclusion of the evidence introduced by the plaintiff, the Judge of the Superior Court for Cumberland County, before whom the case was tried, ordered a nonsuit, and the plaintiff excepted and his exceptions were allowed.

The case is stated in the opinion.

Charles G. Keene, for plaintiff.

Melvin H. Simmons, for defendant.

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

KING, J. The action is to recover the amount of a policy of fire insurance issued by the defendant, the premises insured having been totally destroyed by fire December 4, 1911. The policy was of the Maine Standard Form containing the following provisions:

"In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

The plaintiff introduced, by agreement and without objection, as part of his case, a letter from the president of the defendant company to the plaintiff's attorney, admittedly sent and received prior to the commencement of the action, containing the following statement: "Yours re claim of E. U. Archibald at hand. This company deny all liability and have not done anything about it."

At the close of the plaintiff's evidence counsel for the defendant moved for a nonsuit on the ground that the plaintiff had failed to show any reference to arbitration as required by the policy. Plaintiff admitted that no such reference was had but claimed that the defendant had waived it and that the letter from the defendant

denying all liability was the evidence of such waiver. Thereupon the court ruled as a matter of law that said letter did not constitute a waiver by said defendant company of such reference and ordered a nonsuit. The case is before the court on the plaintiff's exceptions to that ruling.

In Sec. 5, Chap. 49, R. S., it is provided that if the insurance company shall not within ten days after written request to appoint referees under the provision for arbitration in the policy, name three men from whom the insured may select one, or shall not within ten days after receiving the names of three selected by the insured make known to him its choice of one of those to act as one of the referees "it shall be deemed to have waived the right to an arbitration under such policy and be liable to suit thereunder."

In support of the ruling the defendant contends that the statute has specified what constitutes a waiver by the insurance company, and that, at least in the absence of proof of an express waiver, no other waiver by the company can be shown. The contention is not tenable. That statutory provision was not intended we think to specify the only mode by which the insurance company could waive the arbitration provision, but its manifest purpose was to provide a necessary and effective means to prevent the company, by non-action on its part in selecting the referees, from depriving the insured of his right of action under the policy, It declared that certain non-action on the part of the company should be "deemed" a waiver of the right to arbitration, but it did not declare that the waiver of that right mentioned in the policy should be limited to that particular non-action. The company may waive the right in other ways, and such waiver may be inferred from the conduct of its agents and representatives. *Lamson, &c., Co.* v. *Prudential Fire Ins. Co.*, 171 Mass., 433, 436, and cases cited.

It seems to be settled by a controlling weight of authority that an unqualified denial by the insurance company of all liability under the policy renders inoperative a provision therein for an arbitration as to the amount of the loss as a condition precedent to a right of action to recover such loss. *Wainer* v. *Milford Mu. Fire Ins. Co.*, 153 Mass., 335-338; *Lamson, &c., Co.* v. *Prudential Fire Ins. Co.*, 171 Mass., 433, 436; *Yendel* v. *Assurance Company*, 47 N. Y., Supp. 141; *Hamberg* v. *St. Paul F. & M. Ins. Co.*, 68 Minn., 335, 71 N. W., 388; *Moore* v. *Sun Ins. Office*, 100 Minn., 374; *Siegle* v. *Badger Lumber Co.*,

106 Mo. App., 106, 110; *Phoenix Ins. Co.* v. *Stocks*, 149 Ill., 334; *Farnum* v. *Phoenix Ins. Co.*, 83 Cal., 246; *Hickerson* v. *German-American Ins. Co.*, 96 Tenn., 193, 32 L. A. R., 172; *Home F. Ins. Co.* v. *Kennedy*, 47 Neb., 138, 53 Am. St. Rep., 521; 19 Cyc., 882 and cases cited; *Cash* v. *Concordia Fire Ins. Co.*, (Minn.) 126 N. W., 524; May on Ins., vol. 2, page 1178, Sec. 496 B; Biddle on Ins., Sec. 1175.

A distinct denial of all liability by the insurance company is equivalent to a declaration that it will not pay if the amount of the loss should be determined; and the law will not require the useless and expensive formality of an arbitration when the insurer, for whose benefit it was provided, has rendered it superfluous.

The letter in the case at bar was an unqualified denial by the insurance company of "all liability" in respect to the Archibald claim that had been made against it for loss under its policy. This was not a failure to agree as to the amount of the loss, but an unequivocal denial of all liability, leaving no basis for an arbitration. The letter was at least prima facie evidence of a waiver by the insurance company of the provision in the policy for arbitration, and in the opinion of the court the exceptions must be sustained.

Exceptions sustained.

STATE OF MAINE

vs.

ETHMA COLE.

Penobscot. Opinion June 3, 1914.

Complaint. Demurrer. Exposure. Indictment. Revised Statutes, Chap. 125, Sec. 5.

Complaint under Revised Statutes, Chap. 125, Sec. 5, against respondent for indecent exposure of his person, to which he filed a demurrer and in connection therewith a so called reservation of a right to plead over.

Held:

1. That in such case, unless a right to plead over was granted by the Justice who ruled on the demurrer, judgment on the indictment goes automatically for the State.
2. The right to plead over cannot be had by merely "reserving" it. It must be granted by the court.

On exceptions by respondent. Exceptions overruled.

This is a complaint under Revised Statutes, Chap. 125, Sec. 5, against the respondent for wantonly and indecently exposing his private parts openly and in the presence of the complainant. The respondent demurred to the complaint and warrant and the presiding Justice overruled the demurrer. To which overruling of said demurrer, the respondent excepted.

The case is stated in the opinion.

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

U. G. Mudgett, for respondent.

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

SAVAGE, C. J. Complaint under Revised Statutes, Chap. 125, Sec. 5. The defendant demurred. The demurrer was overruled, and exceptions were taken.

The allegation in the complaint is that the defendant "did wantonly and indecently expose his person by then and there openly and in the presence of the complainant expose to view his private parts, against the peace of the State" and so forth.

The statute in question provides that "Whoever wantonly and indecently exposes his person shall be punished." The only grounds of demurrer argued are that the act constituting the offense is not set out, and that under such a complaint a man might be convicted when he had merely accidently exposed his person.

We think otherwise. The particular act by which it is alleged that the defendant "wantonly and indecently exposed his person" was the exposure of his private parts. And that is alleged. The very terms "wantonly and indecently" exclude accidental exposure. The points taken by the defendant are not tenable. The exceptions must be overruled.

And in such case, unless a right to plead over was granted by the Justice who ruled on the demurrer, judgment on the indictment goes automatically for the State. In this case the record shows that the defendant in connection with his demurrer filed a so called reservation of a right to plead over. But it does not appear that any such right was granted by the presiding Justice. The bill of exceptions is silent. The right to plead over cannot be had by merely "reserving" it. It must be granted by the court. We cannot give effect to the reservation.

Exceptions overruled.
Judgment for the State.

ROBERT AHERN, Administrator of the Estate of John X. Welch

vs.

JAMES H. MCGLINCHY.

Cumberland. Opinion June 4, 1914.

Agent. Deceit. Equity. Exceptions. False Representations. Revised Statutes, Chap. 89, Sec. 8. Survival of Actions. Title.

1. That the evidence does not disclose that the deceased in his lifetime was ever deceived by any representations of the defendant.
2. That an action for deceit, under circumstances like the case at bar, does not survive either at common law or by the provisions of R. S., Chap. 89, Sec. 8.
3. That the motion to direct a verdict for the defendant should have been granted.

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

This is an action on the case for deceit to recover money expended in removing a cloud from the title to real estate conveyed to the plaintiff's intestate by Ellen McGlinchy, by warranty deed in March, 1901. The case was tried before the Superior Court of Cumberland County. The plaintiff claimed that the defendant, acting as agent for the grantor, made false representations as to the title to the land, that the grantee, relying upon those representations, purchased the land and later found the title defective. Plea, general issue. The defendant filed a motion requesting the judge to instruct the jury to return a verdict for the defendant, which motion the judge denied, and the defendant excepted thereto.

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

The case is stated in the opinion.

Dennis A. Meaher, for plaintiff.

Connellan & Connellan, for defendant.

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

PHILBROOK, J. Action on the case for deceit, tried in Superior Court of Cumberland County, verdict for plaintiff, and defendant comes to this court on exceptions and general motion for a new trial.

On the seventh day of March, 1901, one Ellen McGlinchy, in consideration of one dollar and other valuable considerations, conveyed a certain parcel of land to John X. Welch, plaintiff's intestate, and Mary Welch, his aunt, giving a warranty deed. The plaintiff claims that the defendant, acting as agent for the grantor, made false representations as to the title to the land, that the grantees relied on those representations, bought the land, and later found the title defective. On the twenty-second day of March, 1910, the grantees instituted equity proceedings to quiet title to the land. While these proceedings were pending John X. Welch died and in September, 1910, the plaintiff appeared in the equity suit as his administrator. That suit was prosecuted to final decree, and in consequence thereof certain expenses were incurred by Mary Welch in her own behalf and by the plaintiff in his representative capacity. Although the warranty deed does not in fact state what fractional interest in the land was conveyed to John, and what to Mary, yet the record shows that defendant's counsel, without contradiction, was allowed to state during the trial that one-third interest was in John and two-thirds in Mary. The plaintiff, as administrator of John, brings this action on the case for deceit and alleges the measure of damages to be the expense incurred in the equity suit to quiet title, and other incidental expenses, one-third of which he says he bore as administrator, and which third, amounting to $207.39, he received a verdict for at the hands of the jury. As to the rule or amount of damages we are not here concerned for the parties appear to have agreed upon that point, for the purposes of this case, providing the plaintiff is entitled to recover any damages.

It does not appear, and the plaintiff does not claim that the defendant ever made any false representations to John, personally, but it is claimed that, in the transaction, Mary was acting as the agent of John and that the false representations to her as the agent of John were, in law, representations made to John. This question of agency was submitted to the jury under instructions to which no exceptions were taken and which were correct. We have examined the

evidence carefully and conclude that the jury were manifestly wrong in their finding upon this question of agency. For this reason the motion for a new trial should be sustained and if that were the only question presented for our consideration our task would end here.

But it is the opinion of the court that we should go farther and decide other questions which are properly involved in this suit. At the close of the plaintiff's testimony, without offering any evidence in his own behalf the defendant presented a motion asking that the presiding judge direct a verdict for the defendant. This motion was denied and to that ruling the defendant filed exceptions which were allowed.

It should be borne in mind that the equity suit referred to has been disposed of by a final decree from which no appeal was taken and we are not now considering that suit. The action before us was begun after the death of John X. Welch, by his administrator, and is an action on the case to recover damages alleged to be suffered by John in his lifetime. The recovery of damages is sought for the benefit of John's estate, the plaintiff declaring that "it was by means of the deception then and there practiced and the representations made by the defendant that said John X. Welch and his estate have suffered the losses herein described." This action being brought to recover damages claimed to be sustained by John, because of the deceit of the defendant is a personal action. *Boyd* v. *Cronan*, 71 Maine, 286; *Hall* v. *Decker*, 48 Maine, 255; *Linscott* v. *Fuller*, 57 Maine, 406. This being true does the cause of action survive either by common law or by the provisions of R. S., Chap. 89, Sec. 8. It is the opinion of the court that it does not. Plainly the statute does not include this action for the only ones there included, in addition to those surviving by common law, are "replevin, trover, assault and battery, trespass, trespass on the case, and petitions for and actions of review."

Does this action survive by virtue of the common law. Under the authority of Chancellor Kent, 1 Kent Com., 473, the doctrine is well established that English statutes passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. It is also familiar learning that by the common law prior to 4 Edward III, ch. 7, and 31 Edward III, ch. 11, the general rule in cases of torts and in actions ex delicto was that upon the death of either party the

right of action did not survive to or against the personal representative of either. But by the statutes just referred to, passed long before the emigration of our ancestors, and which become part of the common law, this rule was altered in its relations to personal property and in favor of the personal representative of the party injured. By the authority of *Baker* v. *Crandall*, 47 Am. Rep., 126, and cases there cited, the rule may be thus stated: "Under the operation of these statutes, and the adjudications thereunder, it was held that the cause of action for any wrong to personal property, by which it was rendered less beneficial to the injured party, survived to his personal representative. It was also held that wrongs contemplated by these statutes were not limited to injuries to specific articles of personal property but extended to other wrongs by which his personal estate was injured or diminished." It should be here observed that a local statute in the State where that case was decided led the court to a different conclusion than that which we shall reach, as applicable to the statutes in our jurisdiction.

The legislature of Massachusetts, in part at least, has incorporated the element of the common law relating to damage to personal property in its provisions for survival of actions when it provides such survival in actions "for damage to real or personal property" and the adjudications of the court of last resort in that Commonwealth are significant and illuminating as applied to the present discussion. In *Read* v. *Hatch*, 19 Pick., 47, the court said: "It is contended that a false representation, by which one is induced to part with his property, by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction, and not conformable to the intent of the statute. If this were the true construction, then every injury by which one should be prevented from pecuniary gain, or subjected to pecuniary loss, would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage done to some specific personal estate, of which one may be the owner. A mere fraud or cheat, by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate." The same court has held that an action for libel does not survive. *Walters* v. *Nettleton*, 5 Cush., 544; nor an action for malicious prosecution, *Nettleton* v. *Dinehart*, 5 Cush., 543; nor

an action for deceit in the sale of poisoned grain, *Cutting, Adm.*, v. *Tower*, 14 Gray, 183; nor an action for fraudulent representations by means of which a person was induced to part with real estate, *Leggate* v. *Moulton*, 115 Mass., 552. Under a similar statute the Supreme Court of Vermont has held that an action for fraud in the sale of shares of stock does not survive, *Jones* v. *Ellis*, 68 Vt., 544. Our own court has held, under the statute of 1841, that an action cannot be sustained which was brought by an administrator against one for aiding a debtor of the plaintiff's intestate in the fraudulent transfer of his property, as the cause of action does not survive, *Smith* v. *Estes*, 46 Maine, 158.

It is therefore the opinion of the court that in the case at bar, the cause of action does not survive, it being one for alleged deceit of the defendant caused by his acts during the lifetime of the plaintiff. The motion to direct a verdict for the defendant was therefore proper and should have been granted.

Exceptions sustained.

HARRY E. ROSS et al.

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion June 4, 1914.

Carmack Amendment. Continuous Carriage. Initial Carrier. Negligence. Notice of Loss. Through Bills of Lading. Terminal Carrier. 24 United States Statutes at Large, page 379.

Potatoes were shipped from a station on the line of the Bangor Railway and Electric Company, an electric railroad corporation, consigned to the shipper's order at Bangor. They were intended by the shipper for through and continuous transportation to Hoboken, New Jersey. At Bangor the cars were received by the defendant and forwarded. There was a through tariff rate from the point of shipment to Hoboken, and when the defendant received the cars it advanced to the Bangor Railway & Electric Company its proportion of the through tariff rate. The defendant issued through bills of lading to Hoboken and collected of the shipper "heater charges" which were intended to cover heating the cars from Bangor to Hoboken. The potatoes were frozen while in transit, but not on the defendant's line.

Held:

1. That the receipt by the Bangor Railway and Electric Company of its proportion of the through tariff charges is some evidence of "a common control, management or arrangement for a continuous carriage or shipment" as defined in 24 U. S. Statutes at Large, p. 379, so as to bring that corporation within the scope of the Act to regulate commerce as amended by the Carmack Amendment, and make it liable, as initial carrier, for the defaults of connecting carriers.
2. But that the defendant, having assumed the obligation of heating after the potatoes had left the possession of the Bangor Railway and Electric Company, is to be deemed the initial carrier as to defaults in heating during the course of transportation.
3. That the case shows sufficient evidence to go to the jury on the question of damages.
4. That, as to the question of failure to give notice of the loss either to the initial or terminal carrier within ninety days, as required by the bills of lading, the point not having been made in the motion for a nonsuit, when the lack of evidence might have been supplied, it is not considered by the court.

On exceptions by plaintiff. Exceptions sustained.

This is an action on the case to recover for damages by freezing of potatoes shipped by a Maine Central bill of lading from Bangor, Maine, over the line of the Maine Central Railroad and connecting carriers to Hoboken, New Jersey. They were shipped from a station on the line of the Bangor Railway and Electric Company, consigned to the shipper's order at Bangor, and intended by the shipper for through and continuous transportation to Hoboken, New Jersey. The potatoes were frozen while in transit, but not on the defendant's line. Plea, general issue. At the close of the evidence for the plaintiff, the presiding Justice directed a nonsuit, to which direction the plaintiff excepted.

The case is stated in the opinion.

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

Fellows & Fellows, for defendant.

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

SAVAGE, C. J. Action of assumpsit against the defendant, as a common carrier, for damages to three car loads of potatoes, caused by freezing. The plaintiffs in their declaration allege in substance that they delivered the potatoes to the defendant to be carried and forwarded by it from Bangor to Hoboken, New Jersey, and that the defendant, in consideration of a certain sum of money paid to it by the plaintiffs, promised "to keep the cars heated and warmed until said cars should reach their destination, so that said potatoes would not freeze or be injured while in transit, but that the defendant did not regard its promise, and failed and neglected to keep the cars properly heated and warmed, so that the potatoes were thereby chilled and frozen."

The case shows that the potatoes were loaded in cars at different stations on the line of the Bangor Railway and Electric Company, a corporation operating an electric railroad between Charleston and Bangor, all in the county of Penobscot, and being physically connected by switch and siding with the Maine Central Railroad at Bangor, and of the same gauge. This railroad does a freight business. It takes freight cars from the Maine Central, uses them for purposes of transportation along its line, and returns them. The cars that are involved in this controversy were so taken. One of them was an

ordinary Eastman Heater car, and the other two are called in the case "Maine Central Eastman Heater" cars. The Bangor Railway and Electric Company hauled the cars, after they were loaded, to Bangor and delivered them to the defendant. The defendant carried them over its line, and caused them to be forwarded to Hoboken, in the same cars, without transshipment. When they reached Hoboken, some of the potatoes were frozen.

The Bangor Railway and Electric Company issued bills of lading for two of the cars, in which it appeared that the potatoes were consigned to the consignor's order, and that their destination was Bangor. There was, so far as the case shows, no bill of lading for the third car. When the potatoes were delivered to the Bangor Railway and Electric Company, the shippers intended a through and continuous shipment to Hoboken, but there is no evidence that the responsible shipping agents of that company knew that the destination was beyond Bangor. But it appears that there was a through tariff rate from the points of shipment on the Bangor Railway and Electric Company's line to Hoboken, and that the defendant when it received the cars at Bangor advanced to that company its proportion of the through freight charges.

When the defendant received the cars, it issued to the plaintiffs through bills of lading to Hoboken. The cars were routed over its own line, the Boston & Maine Railroad, and the Delaware, Lackawanna & Western Railroad, the last company being the terminal carrier. The defendant also collected of the plaintiffs at Bangor "Heater charges" and gave a receipt therefor, and there is no question but that these "charges" were to cover heating the cars from Bangor to Hoboken. There was no reference to heating in the bills of lading. There is no evidence that the potatoes were injured while in transit over the defendant's line. One of the conditions in the bills of lading issued by the defendant was that "claim for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable." There is no evidence that the notice required was seasonably given, either to the initial or to the terminal carrier. But it appears that the plaintiffs first brought suit against the Eastman Heater Car Company. What has become of that suit does not appear.

Upon this state of facts, the presiding Justice ordered a nonsuit, to which order the plaintiff alleged exceptions.

The plaintiffs contend in the first place that the defendant was the initial carrier, and, as such, is liable for any loss, damage, or injury in interstate shipments caused by connecting carriers, by virtue of the amendment of June 29, 1906, known as the Carmack Amendment to the Interstate Commerce Act of February 24, 1887, U. S. Compiled Statutes, Supplement 1909, page 1166. The defendant on the other hand contends that the shipment was a through interstate shipment at a through rate, and that the Bangor Railway and Electric Company was the initial carrier, and hence that it is not itself liable, in the absence of proof of any default on its own line. Although the Bangor Railway and Electric Company did not issue through bills of lading, but issued such bills only over its own line, the fact that the defendant advanced to it its proportionate part of the through tariff rates, is some evidence of a "common control, management or arrangement for a continuous carriage or shipment" as defined by section 1 of the act to regulate commerce, 24 U. S. Stat. at Large, page 379, and therefore we think that the Bangor Railway and Electric Company was as to these shipments originally, within the scope of the act to regulate commerce as amended by the Carmack Amendment, and as initial carrier was liable for the defaults of connecting carriers. *United States* v. *Seaboard Ry. Co.*, 82 Fed. Rep., 563; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 118 Fed. Rep., 613.

But the Bangor Railway and Electric Company entered into no express engagement or undertaking to keep the cars heated, either upon its own line, or beyond, and we think none was implied. The receipt by the defendant of full through heater charges, and the receipt therefor given by it, upon a shipment from "Bangor to Hoboken" do import we think an undertaking on its part to keep the cars heated properly to the point of destination. Congress has by the Carmack Amendment declared in substance "that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout." *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S., at page 198. In the same case it is also said that under the Carmack Amendment a receiving carrier, when it receives

property in one State to be transported to a point in another, involving the use of a connecting carrier for some part of the way, shall be deemed "to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right of reimbursement for a loss not due to its own negligence."

Assuming now that the Bangor Railway and Electric Company was the original initial carrier, is it liable as such under the Carmack Amendment for failure to perform a special agreement made by a subsequent and connecting carrier? or may the defendant be deemed to be the initial carrier, as to the obligation to heat? or is the defendant liable upon its own special undertaking? It is upon the last suggested theory that the plaintiffs have framed their declaration. And as to this, it may be said that while it is the rule in this State that a carrier is not liable for goods shipped beyond the end of its route, unless there is a special undertaking for through shipment, *Skinner* v. *Hall*, 60 Maine, 477; *Grindle* v. *Eastern Express Co.*, 67 Maine, 317, yet it is well settled that a carrier may make such a special agreement and be liable if it be not performed. It may be said also that the Carmack Amendment itself provides that the holder of a bill of lading is not deprived by that act "of any remedy or right of action he has under existing law."

If the Bangor Railway and Electric Company was under no obligation under its general bill of lading to heat the cars, and we think it was not, it is difficult to perceive upon what ground it can be held liable for the non-performance of a special agreement to heat, made by a connecting carrier. We think such a responsibility is not contemplated by the Carmack Amendment. The agreement to heat made by the defendant was incidental to its general duty as a carrier under the bills of lading issued by it, and must be construed with them. The defendant was the first carrier to contract with the shipper with respect to heating. And we think that as to defaults in heating during the course of transportation, it is to be deemed the initial carrier. We may properly add that the point seems to be a novel one in cases involving a construction of the Carmack Amendment. Our attention has been called to no case, and we have found none, like this one. We base our conclusion upon what seems to us to be a reasonable construction of the statute.

One or two other questions remain to be considered. In moving for a nonsuit, the defendant contended, as another ground for non-

suit, that the plaintiff had failed to show the value of the potatoes at the place of shipment, the bill of lading specifying that the amount of loss or damage shall be computed on the basis of the property at the place and time of shipment. We think there was sufficient evidence on this question to go to the jury.

The defendant now contends that the order of nonsuit should not be disturbed, because there was no evidence that any claim for loss or damage was made to the initial or to the terminal carrier within four months, as stipulated in the bill of lading, as a condition to the right to recover, and cites many cases to the effect that such a stipulation is a reasonable and valid one.

But this defense was not pleaded, as some courts have held that it must be, to make it available, nor was the point stated at the trial, by either counsel or court. We think we have no occasion now to decide whether the stipulation as to giving notice is such a condition precedent to a right of action that when there is a failure to give notice the plaintiff in his declaration must allege and excuse it, or whether the defendant must plead it, by way of brief statement. The authorities do not agree upon either of the propositions. For we do think that the defendant having stated other objections, but not having stated this one at a time when the lack of proof of notice, if notice was given, could have been supplied, should be deemed to have waived it.

Holding, as we do, that the defendant was the initial carrier, with respect to the defaults complained of, it follows that it was error to direct a nonsuit.

Exceptions sustained.

CARRIE W. SIMPSON, Appellant from Decree of Judge of Probate In Re Estate of Jane A. Blethen.

Waldo. Opinion June 6, 1914.

Administratrix. Aggrieved. Appeal. Decree. Inventory. Mortgage. Petition. Settlement. Will.

Jane A. Blethen died November 27, 1893, having no husband, and leaving as her only heirs at law and next of kin three children, namely, Carrie W. Simpson, the appellant, and Boutelle B. and Albert A. Blethen. Jane A. Blethen, two days before her death, signed an instrument which was intended to be her last will and testament, but it contained only two witnesses. Carrie W. Simpson delivered to the two sons the money and personal property which they would have received by the terms of the will, had it been valid. The two brothers gave receipts in full satisfaction, relinquishing all claims to their mother's estate.

Held:

1. The two sons, who presented the petition asking the Probate Court to order appellant to file an inventory, had released all their interest in the estate by the receipts executed by them, and were no longer proper parties to present the petition.
2. Not being legally interested in the estate, they were not parties who could appeal from any decree by the court having jurisdiction over the estate, and could not be proper persons to present a petition.
3. It is not every person that is dissatisfied with a decree of the Probate Court who is aggrieved within the meaning of the statute.
4. Only those who have rights which may be enforced at law and whose pecuniary interest might be established in whole, or in part, by the decree, are thus interested in the estate.

On report. Appeal sustained. Petition dismissed.

This was a petition to the Probate Court of Waldo County by Albert A. Blethen and Boutelle B. Blethen, brothers of Carrie W. Simpson, Administratrix of the estate of Jane A. Blethen, and children of Jane A. Blethen, late of Thorndike, in the county of Waldo, deceased, asking that said Carrie W. Simpson be ordered to file an inventory in the said Estate of Jane A. Blethen. On the 27th day

of May, 1913, the Judge of Probate for said County, ordered said Carrie W. Simpson, Administratrix as aforesaid, to file an inventory of the real estate, goods and chattels, rights and credits of the estate of the late Jane A. Blethen, at a Court next to be held at the Probate Court Room at Belfast, in said County of Waldo. From that decree, said Carrie W. Simpson appealed to the Supreme Judicial Court, being the Supreme Court of Probate within and for the County of Waldo next to be held on the third Tuesday of September, 1913. After the testimony was taken out in the Supreme Judicial Court, the case was reported to the Law Court by agreement of parties, for decision, upon so much of the evidence as was legally admissible; this Court to render such judgment as the legal rights of the parties require.

The case is stated in the opinion.

Dunton & Morse, for appellant.

John G. Smith, for appellees.

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

PHILBROOK, J. Jane A. Blethen died November 27, 1893, having no husband, and as her only heirs at law and next of kin, three children, namely Carrie W. Simpson, the appellant, Boutelle B. Blethen, and Albert A. Blethen. On the 25th of November, 1893, two days before her death, she signed a brief instrument, which was evidently intended to be a last will and testament; but the instrument bore the signatures of only two witnesses. This intended will was not presented for probate; but there was delivered by the appellant to the two sons the money and personal property which they would have received by the terms of the will if it had been a valid testament. The two brothers thus receiving money and personal property gave receipts to Carrie W. Simpson, the appellant and remaining heir, for the money and personal property delivered to them, both receipts containing the words, "In full satisfaction, I hereby relinquish all claims to my said mother's estate, both personal and real." Prior to the decease of Mrs. Blethen, she had conveyed her real estate to Elijah Simpson, husband of the appellant, and taken back a mortgage for $1,300. In 1897, it appears that this appellant was appointed administratrix of the estate of Jane A.

Blethen, and according to the testimony of the appellant, this appointment was made for the sole purpose of having some one authorized by law to discharge the mortgage given to Jane A. Blethen. The appellant, who was then and is now the administratrix, filed no inventory of the estate upon which she was appointed to administer. In 1913, the two brothers presented a petition to the Judge of the Probate Court, asking that court to request the administratrix to return an inventory of the estate. Notice was ordered, and hearing held, and on the 27th day of May, 1913, the Judge of the Probate Court ordered, "that the said Carrie W. Simpson, administratrix, as aforesaid, file an inventory of the real estate, goods and chattels, rights and credits of the estate of the late Jane A. Blethen, deceased." From this order of the Probate Court, Carrie W. Simpson appealed to the Supreme Court of Probate, and after the testimony was taken out, the case was reported to the Law Court by agreement of parties for decision upon so much of the evidence as was legally admissible, this Court to render such judgment as the legal rights of the parties require.

From a careful examination of the record we are satisfied that the two sons, who presented the petition asking the Probate Court to order this appellant to file an inventory, had released all their interest in the estate by the receipts executed by them, and hence were no longer proper parties to present the petition. Not being legally interested in the estate they were not parties who could appeal from any decree made by the court having jurisdiction over the estate, and hence could not be proper persons to present a petition. "It is not every person that is dissatisfied with a decree of the Probate Court who is 'aggrieved' within the meaning of the statute, but only those who have rights which may be enforced at law and whose pecuniary interest might be established in whole, or in part, by the decree." *Moore* v. *Phillips*, 94 Maine, 421.

Appeal sustained.
Petition dismissed.

JOHN B. MERCIER

vs.

JAMES MURCHIE'S SONS COMPANY.

Washington. Opinion June 6, 1914.

Assumpsit. Burden of Proof. Contract. Delivery. Memorandum of Agreement. Sale. Scale.

1. The defendant having admitted sale and delivery to itself of 690,000 feet of logs, an amount in excess of that mentioned in the contract, the question relating to the form of action and the admission of the memorandum of agreement are answered in favor of the plaintiff.
2. Whenever personal property is sold to be delivered to a certain person, or at a certain place, for the buyer, a delivery to such person or at such place is a completed delivery to the vendee.
3. Proof of such delivery raises a presumption in favor of the vendor that the property had been accepted by the vendee.
4. These rules of law, however, do not apply when the amount of property claimed to be delivered is largely in excess of that contracted for, as the buyer may reject the excess.

On report. Judgment for plaintiff in the sum of $1331.50 with interest from the date of the writ.

This is an action of assumpsit upon an account annexed and on the money counts, to recover the sum of $5591.18 for logs sold and delivered. The defendant pleaded the general issue. At the conclusion of the evidence, by agreement of the parties the case was reported to the Law Court for its determination upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Reed V. Jewett, and R. J. McGarrigle, for plaintiff.

Curran & Curran, for defendant.

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

PHILBROOK, J. The plaintiff brought this action in assumpsit, on account annexed and on the money counts, offering in evidence, under the latter, proof of the same items as appeared in the account annexed. Under objection on the part of the defendant, the plaintiff offered a certain written memorandum of agreement which appears to have been signed by the defendant but not by the plaintiff.

The account annexed is as follows:

"Calais, Maine, Nov. 9th, 1912.

James Murchie's Sons Co.

To John B. Mercier, Dr.

1911								
May 1,	To	349,300	ft.	logs	5731	pieces	from	D. Delaney
	"	489,384	"	"	6362	"	"	C. McPike
	"	21,000	C	"	521	"	"	C. McPike
	"	117,000	ft.		1872	"	"	H. Smith
	"	119,000	"	"	(1321	"	"	W. Metcalf
					(822	"	"	A. Metcalf

	1095,684 ft.	16,629 pieces at $10 1-2	$11,504.68
To	2 1-9 M feet of logs at $9.00	74 pieces from Lyons	19.00
"	reserved by James Murchie's Sons Co. in the winter of 1910 for driving logs left Jim Brown		50.00
"	amt. paid for board—32 weeks		96.00
			$11,669.68

		Credit	
By	draft	$2000.	
"	"	2000.	
"	paid Webber	2078.50	6,078.50
			$5,591.18"

The memorandum of agreement is as follows:

"MEMORANDUM OF AGREEMENT

Made and concluded this 23rd. day of Nov. 1910 between J. B. Mercier of the first part and James Murchie's Sons Co. of the second part.

Witnesseth, That the said Mercier of the first part agrees to put his teams into the logging woods the ensuing winter on land furnished by himself and cut, haul, mark and deliver in Big Lake properly boomed pine and spruce logs & cedar butts where they can be seen and scaled about 500 M ft. Saw Logs agree to haul none but good sound merchantable Logs, to run up each tree to inches at the top end, and to haul the full length of the tree in one log, also agree to long-butt all the Hemlock, and it is understood that any hemlock not properly long butted shall be not scaled. All logs hauled by said Mercier to be marked thus 1 $\frac{X}{X}$ in two places on each and every log: No pine to be hauled less than 12 ft. long 10 inches top end. No spruce to be hauled less than 20 ft. long 8 inches top end. All logs hauled by said Mercier to be scaled by James S. McCrea or some other competent person to be appointed by said Murchie's Sons Co. whose scale shall be final between the parties to this agreement one half the expense of scaling to be paid by each party.

In consideration of the above being performed, said Murchie's Sons Co. of the second part, agree to pay said Mercier Ten 50-100 dollars per M feet for spruce, pine and cedar, thus hauled and delivered as before mentioned, free of all expenses to said Murchie's Sons Co.

For any cash advances made, or cash liabilities that said Murchie's Sons Co., may come under for said Mercier he agrees to pay one per cent advance for commission and interest until payment on said logs becomes due, which will be

One quarter July 1-11

One quarter Aug. 1-11 James Murchie's Sons Co.

One quarter Sept. 1-11 By W. A. M.

One quarter Oct. 1-11

James Murchie's Sons Company, agrees to accept a four month's draft for one thousand dollars, January first 1911, and a like amount for February first 1911, and a like amount for March first 1911, with the understanding that the said drafts are to be renewed at maturity, for the same time, viz four months, provided always that the logs are landed as per within agreement.

JAMES MURCHIE'S SONS CO.

By W. A. M."

The plea is the general issue and at the close of the testimony the following stipulation and agreement was made;

"Questions of law arising of sufficient importance to justify the same, and by consent of the parties, this cause is reported to the Law Court for its determination upon so much of the evidence as is legally admissible."

The plaintiff claims sale and delivery to the defendant of 1,095,684 feet of logs, the defendant admits sale and delivery of 690,000 feet, the difference of 405,684 feet is in dispute, and "the point for this court to determine is the number of logs the Murchie Company actually did receive from Mr. Mercier and to fix the value thereof," is the way the plaintiff states the problem in his brief. When the testimony was taken out in the court below the defendant objected to the introduction of the memorandum of agreement, and made other objections relative to introduction of testimony, but in their brief counsel for defendant present no argument or citations of law in support of their objections, and dismiss the subject in these words: "It does not seem necessary to discuss the numerous details of testimony, as it is all before the Court and in our view of the case a large part of it is not material. The form of action and other technical questions are also omitted from this argument because the parties and their evidence, legal and otherwise, are in Court now and if possible their legal rights should be determined without further litigation."

The defendant having admitted sale and delivery to itself of 690,000 feet of logs, an amount in excess of that mentioned in the contract, we are of the opinion that the questions relating to the form of action and the admission of the memorandum of agreement are to be

answered in favor of the plaintiff. *Marshall* v. *Jones*, 11 Maine, 54; *White* v. *Oliver*, 36 Maine, 92; *Holden* v. *Westervelt*, 67 Maine, at page 450, and cases there cited.

The memorandum obligated the plaintiff to "cut, haul, mark and deliver in Big Lake, properly boomed, pine and spruce logs and cedar butts, where they can be seen and scaled, about 500 M ft." Whenever personal property is sold deliverable to a particular person or at a particular place for the buyer, a delivery to such person or at such place is a completed delivery to the vendee. This principle is so well settled as to hardly require citations. *White* v. *Harvey*, 85 Maine, 212. Proof of such delivery, moreover, raises a presumption in favor of the vendor that the property has been accepted by the vendee. *White* v. *Harvey*, supra; *Nichols* v. *Morse*, 100 Mass., 523. These rules of law, however, do not apply when the amount of property claimed to be delivered is largely in excess of that bought or contracted for, as the buyer may reject the excess if he chooses, but if he accept he must pay for that excess, whatever the same may be reasonably worth. *Rommel* v. *Wingate*, 103 Mass., 327; *Pittsburgh Plate Glass Co.* v. *MacDonald*, 182 Mass., 593; 35 Cyc. 205. The plaintiff seeks to bring the whole transaction within the above rule of delivery and acceptance because of the use of the words "about 500 M ft." in the memorandum of agreement. We do not think his contention upon this point can be sustained. In *Cabot* v. *Winsor*, 83 Mass., 546, the court held that in sales of merchandise in large quantities where it might be impossible, or practically so to ascertain with precise accuracy the number or weight of the articles, before concluding a contract for their purchase, it is usual to insert the words "more or less" or "about" in connection with the specific amount which forms the subject of the contract, in order to cover any variations from the estimate which are likely to arise from differences in weight, errors in counting, or other similar causes. When such words are used the court held that the contract was for the quantity or amount specified, and that the effect of the words is only to permit the vendor to fulfill his contract by a delivery of so much as may be reasonably and fairly held to be a compliance with the contract, after making due allowance for the excess or short delivery arising from the usual and ordinary causes which prevent an accurate estimate of the weight or number of the articles sold. The Maryland Court in *Salmon* v. *Boykin*, 7 Atl., 701, held that the word "about" as used in

a contract for the shipment of "about" so many tons of goods, means a margin for a moderate excess or diminution of such quantity. In *Maine Red Granite Company* v. *York*, 89 Maine, 54, our court held that the use of the word "about," in an alleged written guaranty to pay for goods sold to a third person, showed that entire accuracy was not intended, but that if goods were sold and delivered very much in excess of the amount named, it might, perhaps, be regarded as evidence of bad faith, and require a limit to be fixed to the guarantor's liability. In the case at bar the plaintiff, as we have said, by virtue of the word "about" seeks to bring himself within the legitimate results of the rules of law above stated, but we cannot adopt this claim, especially in a transaction of such large proportions, where the property which the plaintiff claims to have sold is more than double the amount mentioned in the contract and the alleged excess has so large a monetary value.

That there was a delivery and acceptance of the amount of lumber called for by the contract there is no controversy. Our inquiry relates to the excess, and as to that we hold that none of the presumptions of delivery and acceptance arise in favor of the plaintiff, as he has no contract with the defendant for such a great excess, but that he can only recover for such excess as he may show, by a fair preponderance of the evidence in the case, was actually delivered to and accepted by the defendant. To revert again to the contention as stated in plaintiff's brief, this court is to determine the "number of logs the Murchie Company *actually* did receive from Mr. Mercier and to fix the value thereof." In reaching a conclusion as to the excess logs, which are really the only ones in controversy, we shall not regard the constructive delivery of the excess logs at Big Lake as actual delivery to the defendant, for there was no contract between the parties whereby the delivery of the excess logs at Big Lake was to be a delivery to the defendant. Actual delivery of the excess logs must be shown by the plaintiff in order to recover payment for them. Otherwise the defendant would have no opportunity to exercise his legal right to reject the excess logs if such were his desire.

The burden being on the plaintiff to prove the amount of the excess logs and their delivery to and acceptance by the defendant, what evidence does he offer for that purpose? We cannot be expected to go into all the details of the testimony but will point out the salient features. The plaintiff sub-contracted with five persons to

cut and haul those logs which he claims the defendant received. Those persons were David De Long, Henry Smith, Charles McPike, Amos Metcalf, and Wesley Metcalf. In the account annexed we find the name of David Delaney but evidently this was intended to be David De Long. From him the plaintiff claims in the account annexed to have received 349,300 feet and delivered the same to the defendant. De Long testifies that he delivered the logs at east branch of the Musquash river in the winter of 1910-11 and that they were driven from that river in the following spring. The amount is corroborated by a scale bill, plaintiff's exhibit 3, made by J. S. McCrea, but the latter testifies that when he was making this scale it was a basis for settlement between the plaintiff and his contractor, and not for the defendant company. As to delivery of these logs to the defendant De Long gives no testimony although he says each log bore defendant's mark. It is to be observed that McCrea made his scale by using the count furnished by De Long, after scaling a good number of the logs and then making an estimate.

According to the account annexed the plaintiff obtained from Henry Smith 117,000 feet of logs which he claims were delivered to defendant. Plaintiff took Smith's own scale for that amount and charges defendant according to that scale. Smith delivered the logs at East Musquash river and says the following spring they left his landing but further he knows nothing about the delivery to the defendant. He says, however, that each of his logs bore the defendant's mark.

The next logs charged for in plaintiff's writ are the Charles McPike logs, amounting, in two items, to 510,384 feet. Mr. McPike landed his logs also in the East Musquash river and drove the river the following spring. He says he made a clean drive of the river and landed the logs in Big Lake, boomed in two booms. From that time he has no personal knowledge of what became of the logs. He says the Mercier logs were mixed with logs belonging to others. As to the quantity of his logs he says he never had a scale but the amount was the result of his judgment. As affecting the amount of lumber which plaintiff obtained from McPike bearing defendant's mark, the defendant calls attention to the testimony of Mr. Edgerly, scaler for the Webbers who owned the stumpage which McPike cut. That witness says that the total stumpage was 563,785 feet and that the Murchie mark was only on 224,890 feet. The defendant urges

that the amount which plaintiff claims was cut from the Webber land and bearing the Murchie mark, amounted in all to 510,384 feet, and that this discrepancy of 285,494 feet, goes a long way toward accounting for the absence of excess logs now sued for and which defendant denies were ever delivered.

The plaintiff charges the defendant with 45,000 feet of logs obtained from Amos Metcalf and 74,000 from Wesley Metcalf, the two lots being totaled in the account annexed as 119,000 feet. Both of the Metcalfs testify that their logs bore defendant's mark and were delivered at East Musquash river, Amos Metcalf says part of his logs were landed on the ice and part on meadow land, and says "when the stream opened some of them went down stream." Apparently his testimony gives no further proof of delivery to the defendant. His logs were scaled by himself and he declared that there were 45,000 feet. Wesley Metcalf worked on the drive the next spring and says it was a clean drive as far as he went which was "pretty near down to Musquash Bridge." He also scaled his own logs and says they amounted to 74,000 feet.

The next witness called by plaintiff was George McKechnie, a lumberman, who testified that he saw the logs which McPike boomed in Big Lake. He also saw them in Long Lake after McAllister had towed them through the Narrows between Big Lake and Long Lake. It appears by the testimony of this witness that inside of two weeks after the logs were towed into Long Lake, and tied up, there was a storm which scattered the logs on the southeast side of the lake. He says they were scattered "quite a lot" but that he secured them as well as he could under orders from the plaintiff, who still seemed exercising control over them down to this point. The fastening thus made by McKechnie was broken later and again the logs were blown across the lake, and again the witness says they were badly scattered. He says he attempted to boom the logs but did not get them all.

Henry McAllister, called by the plaintiff testified that it was his business to tow logs from the mouth of the Musquash through connecting lakes and rivers and put them over Grand Falls at Baileyville and that he did this work in 1911. He says he cannot state positively whether or not he took a boom of logs down Big Lake upon notification of McPike in the summer of 1911, but that it was his duty to take all logs that were boomed in any of these lakes to the Grand Falls. He says that if a boom of logs were delivered at the

mouth of the Musquash river in the summer of 1911 it would be cleanly driven by him to Grand Falls. He says he would not expect that more than 200 or 300 pieces would be left behind.

Mr. F. B. Dightman, called by the plaintiff, testified that he is the boom master at Milltown, and in that capacity it was his duty to take charge of all logs turned over the dam at Baring, sort and raft them, and turn then over to their owners. When he was testifying it was admitted that he sorted and delivered to defendant 74 logs in the summer of 1911. He says those logs would run thirty to the thousand or upwards, and they had a rabbit track mark on them, which elsewhere in the testimony appears to have been the Lyons mark, and were evidently the logs sued for in plaintiff's writ as the 74 pieces at nine dollars per thousand. He also says that he is in the employ of the Calais Middle Boom Company whose duty it was to make a clean drive from Baring to the point of delivery to the owners, and that if in the summer of 1911 logs bearing the mark of defendant were delivered to the Boom Company that such logs would be delivered to the defendant. For some unaccountable reason plaintiff's counsel, at this important juncture did not ask this witness the total number of logs delivered in 1911 to the defendant upon which was to be found the defendant's own mark. If plaintiff actually delivered to the defendant all the logs he claimed to have done, including these excess logs, a fitting question to the witness would seem to have been so important that it would not have been overlooked by his able counsel.

The defense denies receiving so many logs as the plaintiff has charged for. The defendant's scaler, McCrea, testifies to finding in Long Lake, 612,000 feet of logs bearing the defendant's mark but defendant's counsel, in his brief, admits that the defendant had received 690,000 feet and claims to have paid for them. The testimony does not state whether this last figure included or excluded the Lyons logs. We do not feel that under all the testimony in the case the plaintiff has sustained his contention of actual delivery of all the excess logs for which he has brought suit.

We allow the plaintiff as follows:

690 M. logs at	$10.50	$7245.00
2 1-9 M. Lyons logs, at	$9.	19.00
Reserved from transaction relating to driving logs		50.00
Board bill for men		96.00
Contra		$7410.00
Cash received		6078.50
Balance.		$1331.50

The judgment will therefore be for plaintiff in the sum of $1331.50 with interest from the date of the writ.

ELISHA C. FARREN

vs.

MAINE CENTRAL RAILROAD COMPANY.

Washington. Opinion June 8, 1914.

Assignment. Demurrer. Exceptions. Fire Loss. Insurance. Locomotive Engine. Negligence. R. S., Chap. 52, Sec. 73. Subrogation.

Under Revised Statutes, Chap. 52, Sec. 73, which provides that where property is injured by fire from a locomotive engine, the railroad company is responsible and has an insurable interest in the property and is entitled to the benefit of any insurance effected by the owner, less the premium and expense of recovery. The railroad company is absolutely responsible, and is entitled to the benefit of the insurance, whether the fire was caused by its negligence or not. Hence it is held that an insurer which has paid a loss occasioned by fire from a locomotive engine is not subrogated to the owner's rights against the railroad company, and cannot maintain an action against it to recover the amount paid.

Dyer v. *Maine Central R. R. Co.*, 99 Maine, 195, is overruled upon the point of subrogation.

On exceptions by defendant. Exceptions sustained. Demurrer sustained.

This is an action on the case to recover damages to plaintiff's buildings and personal property contained therein, alleged to have been caused by fire communicated to said buildings by sparks from the locomotive engine belonging to and being operated by the defendants, at Cherryfield in the County of Washington, on the 24th day of December, 1909. The case was entered in the Supreme Judicial Court for said County on the second Tuesday of October, 1911. At the October Term of said court, 1913, the defendant demurred to the plaintiff's declaration, with leave to plead over by agreement. The demurrer was overruled by the Justice presiding and the defendant excepted to the overruling of the same.

The case is stated in the opinion.

Robert E. Hall, for plaintiff.

White & Carter, for defendant.

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

SAVAGE, C. J. But a single question is presented by this record. It is, whether an insurance company, having paid a loss occasioned by fire communicated by a locomotive engine, by reason of the negligence of the railroad company using it, is subrogated to the rights of the owner, and can maintain an action in his name to recover the amount of the loss so paid? This question was answered in the affirmative in *Dyer* v. *Maine Central R. R. Co.*, 99 Maine, 195. If the decision was well founded, this action is maintainable; otherwise, not. The defendant contends that the construction given to the statute, R. S., Chap. 52, Sec. 73, relating to the subject matter, was unsound, and earnestly asks us to re-examine and reconsider the question.

The statute in question reads as follows: "Where a building or other property is injured by fire communicated by a locomotive engine the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages,

if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had." This language is general and comprehensive, and, if read literally, it includes all cases of fire communicated by locomotive engines, whether by reason of negligence or not. And if the statute be construed as it reads, it is clear that, since the railroad company is, in all cases, "entitled to the benefit of any insurance upon such property effected by the owner," the insurance company is not entitled to subrogation, and cannot maintain an action to recover the amount paid from the railroad company. For, were it otherwise, when the railroad company has received the insurance, or has had the benefit of it, the insurance company can then recover it back and thus deprive the railroad company of the benefit of the insurance. So that, if the statute was intended to include all cases, such a construction would plainly defeat the intention of the legislature.

It is not doubted that prior to the enactment of any statute upon the subject, a railroad company was responsible for fires communicated by its locomotive engines, through its negligence, but not otherwise. By the ancient common law or custom of the realm, if a house took fire the owner was held answerable for any injury thereby occasioned to others. Every house owner was thereby an insurer. But the rigor of this rule was modified by the statute of 6 Ann., Chap. 31, so that the owner was exempted from liability when the fire was occasioned by accident. It is said that the rule does not appear to have been applied to the owner of a field, where a fire may have been kindled. For Baron Comyns states that an action lies, at common law, against the owner "if a fire be kindled in a yard or close, to burn stubble, and by negligence it burns corn in an adjoining close." Com. Dig. A. 6; *Bachelder* v. *Heagan*, 18 Maine, 32. And these principles were in force when railroads were first constructed in this State. A person whose property was injured by fire had a remedy at common law against the one by whose negligence it was occasioned. And the same rule applied when a fire was communicated through negligence by a locomotive engine. The railroad company was in the lawful operation of its engines, so that, unless negligent, it committed no wrongful act, and was not liable. Without negligence, no liability.

But this negligence rule placed upon owners of lands adjacent to railroads an unusual and unjust burden. The chances of fire by locomotives were great. And the proof of negligence as to a particular locomotive, at a particular time, was from the nature of things difficult, and sometimes impossible. Besides, property exposed by fire to locomotives was in danger, even when the operation was reasonably careful. They were such considerations as these, no doubt, which led the legislature in 1842 to enact special provisions for liability in case of injury caused by fires communicated by locomotives. Sec. 5 of Chap. 9 of the Public Laws of that year read as follows:—"Whenever any injury is done to any building or other property of any person, or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured; and any railroad shall have an insurable interest in the property for which it may be so held responsible in damages along its route, and may procure insurance thereon in its own behalf." This act extended the liability of railroad companies to cases of fires communicated by locomotive engines, without negligence. As was said in the Dyer case,—"It was no longer necessary to allege and prove negligence in the use of the engine, and the statute in effect made the railroad company an insurer. If the property was damaged, the insurance company was entitled to subrogation. In such case, the owner might collect of either party he saw fit." Under the Act of 1842, the plaintiff could maintain this action.

The Act of 1842, though condensed, in the several revisions, remained unchanged in substance, until the enactment of Chap. 79 of the Public Laws of 1895. The 1895 statute amended R. S., (1883) Chap. 51, Sec. 64, which was the original 1842 statute, by adding the provision that the railroad "corporation shall be entitled to the benefit of any insurance upon such property, effected by the owner thereof," which is to be deducted from the damages, if recovered before the damages are assessed, or if not, to be assured to the railroad company by assignment of the policy.

The opinion in the Dyer case proceeded upon the theory that the Act of 1842, while it created a new liability in the railroad company and a new right of action in the injured owner, in cases where the fire was communicated without negligence, yet left unchanged the old common law liability and right of action, based upon negligence.

The expression in the opinion was, "The Act of 1842 broadened the liability of a railroad company so that it was made to embrace all cases of fire communicated from its locomotive engines." But after stating that both the railroad company and the insurance company are insurers, the former by force of the statute and the latter by contract, the opinion goes on to say that the amendment of 1895 had "special and particular reference to the adjustment of the liability of the two insurers, in the cases falling under the section which was amended, and in which it was necessary for the owner to invoke the statutory liability of the defendant in order to recover against it," and that "the act is limited in its application to those cases in which the section amended makes the railroad company an insurer, in other words, to those cases in which the liability of the defendant is created by that section, and not by its own negligent act."

The plain import of the language of the opinion is, that there are still two classes of cases, two distinct kinds of liability, in railroad locomotive fire cases, one at common law, for negligence, the other, under the statute, without negligence. With the first there is the right of subrogation, with the latter, not.

The construction to be given to the amendment of 1895 we think necessarily depends upon the proper construction of the Act of 1842. It is an amendment to that Act. It is as broad and comprehensive as that Act, no more, no less. It embraces all the cases which the Act of 1842 embraced. We must recur then to a construction of the Act of 1842. If that Act, properly interpreted, that is, interpreted to give expression to the legislative intent, is limited to cases of non-negligence, then the amendment of 1895 should be so limited, as it was, in effect, in the Dyer case.

The Act of 1842 made the railroad company an insurer. Was it an insurer only in cases of non-negligence? Or was it an insurer in all cases? The Act makes no distinction. If the Act merely "broadened the liability of a railroad company," it is difficult to see that any distinction remained. If its effect was that "it was no longer necessary to allege and prove negligence," it would seem that no distinction was left. Now if the owner has one right of action when there is negligence, and another where there is none, some practical questions arise. Is he bound to elect, at his peril? If he elects to sue for negligence, can he prevail if he proves a case, without negligence? If he sues the railroad company as an insurer, and recovers judgment

for the excess of his damage over insurance, can the insurance company then proceed in his name against the railroad company, on the ground of negligence? If he sues at common law and fails to prove negligence, and for that reason his suit fails, may he then successfully sue under the statute? Was it the legislative intent that the Act of 1842 should expose the owner to the hazards of these various contingencies?

The ground of the decision in the Dyer case was forcibly expressed by the learned Justice who wrote the opinion, in these words:—"This amendment (that of 1895) had special and particular reference to the adjustment of the liability of two insurers, the insurance company and the railroad company, in those cases falling under the section which was amended, and in which it was necessary for the owner to invoke the statutory liability of the defendant corporation in order to recover against it. The legislature might well deem it just that, as between the voluntary insurer by contract and the one which without fault on its part is made such by law, the latter should have the preference. To go further and say that in a case where the railroad company is liable because of its own fault and negligence, and not as an insurer, it should have the benefit of any insurance effected by the owner upon such property, would be a manifest injustice. The consequences of the defendant's negligence would then fall not upon itself but upon the insurance company, not upon the guilty, but upon the innocent. We cannot believe that a result so repugnant to justice could have been within the legislative intention." The effect of the decision in the Dyer case was to interpret the 1895 amendment as if it contained an exception in these words:—"except in cases where the fire was communicated through the negligence of the railroad company." But no such exception was expressed in the statute.

It must be remembered that the relation, as to liability, between the railroad company and the property owner, and the relation, as to who shall bear the burden ultimately, between the railroad company and the insurance company, are regulated by the legislature in accordance with its conception of sound public policy. In one aspect of the case, it might seem a manifest injustice that a railroad company should be compelled to pay for a fire loss, occasioned while in the exercise of an undoubted legal right, and without any fault on its part. Nevertheless it cannot now be doubted that it was a wise public policy to subject the railroad company to that liability.

It is not for the court to question the soundness of the legislative view of public policy. It becomes a matter of argument only when it is sought to establish what the legislature could, or could not, have intended to enact as a matter of public policy. And we are now led to say that the legislature may have considered it as not repugnant to justice to place the ultimate burden upon the voluntary insurer, which receives, as compensation for its undertaking, a premium supposedly adequate for the risk insured against, rather than upon the railroad company which is made liable to the owner at all hazards, whether in fault or not. It is not repugnant to justice to hold the insurer liable for losses by fire occasioned by the negligence of the insured, for it seems to be universally settled that the carelessness of the insured, not amounting to intentional wrong doing, is not a defense in an action upon a policy. One who procures insurance seeks protection against his own negligence as well as that of others. So that the mere fact that the fire is occasioned by negligence presents no phase of injustice to the insurance company which is compelled to pay the loss.

And if it is not unjust to hold the insurance company to its contract, where the loss is occasioned by the owner's negligence, it does not seem to be necessarily unjust to hold it to a liability for which it cannot have subrogation, when the loss is occasioned by the negligence of the railroad company. It was the precise risk which it assumed, and for which it was paid. In case of loss, it loses no more than it contracted to pay. It is not compellable to insure at all, property exposed to locomotive fires. If it does, it is supposed to exact an adequate and satisfactory premium. If it can recover the loss of the railroad company, it virtually assumed no risk at all. These suggestions are not made as reasons why the legislature should or should not, deem it proper to require the insurance company to bear the full pecuniary burden of its contract, but rather to show that if the legislature should so require, by giving the benefit of the insurance to the railroad company, it would not be wholly unjust to the insurance company.

We feel constrained to declare that the decision in the Dyer case is not founded upon the better reason. We hold now that the Act of 1842 enlarged the common law liability for negligence into an absolute responsibility; that the presence or absence of negligence is entirely immaterial, and therefore that negligence need not be

alleged nor proved in any case; that there is only one kind of liability, that declared by statute, and that that is applicable in all cases without distinction; and that the amendment of 1895, giving the railroad company the benefit of the insurance, is as broad as the original statute, and applies like it to all cases without distinction. This conclusion accords precisely with the language of the statute.

It is interesting to note that since the Dyer case was decided, the question which we have discussed has arisen both in Massachusetts and New Hampshire under statutes substantially like our own, and in each State, the highest court has reached the same conclusion as that which we now express. *New England Box Co.* v. *N. Y. C. & H. R. R.*, 210 Mass., 465; *Boston Ice Co.* v. *B. & M. R. R.*, (N. H.), 86 Atlantic Rep., 356.

The demurrer to the plaintiff's declaration was overruled below, in accordance with the Dyer case. We think it should have been sustained.

Exceptions sustained.
Demurrer sustained.

VINAL S. ODLIN

vs.

EDGAR MCALLASTER, LIZZIE M. MCALLASTER, CARRIE S. HARRIMAN, F. L. HARRIMAN, AGNES L. HARRIMAN AND E. O. MCALLASTER.

Androscoggin. Opinion June 22, 1914.

Bill. Commissions. Contract. Equity. Exceptions. Injunction. Public Laws, 1911, Chap. 157. Sale.

Bill in equity to enjoin defendants from interfering with plaintiff in selling land in Lewiston, except in accordance with a written contract between the plaintiff and defendants for the sale of said land, said contract having been accepted March 22, 1912.

1. The contract was for the sale or transfer of real estate, and by said contract the plaintiff became the agent for the sale of real estate.
2. As no time for the termination of said contract was definitely stated, it became void in one year from its date.
3. The fact that the defendants did not know until June 6, 1913, that the contract was void at the expiration of one year from its date is immaterial.
4. The laws of 1911, Chap. 157, having declared the contract void at the expiration of one year from its date, neither party had the right to insist upon a further performance of the void contract, unless by the acts or conduct of the parties they were estopped to question the validity of the contract.

On exceptions by plaintiff. Exceptions overruled.

This is a bill in equity in which the plaintiff prays for an injunction restraining the defendants from interfering with plaintiff in the sale of land in Lewiston, the legal title to which was in defendants, and to enjoin defendants from conveying said land, except according to the terms of a written contract. The case was heard by a single justice upon bill, answer, replication and proof, who made findings of fact and rulings of law, to which rulings the plaintiff excepted.

The case is stated in the opinion.

Oakes, and Puslifer & Ludden, for plaintiff.

McGillicuddy & Morey, for defendants.

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

HALEY, J. Bill in equity filed in the office of the clerk of courts for Androscoggin County June 19, 1913, praying for an injunction restraining the defendants from interfering with the plaintiff in the selling of land in Lewiston, the legal title to which was in the defendants; and to enjoin the defendants from conveying said land except according to the terms of a written contract hereinafter referred to; and from refusing to carry out said contract.

The case was heard by a single Justice, upon bill, answer, replication and proof, who made findings of fact and rulings of law as follows:—

"I find that on March 22, 1912, the parties to this bill made the contract in writing, of which a copy marked 'Exhibit A' is annexed and referred to in the bill.

"I rule as matter of law that that contract became null and void March 22, 1913, by force of Chap. 157 of the Public Laws of 1911.

"I find that during the spring and early summer of 1913 after March 22, all the parties to the contract conducted themselves toward one another, and with reference to the land, as if the contract had been in force.

"I find that the defendants, at most, until June 16, 1913, did not in fact know of the provisions of Chap. 157 of the Public Laws of 1911, but supposed, until that date that the contract of March 22, 1912, was in force.

"I find that the plaintiff in May, 1913, incurred some expense in having the land surveyed, and in preparing to have the corners marked, all of which was known to the defendants, and assented to by them.

"I rule that the conduct of the parties in the spring and summer of 1913 did not have the effect to revive and continue in force the contract of March 22, 1913, and that the defendants are not estopped to plead the statute of 1911.

"If, relying upon the terms of the 1912 contract, the plaintiff performed services or incurred expenses, prior to the bill of complaint dated June 16, 1913, for which he is entitled to be recompensed. I think his remedy must be at law, and not in equity.

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

The agreement referred to as "Exhibit A" is as follows:

"First party is to place for sale with second party his property on Lafayette Street in said Lewiston, giving them full and exclusive right to sell and convey the same, said property consisting of thirty-six (36) lots, be it more or less, and meaning to include all of the property owned by me on said street.

"Second party is to take the above mentioned property on the following terms and conditions. Have the property surveyed and plotted out, said lots to be approximately 50x100, build the streets, and sell said lots to the best advantage he may possibly do.

"IT IS MUTUALLY AGREED that as the lots are sold and paid for they shall net first party one hundred ($100) Dollars, each. and that he shall be allowed eighty (80%) per cent of the price paid in until the sum of thirty six hundred ($3600) Dollars has been full paid, (this to mean for lots only, and not for property built on said lots), and it is further agreed that when the sum above mentioned has been full paid, second party shall have a Warranty Deed of all remaining property, also first party agrees to give a good and sufficient title to any and all lots as they are sold.

"Second party reserves the right to raise a mortgage of six hundred ($600) dollars on or before May first, 1912, said amount to be paid as the lots are sold.

"On all lots built on, when said property is sold, one hundred ($100) dollars shall be paid first party in full settlement of said lot.

"Second party agrees to bear the whole expense of developing said property.

The case is before this court upon exceptions to the above rulings. The defendants claim that, as the contract was accepted March 22, 1912, it was void June 18, 1913, the date at which the plaintiff began these proceedings, by force of Chap. 157 of the Public Laws of 1911, which reads as follows:

"All contracts entered into after August first nineteen hundred and eleven for the sale or transfer of real estate and all contracts whereby a person, company or corporation becomes an agent for the sale or transfer of real estate shall become void in one year from the date such contract is entered into unless the time for the termination thereof is definitely stated."

The intent of the legislature in passing the above law was undoubtedly to give protection to owners of real estate against the contracts

that it was the practice of brokers to obtain from the owners of real estate, many of which contracts were entered into by the owners without realizing that the language used was such that the broker's interest was more fully protected than the owner's, and that the courts had construed them as continuing contracts unless the time they were to terminate was inserted therein, and that if, after many years, the owner sold the property the brokers, by the terms of the contracts, were entitled to a commission. It was to protect the owners that the law of 1911 was enacted, compelling brokers to write their contracts for a fixed time, that the owner might know the time within which the broker must sell the property to be entitled to a commission, and if the time was not set forth by the contract, that one year should be the life of the contract.

We do not think the intent of the legislature, or the plain language of the statute, can be disregarded in construing the statute; we think the statute means what it says; that the contracts enumerated are void, not voidable, in one year unless the time for the termination thereof is definitely stated.

The contract relied upon by the plaintiff is clearly within the statute; to hold otherwise would be to ignore the language of the statute and the intent of the legislature. It was a contract "for the sale or transfer of real estate." The plaintiff, by that contract, became "the agent for the sale of real estate," and as no time for the termination thereof was definitely stated, it became void in one year from its date. The fact that the defendants did not know until June 6, 1913, that the contract was void at the expiration of one year from its date is immaterial. The law declared the contract void at the expiration of one year from its date; being void the parties were at liberty to enter into a new contract embracing the same subject matter, but neither party had the right to insist upon a further performance of the void contract, unless by the acts or conduct of the parties they were estopped to question the validity of the contract.

The small expense that the plaintiff incurred in ignorance of the law, without any act or word on the part of the defendants to induce it, is not sufficient to give life to the void contract, or to estop the defendants from invoking the statute enacted by the legislature to prevent just what the plaintiff seeks by his bill in this case to do.

Exceptions overruled.

FRANK DINGLEY *vs.* CITY OF BATH.

Sagadahoc. Opinion June 22, 1914.

Assumpsit. Liquor Agent. Public Laws of 1909, Chap. 253. Public Laws of 1911, Chap. 10. Salary.

1. Sec. 33 of Chap. 29 of the Revised Statutes made it unlawful for the Municipal Officers to purchase liquors of any person other than the State Liquor Commissioner.
2. Chap. 10 of the Public Laws of 1911, repealed Secs. 15 to 25 inclusive of Chap. 29 of the Revised Statutes and also repealed Chap. 252 of the Public Laws of 1909.
3. When the laws of 1911 went into effect, the office of State Liquor Commissioner was abolished.
4. As the law rendered it unlawful to continue the business of liquor agency, the contract between the plaintiff and defendant was at an end.

Report on agreed statement. Judgment for defendant.

An action of assumpsit upon an account annexed to recover a balance of salary as liquor agent of the City of Bath from May 5, 1911 to May 5, 1912. Plaintiff was appointed and qualified as liquor agent of said Bath, May 5, 1911, and continued as such agent until August 31, 1911, at which time the agency was discontinued. Plea, general issue. The case was reported upon an agreed statement to the Law Court for determination.

The case is stated in the opinion.

Walter S. Glidden, for plaintiff.

George E. Hughes, for defendant.

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

HALEY, J. An action of assumpsit upon account annexed to recover $750 alleged to be due the plaintiff as the balance of salary from May 5, 1911, to May 5, 1912, as the liquor agent of the City of Bath, and before this court upon report.

The plaintiff was duly appointed liquor agent of the city of Bath and qualified May 5, 1911; he entered upon the discharge of his duties at once, and continued to perform the duties of the office until August 31, 1911, when the business of the agency was discontinued, but the plaintiff was not, by any vote or order passed by the mayor and aldermen, removed from office or discharged from his employment, and was willing to perform the duties of liquor agent during the remainder of the year. The salary of the office was fixed by the city government at $1000 per year. At the time the business of the agency was discontinued, August 31, 1911, the plaintiff had in his possession all liquors of the city of Bath, which consisted of one case of champagne and less than one quart of brandy. The plaintiff claims that, as no vote or order was passed by the municipal officers removing or discharging him as liquor agent, he is entitled to the salary for the full term for which he was appointed. He received from the city $250, which was payment in full to August 31st, when the agency business was discontinued.

Chap. 253 of the Public Laws of 1909, was an act to regulate the purchase and sale of intoxicating liquors by the State Liquor Commissioner, and by town or city liquor agencies, and all town and city liquor agencies were to be supplied by the State Liquor Commissioner and all other provisions for a town supplying its agency with liquors were repealed by said Act. Sec. 33, Chap. 29, R. S., makes it unlawful for the municipal officers to purchase liquors of any other person than the commissioner. Chap. 10 of the Public Laws of 1911, repealed Secs. 15 to 25 inclusive of Chap. 29, R. S., which related to the duties of the Liquor Commissioner, and also repealed Chap. 252 of the Public Laws of 1909, so that when the laws of 1911 went into effect, the office of State Liquor Commissioner was abolished, and Secs. 15 to 25, inclusive, of Chap. 29, R. S., repealed and as Sec. 33, Chap. 29, prohibited the purchase of liquors for town or city agencies, except from the State Liquor Commissioner, it was unlawful for the city of Bath to purchase liquor for its agency, and as it had no liquors on hand it could not lawfully continue in the liquor business, for the one case of champagne and less than a quart of brandy was not a stock of liquors within the meaning of the statute, authorizing agencies to sell to the inhabitants of the cities or towns pure liquors for medicinal, mechanical

and manufacturing purposes, and as the city of Bath could not lawfully procure liquors to sell at its agency, it could not lawfully continue in the liquor business.

The plaintiff's contract was lawful when made, although it was known to the mayor and aldermen and to the plaintiff that the law of 1911, Chap. 10, would render it unlawful to continue the employment when the law went into effect, three months after the adjournment of the legislature; but it is not material whether they knew the law or not, for, although the contract was lawful when made, the law afterward, Act of 1911, made it unlawful to supply the agency with liquor to carry on the employment of the plaintiff, and as the law rendered it unlawful to continue the business the contract between the plaintiff and the defendant was at an end.

American Mercantile Exchange v. *Blount*, 102 Maine, 128, and cases cited.

Judgment for defendant.

ROBERT P. CURRAN, Administrator

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY COMPANY.

Androscoggin. Opinion June 29, 1914.

Accident. Chap. 27, Public Laws, 1913. Contributory Negligence. Damages. Death. Due Care. Negligence.

1. In case of immediate death, under the original statute, giving a right of action, it was not only incumbent upon the plaintiff to prove the negligence of the defendant, but also that the decedent, at the time of the accident, was in the exercise of due care.
2. Under the Act of 1913, the burden of proof upon the question of due care was shifted and the rule of pleading contributory negligence changed.
3. Under this statute, the decedent is presumed to have been in the exercise of due care at the time of the accident and injury, and this presumption cannot be rebutted by evidence tending to prove contributory negligence, unless it shall be pleaded by the defendant.
4. The measure of damages in this class of cases is based entirely upon the prospective pecuniary benefit, which the decedent at a given age can be anticipated to furnish his beneficiary.

On motion by defendant. Motion sustained, unless the plaintiff within thirty days from the certification of this case, shall file a remittitur of the verdict in excess of $500.00.

This action is to recover for injuries which resulted in the immediate death of plaintiff's intestate, a girl eight years of age, by being struck by defendant's car on the 20th day of July, 1913, on Lisbon Street, in the city of Lewiston, in the county of Androscoggin. This action was brought under Chap. 27, Public Laws of 1913. The plea was the general issue. The jury returned a verdict for the plaintiff in the sum of $1811.00. The defendant filed a motion for a new trial.

The case is stated in the opinion.

R. J. Curran, and Connellan & Connellan, for plaintiff.

Newell & Skelton, for defendant.

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

SPEAR, J. This is a motion by the defendant for a new trial. The jury found for the plaintiff in the sum of $1811.00.

The action was to recover for injuries which resulted in the immediate death of the plaintiff's intestate, eight years of age, and is brought by the plaintiff as administrator for the benefit of her surviving father and mother. The evidence shows that the decedent, who was with other children in the street, ran ahead of her companions, walked directly toward the track, crossed the outer rail and remained standing on the track, looking toward the other children, with the car approaching from the rear. There she stood until the accident happened. From the undisputed evidence the jury were warranted in finding that the motorman could, if observing, have seen the little girl standing on the track at any point within a distance of 400 feet from her. But it seems quite conclusive that his attention must have been called to the presence of this girl upon the track when he was at least 200 or more feet away, as that of several other people was who repeatedly shouted to her, while the car was approaching with the gong sounding. After he saw her, had he been in the exercise of due care, it seems evident that he might have stopped his car before reaching her. The evidence further warranted the jury in finding that the car was running through this thickly settled community at a speed of 20 to 25 miles an hour, which, in the minds of the jury may have been regarded as a negligent rate of speed, in view of the fact that it was the duty of the motorman to anticipate the dangers that were liable to happen and provide against them. If they so regarded the speed, they might have properly concluded that had he been running with due care, the motorman could have stopped his car, after he had become convinced that the little girl did not hear the warnings and showed no indications of stepping from her dangerous situation. Upon all the evidence, it is the opinion of the court that the jury did not go astray in finding the defendant negligent.

In case of immediate death, under the original statute giving a right of action, it was not only incumbent upon the plaintiff to prove the negligence of the defendant, but also that the decedent at the time of the accident was in the exercise of due care; but, under

the act of 1913 the burden of proof upon the question of due care was shifted, and the rule of pleading contributory negligence changed. Before the latter statute the general issue was sufficient. But Chap. 27, Public Laws, 1913, expressly provides: "In actions to recover damages for negligently causing the death of a person, or for injury to a person who is deceased at the time of trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant." The language of this statute is unambiguous and plain. The decedent, in the case provided for in this statute, is presumed to have been in the exercise of due care at the time of the accident and injury, and this presumption cannot be rebutted by an offer of evidence tending to prove contributory negligence, unless it "shall be pleaded" by the defendant. This defense in this case was not pleaded. The defendant, accordingly, was precluded from offering any evidence tending to prove contributory negligence. In other words, contributory negligence, if it existed on the part of the decedent, was not in issue under the pleadings.

It may be well to note, however, that were the question of contributory negligence open, the subsequent negligence of the defendant would still seem to be sufficiently proven to establish its liability.

This brings us to the question of damages. Upon this issue the court is of the opinion that the damages were clearly excessive. The right to recover damages at all in this class of cases is purely statutory. There was no common law action. We are, therefore, confined to the express language of the statute. R. S., Chap. 89, Sec. 10, provides: "The jury may give such damages as they shall deem a fair and just compensation, not exceeding $5,000, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought." We can readily discern how the immediate death of a parent may be a great loss to the surviving parent and children, and how the loss of a husband or wife may be a serious loss to the survivor, depending upon the circumstances surrounding the particular case; but in the case of the death of a child of tender age, whose very existence for years to come depends upon the protection of its parents; who,

under the school laws, must attend school until the age of fifteen; whose capacity and character are in no way established; whose life is uncertain; whose future pecuniary usefulness to its parents is a problem, depending upon so many contingencies that it cannot be solved; a question is presented so speculative and devoid of data that any reasonable or satisfactory conclusion is practically impossible. In the last analysis, all that can be done toward calculating the future value of a young child to its parents is to make an estimate based upon such presumption of that value as may be derived from common knowledge and experience, as no evidence is possible that can foretell the future history of any given child. But the statute contemplates that parents may, during their entire lifetime be the recipients of bounty from a child or children. Yet, if our presumption be true, it must be conceded that a majority of children, eight years of age, will have cost their parents during their lifetime, a much larger outlay than they will have contributed to their benefit.

Yet the measure of damages in this class of cases is based entirely upon the prospective pecuniary benefit, which the decedent at a given age can be anticipated to furnish his beneficiary. In the present case the decedent was eight years old. But we cannot act upon the rule that in a majority of cases children are an outset, as the statute must be construed to assume that the immediate death of a person, old or young, may carry with it some damages. We think, however, that the court as well as the jury should consider the rule in the estimate of damages. The difficulty with the jury, and even with the court, in considering the question of damages under this statute is to separate the cold-blooded fact of pecuniary value from those emotions of sentiment and affection which regard the loss of a child or a parent as beyond money and without price. It is the duty of the court, however, regardless of sentiment, to observe the clear mandate of the statute and finally fix the measure of damages in accordance therewith. In obedience to this duty, it is the opinion of the court that the plaintiff is entitled to recover the sum of $500.00.

Motion sustained unless the plaintiff within thirty days from the certification of this case shall file a remittitur of the verdict in excess of $500.00.

MAURICE L. STRICKLAND

vs.

PEERLESS CASUALTY COMPANY.

Kennebec. Opinion June 30, 1914.

Assumpsit. Chronic Disease. Exceptions. False Representations. Insurance. Policy. Sick Benefits.

1. By Revised Statutes, Chap. 49, Sec. 93, agents of foreign insurance companies and agents of all domestic companies shall be regarded as in place of the company in all respects regarding insurance effected by them.
2. The company is bound by the agent's knowledge of the risk and all matters connected therewith.
3. Omissions and misdescriptions known to the agent shall be regarded as known to the company and waived by it as if noted in the policy.
4. This provision has been held applicable to life, as well as fire insurance policies, and by parity of reasoning it should also be held to apply to a health policy like that in the case at bar.

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

An action in assumpsit to recover sick benefits under a contract of insurance, provided for in a policy issued to the plaintiff by defendant, dated November 21, 1910, therein agreeing to pay plaintiff at the rate of eighty dollars per month, tried before the Superior Court for Kennebec County. Plea, general issue and brief statement as follows: That the statements and warranties set forth in the application for a policy of insurance declared upon in this action were untrue and that there is a breach of said warranties. The jury returned a verdict for the plaintiff of $145.91. The defendant excepted to an instruction by the presiding Judge to the jury and filed a general motion for a new trial.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.

F. W. Clair, and F. E. Brown, for defendant.

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

HANSON, J. This is an action of assumpsit to recover sick benefits under a policy of insurance dated November 21, 1910. The plaintiff recovered a verdict of $145.91 the full amount claimed for illness between April 20, 1912, and July 27, 1912, and the case is before the Law Court on both motion and exceptions.

MOTION. The defendant company claimed relief from liability on the ground that the plaintiff in his written application made false representations of fact, viz.: that he had not received any medical or surgical treatment during the five years prior thereto and that he did not then have and had never had any chronic disease. It is conceded that the plaintiff received and was treated for gun shot wounds only two months prior to the application, and there was evidence tending to show that he suffered from some form of gastric catarrh in the year 1907.

Art. 17, Sec. H of the policy contains this provision: "It is understood and agreed that if any of the statements or warranties set forth in the application for this policy are false in whole or in part, the contract issued thereon shall become null and void from its inception and that all premiums paid thereon shall be forfeited to the company."

That statements in the application untrue in fact vitiate the policy is settled law. *Maine Ben. Ass'n.* v. *Parks*, 81 Maine, 79; *Johnson* v. *Maine & N. B. Ins. Co.*, 83 Maine, 183; and if the question were to rest here it might perhaps with propriety be held that the verdict was manifestly contrary to the law and the evidence.

But R. S., Chap. 49, Sec. 93, provides that "such agents (of foreign insurance companies) and the agents of all domestic companies shall be regarded as in place of the company in all respects regarding insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known to the company and waived by it as if noted in the policy."

This provision has been held applicable to life as well as fire insurance policies, *Marston* v. *Ins. Co.*, 89 Maine, 266, and also to accident policies, *Thorne* v. *Casualty Co.*, 106 Maine, 274; *Washburn* v.

Casualty Co., 108 Maine, 429. By parity of reasoning it should also be held to apply to a health policy like that in the case at bar.

The plaintiff testified that the agent had full knowledge both of the gun shot wounds and of the previous gastric difficulty, which he claimed to be slight, and his testimony stands uncontradicted. The agent was not a witness. The question of the agent's knowledge being one of fact for the jury, it is apparent that this court would not be justified in setting aside a finding reasonable in itself and based upon such uncontradicted evidence.

The motion therefore is overruled.

EXCEPTION. Only one exception was taken and argued, and this relates not to liability but to the measure of damages. Art. 6 of the policy reads: "In the event of disability or illness resulting wholly or in part, directly or indirectly from tuberculosis, rheumatism, paralysis, neuritis, cancer, Bright's disease, chronic diseases, nervous diseases, and in all such cases referred to in this Article the limit of the company's liability shall be for a period not exceeding four weeks idemnity at the rate which would otherwise be payable under Article 5 of this policy, anything herein to the contrary notwithstanding." The rate referred to in Art. 5 was $80. per month plus ten per cent. increase if the policy had been in force for more than one year, as in this case.

The defendant contended that the illness for which the plaintiff was seeking to recover, viz.: broken compensation "resulted wholly or in part, directly or indirectly" from a chronic disease, viz.: aortic regurgitation or a leaking valve of the heart, and that therefore the liability under Article 6 was limited to a period of four weeks at the rate of $88. per month. This was a question of fact for the jury to determine upon all the evidence in the case including that of the medical experts. The presiding Judge at the close of the charge gave this instruction requested by the plaintiff: "The disease would not be a 'chronic disease,' as the words are used in Article 6 of the policy unless the jury are satisfied by a preponderance of the evidence that he suffered with it when he made the application, it would not be 'chronic' within the meaning of Article 6 of the policy."

This in effect confines a chronic disease that would limit the measure of damages to one existing when the application was made. This is clearly wrong. A chronic disease existing at that time would

not merely reduce the amount of liability but would preclude any liability whatever and therefore any recovery. The chronic disease contemplated in Article 6 is one arising after the application was made, and it was for the jury to say whether the broken compensation for which the plaintiff was seeking to recover was or was not an acute condition resulting from a chronic disease, and they should not have been obliged to find that such chronic disease existed at the time the application was made. The instruction requested and given was clearly prejudicial to the defendant as it forced the jury to apply a test unwarranted by the condition of the policy, and to render a verdict in excess of what it might have been had the correct interpretation been given.

Exceptions sustained.

STATE OF MAINE, by Scire Facias

vs.

MICHAEL MCCAULEY, et als.

Hancock. Opinion June 30, 1914.

Bail Commissioner. Declaration. Demurrer. Recognizance. Record. Revised Statutes, Chap. 134, Sec. 27.

Demurrer based on the ground that the declaration did not aver that the recognizance was returned to the Supreme Judicial Court and entered of record. Under the provisions of R. S., Chap. 134, Sec. 27, this lack of averment is not ground for demurrer. From an inspection of the recognizance and the declaration in the writ it can be sufficiently understood from its tenor at what court the defendant was to appear and from the description of the offense charged that the magistrate was authorized to require and take the same.

On exceptions by defendants. Exceptions overruled.

Scire facias against bail on recognizance taken by bail commissioner. The defendants filed a demurrer to plaintiff's declaration, which

was joined by the attorney for the State. The presiding Justice overruled the demurrer. To which ruling the defendants excepted.

The case is stated in the opinion.

H. L. Graham, for the State.

Geo. E. Googins, for defendant.

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

PHILBROOK, J. In the court below the defendants filed a demurrer and assigned as causes of demurrer that the declaration does not aver that the recognizance was returned to the Supreme Judicial Court and entered of record; that this is not a defect in form but a substantial defect which is not cured by R. S., Chap. 134, Sec. 27; that the recognizance was taken by bail commissioner in vacation and the declaration should aver that said recognizance was returned to the proper court and made part of the record thereof.

The attorney for the State replies by citing the provisions of the same statute, R. S., Chap. 134, Sec. 27, which reads thus: "No action on any recognizance shall be defeated, nor judgment thereon arrested, for an omission to record a default of the principal or surety at the proper term, nor for any defect in the form of the recognizance, if it can be sufficiently understood, from its tenor, at what court the party or witness was to appear, and from the description of the offense charged, that the magistrate was authorized to require and take the same."

Concerning this statute Chief Justice APPLETON, in *State* v. *Hatch*, 59 Maine, 410, says "This section, it will be perceived, is applicable only to recognizances in criminal, and not in civil proceedings. Hence the decisions in the latter class of cases are inapplicable" . . . . "This provision in regard to recognizances in criminal cases first appears in the revised statutes of 1841. The authorities of an earlier date are, therefore, so far as this section is of any avail, inapplicable." Thus the force of some of the authorities cited by defendant's counsel is much weakened if not entirely destroyed.

In *State* v. *Baker*, 50 Maine, 45, it was not alleged in the declaration that the recognizance was returned to the Supreme Court, and became a matter of record. Counsel for the defendant argued that

without the latter allegation, "became a matter of record," the declaration was insufficient but the court held otherwise, especially in view of the statute already referred to.

In *State* v. *Edminster*, 105 Maine, 485, Mr. Justice CORNISH says "The purpose of this statute, originally passed in 1841, is to modify the strictness of the common law and to prevent the thwarting or delaying of justice by mere technicalities, and in carrying out its spirit a liberal construction has been adopted by this court."

In *State* v. *Russ*, 100 Maine, 76, a declaration in scire facias had been demurred to and the court sustained the declaration saying, "In the first place, it can be sufficiently understood from its tenor at what court the defendant was to appear and from the description of the offense charged that the magistrate was authorized to require and take the same."

In the case at bar, from an inspection of the recognizance and the declaration in the writ it can be sufficiently understood from its tenor at what court the defendant was to appear and from the description of the offense charged that the magistrate was authorized to require and take the same.

Exceptions overruled.

RAY EASTON, In Error, *vs.* LOANA EATON.

Hancock. Opinion June 30, 1914.

Bastardy. Exceptions. Guardian. Judgment of Affiliation. Minor. Writ of Error.

1. It is the rule of the common law that in all civil actions an infant must be represented by a guardian, or next friend, and whenever it appears to the court in which an action is pending that one or more of the parties are infants, and such infant has no guardian by appointment of the Probate Court, the Court should appoint a guardian ad litem to appear and protect the rights of the infant.
2. Unless the infant is so protected and the records so show, a judgment or decree against him is erroneous and may be reversed on a writ of error.
3. The proceedings in bastardy, under Revised Statutes, Chap. 99, are civil actions.
4. There is nothing in Revised Statutes, Chap. 99, on which the proceeding is founded that alters the common law in this respect.

On exceptions by plaintiff. Exceptions sustained.

This is a writ of error, in which the plaintiff in error seeks to have the judgment against him reversed, recalled or corrected. Said original judgment was rendered by the Supreme Judicial Court for the county of Hancock at a term thereof held on the second Tuesday of April, 1913, in bastardy proceedings, wherein Loana Eaton was complainant and Ray Easton was respondent, and was a judgment of affiliation after a verdict of guilty. This plaintiff in error, who was the respondent in the bastardy proceedings, was, during all the proceedings, a minor under the age of twenty-one years, and had no guardian. The presiding Justice ruled pro forma that the respondent in the bastardy proceedings could defend without a guardian and affirmed the former judgment of affiliation. To this ruling, the plaintiff excepted.

The case is stated in the opinion.

Montgomery & Emery, for plaintiff in error.

Elmer P. Spofford, for defendant in error.

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

HALEY, J. This is a writ of error, in which the plaintiff in error, seeks to have the judgment against him therein described reversed, recalled or corrected, as law and justice may require. The original judgment was rendered by the Supreme Judicial Court for the county of Hancock, at a term thereof held on the second Tuesday of April, 1913, in a bastardy proceeding instituted and prosecuted under Chap. 99 of the Revised Statutes, wherein the defendant in error was complainant, and the plaintiff in error was respondent. The judgment was a judgment of affiliation after a verdict of guilty. The error alleged in said writ of error is: "Because said defendant at the commencement of the suit was a minor of the age of fifteen years, and while under age said defendant appeared without guardian, and at no time during said action was any guardian ad litem appointed to defend the suit in his behalf." It is admitted that the records in said original proceedings show that the plaintiff in error at the time of the commencement and during the prosecution of said proceedings was a minor under the age of twenty-one years, and that in the preliminary proceedings before the magistrate, and in the subsequent proceedings in court, he appeared in person and by attorney, and his defense was made by said attorney; that at no time during the pendency of said proceedings did the plaintiff in error have a guardian, either by probate appointment, or by a guardian ad litem appointed by the court to defend said proceedings in his behalf."

The only question raised by this writ of error and exceptions is, whether an infant respondent in bastardy proceedings must defend the proceedings by guardian? The court ruled *pro forma* that he could defend without a guardian, and affirmed the former judgment. To this ruling the plaintiff excepted, and the case is before this court upon said exceptions.

It is a rule of the common law that in all civil actions an infant must be represented by a guardian, or next friend, and whenever it appears to the court in which an action is pending that one or more of the parties are infants, and such infant has no guardian by appointment of the Probate Court who has appeared to protect his rights, the court should appoint a guardian ad litem to appear in the cause and protect and safeguard the rights of the infant, and, unless the infant is so protected and the records so show, a judgment or decree against

him is erroneous and may be reversed on a writ of error. "In an action against an infant he must appear by guardian, for, as it is quaintly remarked, 'he has neither knowledge of his own affairs, or to choose one to plead for him; and may have an action against his guardian if he misplead for him.' " 6 Com. Dig. Pleader, 2, Chap. 2, (202.) Error will lie if no guardian is appointed. *Crockett* v. *Drew*, 5 Gray, 399; *Beckley* v. *Newcomb*, 4 Foster, 359. *Marshall, Admr.*, v. *Wing*, 50 Maine, 62; *Bernard* v. *Merrill*, 91 Maine, page 361; *Leach* v. *Marsh*, 47 Maine, 549; *Swan* v. *Horton*, 80 Mass., 179; *Valier* v. *Hart*, 11 Mass., 300.

That proceedings under Chap. 99, R. S., are civil actions is too firmly established to be questioned. *Hodge* v. *Sawyer*, 85 Maine, 285; *Smith* v. *Lunt*, 37 Maine, 546; *Mahoney* v. *Crowley*, 36 Maine, 486; *Eaton* v. *Elliott*, 28 Maine, 436; *Robinson* v. *Sweet*, 26 Maine, 378; *Lowe* v. *Mitchell*, 18 Maine, 372; *Hinman* v. *Taylor*, 2 Conn., 355.

In *Hinman* v. *Taylor*, cited above, the proceeding was under the laws of that State for the support of bastard children, practically the same as the proceedings under the Revised Statutes of this State, and the complainant was a minor, and the case was tried and a verdict found for the complainant. After judgment the defendant brought a writ of error, alleging as error the fact that the complainant was a minor and prosecuted the action in her own person and by an attorney employed by her, and that no guardian appeared of record to protect her rights. The court held that the proceeding was a civil action, and stated: "It is an unquestionable rule of the common law, that an infant must sue by guardian or next friend. There is nothing in the statute on which this proceeding is founded, that alters the common law in this respect. The statute creates a right to commence and prosecute a civil suit; but the party must conform to the principles of the common law in carrying it on. As the plaintiff has not sued by guardian or next friend, I am of opinion she cannot prosecute the suit; that the judgment of the superior court be reversed." The opinion was concurred in by six of the other Justices.

In *Coomes* v. *Knapp*, 11 Vt., 540, it was sought to reverse a judgment for the complainant, because in a bastardy proceeding there had been no guardian ad litem appointed, but the court held it was sufficient if one was appointed before the defendant's plea was filed and who appeared and defended the infant, recognizing the rule that

there must be a guardian before a valid judgment can be rendered against an infant.

As the proceedings for the maintenance of bastard children under Chap. 99, R. S., are civil actions, and are within the rule requiring the appointment of a guardian ad litem to protect the rights of the infant before a judgment is entered against the infant, it follows that there was error in the original proceedings and the mandate should be,

Exceptions sustained.

SARAH G. CROSBY, et als. In Equity

vs.

ALICE M. CORNFORTH, et al.

Somerset. Opinion July 1, 1914.

Bill in Equity. Construction. Gift. Intention. Interpretation. Personal Property. Residue and Remainder. Tangible. Will.

1. The words "personal property" are susceptible of two meanings; one, the broader, including anything which is the subject of ownership, except lands and interest in lands; the other, more restricted, oftentimes embracing goods and chattels only.
2. The intention of the testator is the fundamental canon of interpretation in the construction of wills.
3. The intention of the testator is to be gathered, not only from the words of the particular devise, but from the whole will, from the relation of the testator to those who are the objects of his bounty, and from all the circumstances surrounding the testator.
4. When certain things are enumerated and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of like kind with those enumerated, upon the presumption that the testator had only things of that kind in mind.
5. Testatrix, to carry out a provision in the will of her deceased husband, whereby he gave her his estate for life with power to dispose of the same by will to a charity, gave by will a specified sum to a charity. She subsequently made an additional will wherein she directed her executrix to give specific tangible

articles to various legatees named, and gave the remainder of her "personal property" to the executrix to be kept for herself and given to others as she saw fit. The heirs of testatrix were first cousins, and the executrix and her husband second cousins, and the executrix was a niece of the deceased husband. The executrix had an insane sister dependent on her for support, and for more than a year testatrix had been living in the family of the executrix and her husband. There was some evidence that testatrix disliked some of her heirs. *Held*, that the gift of the remainder of the personal property included rights and credits and was not limited to tangible personal property.

On report. Decree in accordance with the opinion.

In this bill in equity, the plaintiffs ask the court to construe and interpret the provisions of the will of Semantha C. Jerrard and to particularly determine whether the clause and paragraph of said will, as set forth, in paragraph three of the bill, disposes of all or any of the rights and credits of the estate. Answers were filed by both defendants. At the conclusion of the evidence, the Justice hearing the case, being of the opinion that questions of law were involved of sufficient importance or doubt to justify the same, and the parties agreeing thereto, the case was reported to the Law Court, upon so much of the foregoing evidence as is legally admissible, for final determination.

The case is stated in the opinion.

Merrill & Merrill, for plaintiffs.

Manson & Coolidge, for defendants.

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

SAVAGE, C. J. This bill in equity is brought to obtain a construction of the will of Semantha C. Jerrard. The plaintiffs were next of kin of the testatrix, and the defendants are the executors. Alice M. Cornforth is also a legatee.

Mrs. Jerrard's husband, Simon G. Jerrard, died in 1909, testate. By the ninth paragraph of his will, he devised and bequeathed the residuary estate in the following manner: "All the rest, residue and remainder of the property of whatever name or kind of which I may die possessed, together with the use and proceeds during her lifetime of all property embraced in the foregoing bequests, I hereby give, devise and bequeath to my beloved wife Semantha C. Jerrard, for her sole and separate use for and during her natural life, with full power to use, dispose of, sell and convey any or all of it as she may desire,

the same as I might do if living, and to dispose of by will, at her discretion, as a memorial fund in her own name and mine, to be devoted to some charitable, benevolent or educational use, a sum not exceeding three-fourths part of what may remain of my estate at her decease. And I earnestly desire that my said wife during her lifetime shall dispose of by gift to such of my relatives as are not specially named in this instrument all my household goods, pictures, silver, glass and crockery ware and all other articles which go to make up the furnishings of our home, so that none of said furnishings shall ever be disposed by sale." The remainder over he bequeathed to certain relatives.

To carry out the foregoing provision for a memorial fund, Mrs. Jerrard on August 16, 1911 made a will by which she gave $4000 to the Home for Aged Women at Bangor, Maine, "to be paid from the property described in said ninth paragraph of the will of Simon G. Jerrard and is disposed of by authority of that paragraph." She named the defendant Libby as executor.

On October 25, following, she made an additional will, in which she recited that "having already under such circumstances made a gift of all the articles named in this will, some of which are at hand and capable of manual delivery such as I have made, and some of which are at a distance and capable of delivery by keys and other instrumentalities, all of which I have done to the best of my ability, do hereby make this will to confirm and make good these gifts if it be at all necessary." She appointed the defendant, Alice M. Cornforth, as executor of this will, and confirmed the will of August 16, 1911. She then in paragraph 2, directed Mrs. Cornforth to give certain specific articles to various legatees named. Among these bequests are only two which need be specifically referred to, namely, "everything tangible, not including money and choses in action, in my room and the two adjoining clothes presses at Pittsfield to Alice M. Cornforth for herself;" and a quilt and "the large marble topped table at Levant to Alice M. Cornforth for her own use."

The third and last, but unnumbered paragraph, reads as follows:

"All the remainder of my personal property, I hereby give, devise and bequeath to Alice M. Cornforth to be kept for herself and given to others as and how she sees fit."

The executors returned an inventory showing goods and chattels appraised at $118.50; rights and credits appraised at $6696.46; and

real estate appraised at $1000. It appears that the greater part of the rights and credits are claimed by the administrator de bonis non of the estate of Simon G. Jerrard, as remainder over after the termination of Mrs. Jerrard's life estate.

This controversy has arisen over the interpretation of the words "personal property" in the last paragraph of Mrs. Jerrard's will. Mrs. Cornforth contends that the words include the rights and credits as well as the goods and chattels or articles, while the plaintiffs claim that "personal property" in this will means only the articles, or goods of which Mrs. Jerrard died possessed, and that the rights and credits, not having been bequeathed, are intestate estate, and will go ultimately to the heirs.

And it should be noted at the outset that we are not now concerned with the controversy between these executors and the administrators of Mr. Jerrard's estate touching the question what part, if any, of the rights and credits belongs to the latter estate. The construction which we shall give to Mrs. Jerrard's will will affect only so much of the property as belongs to her estate.

In support of their contention that the words "personal property" in this will should be so construed as to exclude "rights and credits, the plaintiffs rely very strongly upon *Andrews* v. *Schoppe*, 84 Maine, 170. The court has had occasion often to remark, as was remarked in effect in *Andrews* v. *Schoppe*, that decisions of the courts interpreting other wills somewhat differently phrased, or surrounded by different conditions, are very unsafe and uncertain guides. Slight changes in phraseology may very seriously differentiate the meaning. Similar, but not wholly alike phrases, are quite likely to mislead.

It is true that in *Andrews* v. *Schoppe*, the court pointed out that the words "personal property" were susceptible of two meanings: one, the broader, including everything which is the subject of ownership, except lands, and interest in lands; the other, more restricted, oftentimes embracing goods and chattels only. And it was suggested that it is in this sense that the expression is ordinarily and popularly used.

But granting this, the question in each case is, what did the testator mean? For that is the fundamental canon of interpretation in the construction of all wills. The intention of the testator is the goal which the court seeks to reach. "That intention is to be gathered not only from the words of the particular devise, but from

the whole will, from the relations of the testator to those who are the object of his bounty, and from all the circumstances surrounding the testator." *Andrews* v. *Schoppe,* supra.

And we may as well say here, that in *Andrews* v. *Schoppe,* the court found strong internal evidence that the testator intended by the words "personal property" to include only goods and chattels. And that case is distinguishable from this one in several respects, as is pointed out by the learned counsel for the defendants in this case. In that case, the words were "all other articles of personal property in the house." The words "personal property" were limited by "articles," and by "in the house." Again the words follow certain enumerated articles in the same sentence. Then in the next clause money was given to the same legatee. And finally there was in another paragraph a residuary clause.

We are now to inquire what Mrs. Jerrard's intention was. Aside from the language of the will, it is proper to consider the circumstances which surrounded her at the time she made the will, and her relations with the heirs and the legatees. The heirs were cousins. Both Mrs. Cornforth and her husband were second cousins, and Mrs. Cornforth was a niece of Mr. Jerrard. Mrs. Cornforth had an insane sister dependent upon her for support. For more than a year Mrs. Jerrard had been living in the family of Mr. and Mrs. Cornforth, for whom she apparently entertained the kindliest of feelings. She had previously given Mr. Cornforth $500, and on the day the will was made, she gave Mrs. Cornforth a $500 note and mortgage which she held. There is some evidence that she disliked some of her heirs, and that at the best her relations with them were not intimate. So much for the circumstances.

The plaintiffs contend that the will on the face of it shows that the testatrix intended merely to confirm gifts already made, and that, as there is no evidence of gifts of money and choses in action made to Mrs. Cornforth, it should be concluded that there were no such gifts, and therefore that no such gifts were confirmed by the residuary clause, and this clause was not intended to include money and choses in action, property which had not previously been given away.

Again, the plaintiffs contend that the residuary paragraph, which is unnumbered, should be treated as if it were the concluding part of paragraph 2, that when the testatrix, after having bequeathed a number of specific articles of furniture and personal belongings to

various individuals, said in substance, "I give the remainder of my personal property," it should be interpreted as meaning "the remainder of my goods and chattels, such as I have already bequeathed." And they rely upon the familiar rule, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things of like kind with those enumerated, upon the presumption that the testator had only things of that kind in mind. *Andrews* v. *Schoppe,* supra.

Finally, the plaintiffs ask, why, if the testatrix intended the money and choses in action to pass to Mrs. Cornforth as personal property in the residuary clause, did she exclude them in the legacy to her in the second paragraph? They earnestly insist that the exclusion in paragraph 2 is clear evidence of an intention not to give them to Mrs. Cornforth.

We find ourselves unable to agree with any of these contentions. We think they are not tenable. We will not discuss them in detail, except as we state our interpretation of the will and the reasons for it. The words "personal property" in a will must be given their full legal effect, unless limited by some other part of the will, or unless, read in the light of surrounding circumstances, it appears that such was not the intention of the testator. *Brown* v. *Coggswell,* 5 All., 556. And in law, "personal property" includes all property rights and estates, except real estate, and interests therein.

Were it not for the exclusion of money and choses in action from Mrs. Cornforth in the second paragraph, we think it would be perfectly clear that they passed to her by the residuary clause. Nothing in the will indicates a contrary intention. What was the reason for that exclusion?

We think the answer is this. Mrs. Jerrard's husband in his will had earnestly desired her to give away to his relatives the household goods and furnishing, so that they never should be sold. She attempted to carry out his wish, but seems to have had fears that some of the gifts were not complete for want of delivery. This difficulty she sought to remedy by her will. And it seems clear to us that paragraph 2 of the will was devoted to that remedy. The scrivener of the will testifies that he has no doubt that he had a list from which to make the draft of the will. The testatrix by the will directed the executrix to give the various articles to the legatees

named, to give "the star quilt that belonged to Aunt Rhoda" and "the large marble topped table at Levant" to herself "for her own use;" likewise "everything tangible, not including money and choses in action, in my room and the two adjoining clothes presses," to herself "for herself." The articles given were grouped together as the gifts she had made in pursuance to her husband's will, that they might not be sold. The money and choses in action had not been given away and did not belong to this group. They were therefore excepted from "everything tangible" in the room. Moreover, the expressions, "for her own use" and "for herself" when compared with the expression in the residuary clause, "to be kept for herself and given to others as and how she sees fit," indicate, we think, that the testatrix had in mind her husband's desire that those articles should not be sold, and expressed her wish, imperfectly perhaps, that they should be regarded by the recipients as family treasures, and so kept and used by them.

Lastly, after having directed her executrix to give certain articles in confirmation of her own gifts of the same articles, she changes the expression and says, as to the remainder of the personal property, "I hereby give, devise and bequeath" it to Alice M. Cornforth. She uses the technical, formal phrase. She now makes disposition of property not previously given away. She does so by a distinct testamentary clause. She makes no limitation except that it is personal property, and *all* her personal property. As to this property, there is no wished for limitation in use. It is to be kept or given to others as the legatee thinks fit.

Accordingly, we answer the questions propounded by the bill as follows: Semantha C. Jerrard did not die intestate, as to the items of rights and credits named in the inventory of her estate, and contained in Exhibit D. attached to the bill. All the rights and credits named in said inventory, or so much thereof as belonged to Mrs. Jerrard at her death, subject to charges and contingencies of administration, passed to Mrs. Cornforth by the residuary clause in the will.

The reasonable costs, expenses and fees incurred by the parties in this litigation, may be allowed by the Judge of Probate, and paid out of the estate.

Decree in accordance with the opinion.

ELLEN CROCKER

vs.

THE INHABITANTS OF THE TOWN OF ORONO.

Penobscot. Opinion July 1, 1914.

Defect. Due Care. Highway. Injury. Negligence.

Upon the facts as disclosed by the testimony of the witnesses, as to the precise situation and character of the hole or depression, neither the jury nor the court is warranted in saying that the defendant town had failed to keep this road, at the place of the alleged accident, reasonably safe and convenient, as the statute requires.

On motion by defendant for new trial. Motion sustained.

This is an action on the case to recover damages for injuries claimed to have been sustained by the plaintiff by reason of a defect in the highway in the town of Orono.

Plea, the general issue. The jury found for the plaintiff in the sum of eight hundred and fifty dollars ($850.00), and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

A. G. Averill, and G. E. Thompson, for plaintiff.

C. J. Dunn, for defendant.

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

SAVAGE, C. J. Action to recover for injuries occasioned by an alleged defect in a highway. The plaintiff recovered a verdict, and the case comes before this court on a motion to set it aside.

The plaintiff was a passenger on the electric railway from Bangor to Old Town. At that time electric cars were not permitted to cross Orono bridge, so called, and the passengers were transferred from a car at one end to a car at the other end. The car in which the plaintiff was a passenger stopped about forty feet from the bridge. The

plaintiff alighted from the front end. Her claim as stated in her writ is that after alighting "while walking along said highway . . . and when near the entrance to said Orono bridge she stepped and fell into said hole."

The hole as described in the writ, and likewise in the "fourteen days' notice," so called, to the municipal officers, was two feet in circumference and about three and one-half feet deep. And the plaintiff, testifying, described the accident as follows: "When he [the conductor] said 'All transfer,' I got up with the rest and came out. I came out this side door, and, as I usually do, I took hold of the rail as I go down the steps, of course, everything was smooth as a floor, and I looked through the bridge to see if the car had got there on the other side; and I stepped one foot down, and when I stepped the other, I felt myself going, and it was dreadful. I thought it was an earthquake and I was being swallowed up." And on cross examination she said that she stepped "immediately from the car" into the hole, without walking any distance whatever. In her testimony she gave no further description of the hole or its location. The only inference to be drawn from the plaintiff's testimony is that there was a hole in the road so situated that in the act of alighting from the car, she stepped directly into it.

The plaintiff, however, is contradicted by the testimony of all the other witnesses, both as to the location of the hole and the manner of the accident. Among these witnesses were two called to testify by the plaintiff herself. In order to understand their testimony it is necessary to describe the road at the point of the accident. The floor of the bridge is somewhat higher than the natural level of the land surrounding it, and the road has been built up from the level to the bridge with crib work covered by earth. This made a bank on each side of the road. And to protect travelers a fence was built along the crest of each bank from the bridge at least as far as to the place where the car stopped. This fence was about six feet from the nearest rail of the electric railway, and about four feet from the car steps from which the plaintiff alighted. The roadway in general was smooth, and there was no hole at the point where the plaintiff stepped from the car.

But as is agreed by all the witnesses on both sides, except the plaintiff herself, there was a depression in the outside of the road, near and under the fence. It was about six feet towards the bridge

from the front end of the car. It extended into the road from the fence not exceeding ten inches, for it could be completely covered by a plank lying on edge against the fence and another eight inch plank lying against the first one. It sloped from comparatively nothing at the inner edge to a depth of from five to seven inches under the fence. One or two of the witnesses graphically described it as looking as if a shovelful of dirt had been taken out. The depression was caused by the crumbling away of the earth on the brow of the bank.

A little reflection will show that a traveler walking in the direction that the plaintiff would have walked to reach her other car, and walking very close to the fence, might naturally step with his right foot upon the shallowest part of the depression, but his left foot would step several inches inside of it. And it is difficult to understand how a traveler going across from the car steps towards the hole, and in the exercise of due care, could step into the hole and fall, unless he ran into the fence. This can easily be demonstrated.

But it was the plaintiff's left leg that went into the depression and was injured. This indicates clearly, we think, that she was walking backward toward the bridge, and not forward toward it, when her left foot went into the depression, and the soil giving way, she was drawn down to a sitting posture, with her left leg under the fence. Although the plaintiff denies it, all the witnesses on both sides who saw it agree in substance that as the plaintiff stepped from the car she turned around and spoke with another lady. She was then back towards the bridge and the depression, and one of her own witnesses says that she stepped backward and so into the depression. And that this is true is confirmed by the fact, already stated, that it was her left foot that went into the depression.

Upon these facts, and keeping in mind the precise situation and character of the hole or depression, we feel compelled to say that neither the jury nor the court is warranted in saying that the defendant town had failed to keep this road at this place "reasonably safe and convenient," as the statute requires. Towns are not insurers. They are bound only to have the roads reasonably safe. To say that a depression like this one, at the extreme side of the road, beginning not more than ten inches from the road fence and deepening to not more than 5 or 7 inches under the fence is an actionable defect would extend municipal liability far beyond the effect of any

case that we have seen. See *Witham* v. *Portland*, 72 Maine, 539; *Morgan* v. *Lewiston*, 91 Maine, 566; *Haggerty* v. *Lewiston*, 95 Maine, 374; *Cunningham* v. *Frankfort*, 104 Maine, 208.

And if this were not so, we regard it as demonstrated that the plaintiff was stepping backward when her foot stepped into the depression, that she was paying no attention to where she stepped, and therefore that she was not in the exercise of due and reasonable care. This must defeat her action.

It is manifest, we think, that the jury erred, and that they either misunderstood the facts, or misapplied the law.

Motion for a new trial sustained.

JOSEPH E. MOORE

Appellant From Decree of Judge of Probate.

Knox. Opinion July 1, 1914.

Account. Commissions. Fraud. Guardian. Investments. Petition. Reopening of Account. Trust.

1. Guardians, like other trustees, are required to exercise the utmost good faith in all matters pertaining to their employment.
2. In settlement with their wards and in accounting to the Court, it is their duty to make full disclosure of all facts and circumstances necessary to a complete and full understanding by either, of the business in hand, and failure to do so is a breach of the trust which has been held to be fraudulent.
3. Neither the knowledge of the succeeding guardian, if such he had, not his failure to take action, if he had knowledge, can affect the rights of the ward in the premises.
4. When no time is specified by statute within which a settlement may be opened for fraud or mistake, it must depend on the sound discretion of the court.
5. When a guardian has been guilty of wrong doing in the management of the estate of the ward, or the latter has suffered by reason of the guardian's neglect of duty, commissions will be refused.

On report. Case remanded to the Supreme Court of Probate of Knox County for further action in accordance with this opinion.

This is a petition by Albert T. Gould to the Probate Court for the County of Knox, asking that the final account of Joseph E. Moore as the guardian of him, said Albert T. Gould, be reopened and certain sums credited to said Moore, in his said account disallowed, and an account taken of what is now due the petitioner for principal and interest on the same. Upon a hearing on the said petition, it was decreed that said petition be granted and that said account be reopened. From this decree, the said Moore appealed to the Supreme Court of Probate. At the conclusion of the evidence, the case was reported to the Law Court for determination, upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

Arthur S. Littlefield, and Rodney I. Thompson, for appellant.

Alan L. Bird, and Norman L. Bassett, for Albert T. Gould, the appellee.

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

BIRD, J. This is the petition of Albert T. Gould to the Probate Court of Knox County to open the account therein denominated "final" of the appellant as guardian of the petitioner and disallow sundry items of credit therein allowed the guardian, upon the ground that their allowance was obtained by fraud upon the court and also for disallowance of the guardian's commissions. The petition was sustained in the Probate Court, the account opened and the items in question and the commissions disallowed and the account restated. The guardian appealed from the decree of the Probate Court and the case is here upon report from the Supreme Court of Probate.

It would seem clear that the account is to be regarded as final, although perhaps informal: See *Mattocks* v. *Moulton,* 84 Maine, 545, 549; Pub. Laws, 1830, Chap. 470, Sec. 10; R. S., 1841, Chap. 110, Sec. 29; R. S., 1903, Chap. 69, Sec. 22; Id. Sec. 10; *Emery* v. *Batchelder,* 132 Mass., 452, 453.

It is not seriously questioned by appellant that the use made of the moneys of the ward forming the items of credit the dis-

allowance of which is asked, made them improper investments, if such they may be called, of trust funds not only from the nature of the use made (*Mattocks* v. *Moulton*, 84 Maine, 545) but from the relation of the guardian to the property to which they were applied. Without considering at present the nature of the items, it is sufficient to say that the application of the moneys covered by the items in question was manifestly improper and such as would render the guardian liable for all losses arising therefrom.

The petitioner was born January 9, 1885, and appellant was appointed his guardian by the Probate Court of Knox County in July, 1891. His resignation as guardian was accepted at a term of the same court held on the third Tuesday of March, 1896. The minor having removed to the State of Ohio, one George Hardy, of Columbus, Franklin County, Ohio, was appointed his guardian on the twelfth day of September, 1896. A certificate of his appointment was thereafter filed in the Knox County Probate Court. The final account of appellant, which was allowed in December, 1898, contains this item of credit:—

"Nov. 11 (1896) Amount transferred to Geo. Hardy, Gdr. Assets of estate turned over to Gdr————$10,660," the account indicating that this item of credit was supported by voucher 23. This voucher is a receipt given by the succeeding guardian to the former guardian for sundry "evidences of property and securities." Among these are included the following:—

"Note of Henry Trowbridge, Nov. 24, 1891, for $400.

Cert. of H. Trowbridge, Denver, Col. as to loan of $1900. April 17, 1893.

Cert. of H. Trowbridge, Denver, Col. as to loan of $600. Feb. 27, 1893"

No values however were carried out against these items in the account as filed but at the time the account was settled, the face values were carried out against each item of the receipt and their aggregate inserted in the account by the accountant. By so doing he represented the face values to be the cash values and we find nothing in *Mattocks* v. *Moulton*, 84 Maine, 545, which militates against this view. To investigate the character of investments upon the allowance of a guardian's account is clearly within the duty of the Probate Court: *Brigham* v. *Morgan*, 185 Mass., 27, 44, 45.

It is true that it probably sufficiently appears upon the face of the account that these three items were investments without security and also that they were made beyond the jurisdiction of the court. The former infirmity renders the accountant responsible for all losses thence arising, *Mattocks* v. *Moulton*, 84 Maine, 545, and the latter, except under peculiar circumstances nonexistent in the case at bar, also subjects him to the peril of responsibility for the safety of the fund: *Ormiston* v. *Olcott*, 84 N. Y., 339, 344; *Amory* v. *Green*, 13 Allen, 413, 415; 1 Perry on Trusts, Sec. 452. We do not find, however, that the accountant made a disclosure of his personal relations to these so called investments and it by no means follows that, had such been made, they would have been allowed. Indeed, upon the evidence, we are warranted in the conclusion that they would not have been and that their allowance was procured by a suppression of material facts.

The petitioner attacks the further credit item of the account "1894 June 16 Pd H. Trowbridge Acct. Denver loan $593.88." This item was not submitted to the Probate Court as an item of investment. It is a claim of credit for moneys expended for the benefit of the ward's estate. It was applied to preserve the so called investments of $600 and $1900 already considered. It is sufficient to say that our conclusion as to this item must be the same as that arrived at respecting these so called items of investment.

Guardians, like other trustees, are required to exercise the utmost good faith in all matters pertaining to their employment. In settlement with their wards and in accounting to the court, it is their duty to make full disclosure of all facts and circumstances necessary to a complete and full understanding by either of the business in hand. Failure to do so is breach of trust which has been held to be fraudulent. *Durrell* v. *Gibson*, (Maine) 9 Atl., 353; *Slauter* v. *Favorite*, 107 Ind., 291; 57 Am. Rep., 106, 110; *Brooke* v. *Lord Mostyn*, 2 DeG., J. & S., 373; *Boswell* v. *Cooks*, L. R., 27 Chan. Div., 424; *Kelley* v. *Nealley*, 76 Maine, 71, 74; *Scoville* v. *Brock*, 79 Va. 449, 459.

Neither the knowledge of the succeeding guardian, if such he had, nor his failure to take action, if he had knowledge, can affect the rights of the ward in the premises. *Potter* v. *Titcomb*, 11 Maine, 157, 166; *Denholm* v. *McKay*, 148 Mass., 434, 442-3. See also *Blake* v. *Pegram*, 101 Mass., 592; *Lamar* v. *Micou*, 112 U. S., 452, 454.

It should be noted that, at the hearing allowing the account, the ward was not represented by either his general guardian or a guardian *ad litem.* See *Denholm* v. *McKay,* 148 Mass., 434, 442.

Has the conduct of the ward since arrival at his majority been such as to affect the granting of the remedy sought? Proceedings for the opening and modifying of a final account or settlement upon the ground of fraud or mistake whether by bill in equity or bill of review in equity or petition therefor in the Probate Court are founded upon equitable principles. Where no time is specified by statute within which a settlement may be opened for fraud or mistake it must depend on the sound discretion of the court, and the circumstances of each particular case considered with reference to the nature and extent of the account, the condition and situation of the parties, and the character and evidence of the alleged fraud or mistake: *Hyer* v. *Moorhouse,* 20 N. J. L., 125; *Rogers* v. *Van Nortwick,* 87 Wis., 429; *Stoudenmire* v. *DeBardelaban,* 72 Ala., 302. See *Frost* v. *Walls,* 93 Maine, 412; *Aaron* v. *Mendel,* 78 Ky., 427; *Knight* v. *Hollings,* 73 N. H., 495, 502.

The appellant urges that the laches of the former ward, since his majority defeats his right. We find none of the elements of laches save lapse of time. We do not discover that the testimony of any material witness or other evidence has been lost, or that there has been a change of circumstances affecting appellant of which he can avail himself. *Leathers* v. *Stewart,* 108 Maine, 96, 102. While we have not found any change in the condition of the sureties upon the bond of accountant, as urged, it is only necessary to say that the sureties are not so directly interested in these proceedings as to warrant the consideration of this defense as to them. See *Shaw* v. *Humphrey,* 96 Maine, 397, 399. That, if they have a remedy it is elsewhere, see *Clark* v. *Chase,* 101 Maine, 270.

Commissions were allowed to the amount of $918,35. This allowance is challenged by the appellee. Authorities are abundant that where a guardian has been guilty of wrong doing in the management of the estate of the ward or the latter has suffered by reason of the guardian's neglect of duty, commissions will be refused. In *re Pierce,* 68 Vt., 639; *Martin* v. *Porter,* 53 N. Y., Suppl. 186; *Albert's Appeal,* 128 Pa. St., 613; *Lamb's Appeal,* 58 Pa. St., 142. See also *Pierce* v. *Prescott,* 128 Mass., 140, 148.

The objection of appellant that the Probate Court, having decreed the reopening of the account, exceeded its powers in restating it, does not appeal to us as convincing or well taken.

The entry, therefore, must be.

Decree of Probate Court affirmed.
The case is remanded to the Supreme Court of Probate for the County of Knox for further action in accordance with this opinion.

WALTER L. MORSE, et als. In Equity

vs.

WILLIAM R. BALLOU, et als.

Penobscot. Opinion July 7, 1914.

Construction. Equity. Husband and Wife. Intention of Testator. Legal Heirs. Residue. Trust Fund. Trustees. Widower. Will.

1. In construing the clause in question in the will of Llewellyn J. Morse, the court must presume that he used the words "legal heirs" in the sense that had been ascribed to them by usage and sanctioned by judicial decisions, unless a clear intention to use them in another sense is apparent from the context.
2. If the presumption is that he used the words "legal heirs" in the sense that has been ascribed to them by usage and sanctioned by Judicial decisions, he did not intend that Fred D. Hill should take any part of the trust fund.
3. Prior to the date of the will, and after the existing statute of distribution went into effect, it was held that the widow was not an heir of her husband, and if the widow is not an heir of her husband, then of course, a husband cannot be the heir of his wife, for they both take under the same statute.
4. Husbands and wives, though they may be entitled under our statute to certain interests in the estate of each other, are not, properly speaking, heirs of each other. These rights, which the statutes give them respectively, they do not take as heirs.

On report. Decree according to opinion.

This is a bill in equity brought to obtain the construction of the will of Llewellyn J. Morse. The principal question is whether Fred D. Hill, the widower of Louisa Bridges Hill, is one of the legal heirs of his wife, within the meaning of a devise over to the legal heirs of the testator's granddaughter, a beneficiary of a trust created in said will and who died before the termination of the trust. The respondents filed answers to said bill. The case was reported to the Law Court upon bill, answers, copy of the will of Llewellyn J. Morse and the agreed stipulation that Louisa Bridges Hill was a granddaughter of Llewellyn J. Morse, and that the property devised consisted of both real estate and personal property; the Law Court to render such final judgment as the legal and equitable rights of the parties require.

The case is stated in the opinion.

L. C. Stearns, for plaintiffs.

George H. Worster, for William R. Ballou.

Irish & George, for Fred D. Hill and for Fred D. Hill, guardian.

John E. Nelson, guardian ad litem, pro se.

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

HALEY, J. This is a bill in equity brought by Walter L. Morse, Carrie L. Higgins and Alfred J. Robinson, trustees under the will of Llewellyn J. Morse, against Fred D. Hill, the widower of Louisa Bridges Hill, William R. Ballou, Louise M. Hill, Mark Langdon Hill, Walter Hill and Marion Hill, children of said Louisa Bridges Hill, deceased, to obtain a construction of the will of said Llewellyn J. Morse, and is before this court upon report.

Llewellyn J. Morse died October 24, 1902, and his will was duly proved and allowed, and the plaintiffs qualified as executors and trustees. Louisa Bridges Hill died testate March 22, 1907, leaving as survivors her husband, Fred D. Hill, and the other defendants, who were her children. Her will, after disposing of a part of her estate, contained the following provision: "All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die seized and possessed, or to which I may be entitled at the time of my decease, I desire to be distributed in accordance with the laws of the State of Maine, as they may exist at the time of my decease."

And in said will Fred D. Hill was appointed executor. There is no dispute as to the facts, and the court is asked to construe paragraph six of the will of said Llewellyn J. Morse, which reads as follows:

"All the rest residue and remainder of my estate and effects, wherever found and however situated, and of what nature and kind soever not hereinbefore disposed of, and not hereafter disposed of by my executors for the payment of proper charges against my estate and the legacies herein provided for, I give, bequeath and devise as follows, viz: One-third ($\frac{1}{3}$) of the same in fee to my daughter, Carrie L. Higgins, one-third ($\frac{1}{3}$) of the same in fee to my son, Walter L. Morse, and the remaining one-third ($\frac{1}{3}$) I give, bequeath and devise to Walter L. Morse, Carrie L. Higgins and Alfred J. Robinson above named, to have and to hold the same to the said Walter L., Carrie L. and Alfred J., their heirs, executors, administrators or assigns according to the nature and quality thereof respectively, in trust, for the following purposes and uses, viz: To invest, manage and control the same as they may deem best, and during the lifetime of my deceased daughter's husband, Willis B. Bridges, to pay over to the said Fannie Bridges Robinson and Louisa Bridges Hill the net annual income and profits of the said one-third ($\frac{1}{3}$) held in trust by them as aforesaid, said trust to continue until the death of the said Willis B. Bridges, and after his decease, then I order and direct said trustees to transfer and convey said one-third ($\frac{1}{3}$) to the said Fannie Bridges Robinson and Louisa Bridges Hill, each to share and share alike, and in case they, or either of them, are not living at the termination of said trust, then I order and direct said Trustees to transfer and convey said one-third ($\frac{1}{3}$) to the persons who would be at the time the legal heirs of the said Fannie Bridges Robinson and Louisa Bridges Hill, or either of them, such heirs to take the same share the said Fannie Bridges Robinson or Louisa Bridges Hill would have taken if living."

Louisa Bridges Hill, as stated above, deceased March 22, 1907, Willis B. Bridges deceased on the 30th day of April, 1913, and the said Fannie Bridges Robinson is now living.

The trust created by said paragraph six terminated by the death of said Willis B. Bridges. Fred D. Hill claims to be one of the legal heirs of his deceased wife, Louisa Bridges Hill, and that he is entitled to a share in that part of the estate of Llewellyn J. Morse which would have passed to said Louisa Bridges Hill, had she been living

at the termination of said trust, and the court is asked to construe that portion of paragraph six of said will which provides for the distribution of the one-third ($\frac{1}{3}$) of the trust fund that was to be paid over at the death of Willis B. Bridges to Fannie Bridges Robinson and Louisa Bridges Hill, and to determine who is entitled to that part of the principal of the trust fund to which said Louisa Bridges Hill would have been entitled had she been living at the termination of said trust.

No part of said trust fund passed by the will of Louisa Bridges Hill; that part which would have been payable to her at the termination of the trust, if she had been living, passed to her legal heirs as an executory devise under the will of Llewellyn J. Morse. *Buck* v. *Paine,* 75 Maine, 582; *Houghton* v. *Hughes,* 108 Maine, 233.

It is claimed that Fred D. Hill, the widower of Louisa Bridges Hill, is one of the legal heirs of his deceased wife within the meaning of the provisions of the will of Llewellyn J. Morse, and that he is entitled to share in that part of the estate which would have passed to her had she been living at the termination of said trust.

It is the opinion of the court that that claim cannot prevail, for two reasons; first, that such was not the intention of Llewellyn J. Morse, as shown by his will; second, because a widower is not a legal heir of his deceased wife.

First. The will of Llewellyn J. Morse is dated April 24, 1901, and in construing the clause in question the court must presume that he used the words "legal heirs" in the sense that had been ascribed to them by usage and sanctioned by judicial decisions, unless a clear intention to use them in another sense is apparent from the context. *Houghton* v. *Hughes,* supra. And if we presume he used the words "legal heirs" in the sense that has been ascribed to them by usage and sanctioned by judicial decisions, then he did not intend that Fred D. Hill should take any part of the trust fund because, for many years prior to the execution of his will the words "legal heirs" had been held by usage and judicial decisions in this State not to include husband and wife, and, as said in *Houghton* v. *Hughes,* supra, "his will was made and executed in Maine. It is not probable that he was familiar with the laws of any other State, but he is presumed to know the laws of Maine, and it should be assumed, we think, that he used the words 'heirs at law' in his will in the sense which

those words had according to the laws of the State of Maine, and as judicially construed by the courts of Maine, there being nothing in the language used which repels or controls such conclusion." Prior to the writing of the will, and after the existing statute of distribution went into effect, it was held in *Golder* v. *Golder*, 95 Maine, 259, that the widow was not an heir of her husband, and, if the widow is not an heir of her husband, then, of course, a husband cannot be the heir of his wife, for they both take under the same statute. Before the present statute of distribution took effect, it was held in *Buck* v. *Paine*, 75 Maine, 582; *Clark* v. *Hilton*, 75 Maine, 426; *Lord* v. *Bourne*, 63 Maine, 368, that husbands and wives were not heirs of each other, and we must assume that the testator wrote into his will the words "legal heirs" in the sense in which they had been judicially construed by the decisions of this court. We must assume that he selected the words "legal heirs" with the intention of excluding Fred D. Hill from participation in the distribution of the trust fund, because that was the sense in which this court had construed those words, it being a cardinal principle in the construction of wills to ascertain the intent of the testator, and as it is apparent from the language used, as the words had been construed by this court, that he intended only the heirs by blood of Louisa Bridges Hill should share in the distribution of the trust fund which she would have taken had she been living at the termination of said trust.

Second. It is urged that the widower is a legal heir of his deceased wife. "The primary meaning in law of the word 'heirs' is the persons related to one by blood, who would take his real estate if he died intestate, and the word embraces none not thus related." *Tillman* v. *Davis, et al.*, 95 N. Y., 17. And it has been held by this court many times, when the question has arisen for consideration, that husbands and wives are not heirs of each other. In *Lord* v. *Bourne*, supra, decided in 1873, the court, after careful consideration, held that the term 'legal heirs' did not include the widow, and the opinion states that there had been a prior decision to the same effect, that through mistake or inadvertance had not been printed. In *Clark* v. *Hilton*, 75 Maine, 426, the court said: "He (the widower) is not one of the heirs of his wife. Husbands and wives, though they may be entitled under our statute to certain interests in the estate of each other are not, properly speaking, heirs of each other. The rights which the statute give them respectively they do not

take as heirs." In *Buck* v. *Paine*, supra, the court approved the doctrine of *Lord* v. *Bourne*, as it did in *Kenniston* v. *Adams*, 80 Maine, 295, and the case of *Lord* v. *Bourne*, was quoted with approval in the elaborate opinion in *Mason* v. *Bailey*, 6 Del., 129, and also approved in *Wilkins* v. *Ordway*, 59 N. H., 378, where the court said: "But husband and wife are nowhere included with 'heirs' or 'next of kin' in the statutes. These terms, in their proper and legal sense and acceptance, have reference to relationship by blood; and in *Richardson* v. *Morton*, 55 N. H., 45, it was held that the widow of a devisee cannot take as heir of her husband, under a clause giving certain bequests to him and his heirs, unless it is apparent from the will that the word 'heirs' is not used in its ordinary sense."

In *Golder* v. *Golder*, supra, decided in 1901, after the present statute of distribution was enacted, the question whether the wife was an heir of her husband was again considered by the court, and it was held, page 262, "the statute does not change the status of the widow with reference to her deceased husbands estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes not as heir, but as widow."

In 1907, in *Herrick* v. *Low*, 103 Maine, 253, and in *Houghton* v. *Hughes*, supra, the court approved the rule laid down in *Lord* v. *Bourne*, supra. In *Tillman* v. *Davis, et al.*, supra, the court reviewed many of the decisions of this country and of England and ruled that the widow was not an heir of her husband, and stated: "The primary object of all construction of wills is, in each case, to ascertain the intention of the testator, and to give effect to that within the rules of law. The words 'heirs,' 'next of kin' may be so used in the association with other language, and under such circumstances as show an intention to include other than blood relatives. But in the absence of anything showing a different intention they must be held to mean what they primarily import, relatives in blood. In this State they have not by legal usage, or general custom, come to mean anything else; and there is nothing in this will, and there were no circumstances connected with the testatrix or her estate to indicate that she intended by the words 'heirs' a broader significance."

We think an examination of the above cases, and cases cited in the opinion, demonstrate that the rule followed in this State for many years, that husbands and wives are not heirs of each other, is

the right rule and approved by most of the authorities that have discussed it. It is easily applied and understood, and will generally, if not universally, be more likely to give effect to the real intent of testators to so hold.

The trustees are instructed that Fred D. Hill is not a legal heir of his wife, Louisa Bridges Hill, and is entitled to no part of the trust fund mentioned in section six of said will, which would have gone to Louisa Bridges Hill if she had been living at the termination of said trust, viz.: at the death of Willis B. Bridges; that the part of said trust fund that would have gone to said Louisa Bridges Hill, if living at the death of Willis B. Bridges, should be paid to the defendants, William R. Ballou, Louise M. Hill, Mark Langdon Hill, Walter Hill and Marian Hill, the children and legal heirs of said Louisa Bridges Hill. Decree in accordance with this opinion, the question of costs and expenses to be settled by the justice signing the decree.

Decree as above.

WILLIAM A. ESTEY

vs.

WILLIAM R. WHITNEY.

WILLIAM R. WHITNEY

vs.

WILLIAM A. ESTEY.

Somerset. Opinion July 7, 1914.

Contract. Fraud. Mortgage. Rescission. Representation. Sale. Waiver. Warranty.

1. It is undoubtedly the law that a party who is defrauded by false representations, in the sale of property, upon discovery of the false representations, is entitled to the right to rescind the contract.
2. If he would rescind by reason of the fraud, he must do so within a reasonable time after the discovery of the fraud.
3. When he has once elected to rescind, or not to rescind, he must abide by his decision.
4. If the party who is defrauded by false representations, made to induce him to enter into a contract, after having knowledge of the fraud and false representations continues to retain the property and does not notify the seller of his election to rescind within a reasonable time, without excuse, this of itself affords proof of an election to abide by the contract, which is irrevocable, except of course by mutual consent.

On motions by defendant to set aside the verdicts in both cases.

Motion in each case overruled.

These two actions were tried together before a jury at the September Term, 1913. The plaintiff in the action of *Estey* v. *Whitney*, sued to recover the sum of fifteen hundred dollars and interest paid by plaintiff to defendant in part performance of an oral contract for the purchase of a farm, which contract the plaintiff claims he

rescinded, because of false representation made by the defendant in the course of the negotiations, by which he was defrauded.

In the case of *Whitney* v. *Estey*, the plaintiff sued to recover the sum of two hundred dollars for wintering defendant Estey's cattle and horses during the season of 1910-1911.

The general issue was pleaded in both cases, and in the case of *Estey* v. *Whitney*, the jury returned a verdict for the plaintiff of $1797.62, and in the case of *Whitney* v. *Estey*, the jury returned a verdict for the defendant. The defendant filed a motion for a new trial in both cases.

The case is stated in the opinion.

Augustine Simmons, for William A. Estey.

Fred F. Lawrence, for William R. Whitney.

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

HALEY, J. Two actions of assumpsit, tried together at the September Term, 1913, in Somerset County.

The writ of *Estey* v. *Whitney* contains a count alleging an oral agreement by the plaintiff to purchase of the defendant a farm in Emden; that the defendant represented and warranted that the farm contained four hundred acres of intervale land, islands and some upland, and that the defendant represented that the year before the purchase the farm pressed out one hundred and two tons of hay and, in addition, that there was other hay in the barn on said farm; that the plaintiff believed said statements and representations and, relying upon them, entered into an oral agreement for the purchase of said farm and certain hay, farm products, farming machinery, etc., for the sum of eight thousand dollars, and paid, as a part of the purchase price, five hundred dollars, and was to pay a further sum of three thousand dollars when he took possession of said premises; that on the fourth day of May the plaintiff paid one thousand dollars more towards the purchase price and agreed to get other money within a short time, and that the plaintiff took possession of said farm on said day, and that the defendant waived the payment of the other two thousand dollars due at that time; that the plaintiff continued to keep said premises under said agreement, and, on the 25th day of July, 1910, gave the defendant his

promissory note for said sum of two thousand dollars, being the balance of the amount to be paid when the plaintiff took possession, and secured the payment of the same by a mortgage of all the hay then in said barn and all the growing crops, including grain and potatoes and personal property bargained for with said farm, and that the defendant then and there promised the plaintiff that, after the payment of said note, he would give the plaintiff a deed of said farm and the title to the personal property aforesaid; that the plaintiff afterwards delivered to the defendant between sixty-three and sixty-four tons of hay of the value of nine hundred and forty-five dollars, and some pressed straw of the value of twenty-five dollars, and eleven hundred barrels of potatoes of the value of fifteen hundred dollars, less some items of credit for pressing and phosphate; that the statement of the amount of hay raised on said farm was false and fraudulent and was craftily made to induce the plaintiff to purchase said farm; that the year previous said farm only pressed out between eighty-five and eighty-six tons of hay; that said farm did not contain four hundred acres, but a much smaller number, to wit, three hundred acres; that the plaintiff relied upon the warranty and representations made to him concerning the acreage of said farm and the amount of hay pressed from it the year previous and other allegations of what the defendant did upon said premises, and that said contract was rescinded by the plaintiff within a reasonable time after his discovery of said false and fraudulent representations. Under said count the plaintiff sought to recover the sum of money paid by him as aforesaid, and to recover back the value, if negotiated, of said note of two thousand dollars.

The writ also contains the common counts for goods sold and delivered, money had and received and for money found to be due upon an account stated between them, and a specification that under the above counts the plaintiff would seek to recover the same amount alleged to be due on the first count of the declaration.

The writ of *Whitney* v. *Estey* contains an account annexed alleging the indebtedness to the plaintiff in the sum of two hundred dollars, the account annexed being, "To wintering your cattle and horse at Emden during the season of 1910 and 1911, $200."

In the first case the verdict was for the plaintiff for $1797.62, and in the second case the verdict was for the defendant.

It is admitted that both verdicts must stand or fall, according to the correctness of the finding of the jury upon the issue of the rescission of the contract for the purchase of the farm.

In the case of *Estey* v. *Whitney*, the evidence shows that the plaintiff and the defendant entered into a contract in the early spring of 1910 for the sale to the plaintiff by the defendant of the farm owned by the latter, together with the farming tools and machinery, for the sum of eight thousand dollars; that the plaintiff paid five hundred dollars down and was to pay three thousand dollars more in June or July, and that when the said three thousand dollars were paid the defendant was to give to the plaintiff a deed of the farm and take back a mortgage for the unpaid balance of forty-five hundred dollars; that of the three thousand dollars the plaintiff paid one thousand in cash, thus making in all a cash payment of fifteen hundred dollars, and agreed that he would, in a short time, obtain from his home in New Brunswick the money to pay the balance. The plaintiff went into possession of the premises and cultivated and used them, under the terms of the agreement. It was proved by the testimony of the court surveyor, and uncontradicted, that the farm, including the islands, contained only three hundred acres instead of four hundred, and the plaintiff discovered that only eighty-five to eighty-six tons of hay were pressed from the farm the year before the purchase, although, as he claimed and testified, the defendant represented the farm as containing at least four hundred acres, and pressed the year before one hundred and two tons of hay, in addition to some loose hay in the barn.

The plaintiff claims that, on the 25th day of July, 1910, he rescinded the contract, or attempted to rescind it, because of the false representations of the defendant as to the acreage and the quantity of hay cut the year previous; and on said 25th day of July the plaintiff executed a mortgage of the growing crops and the personal property upon the premises to the defendant to secure the payment of a two thousand dollar note that day given by him to the defendant as the balance of the three thousand dollar payment that the plaintiff had agreed to pay when he entered into possession of the premises.

The defendant denies that there was any rescission, or attempted rescission, but contends that the giving of the note and mortgage was an election by the plaintiff to stand by the contract, and that, having made that election, he was bound by it and could not afterwards

rescind the contract. In explanation of the note and mortgage the plaintiff testified that the defendant represented at that time that he, the plaintiff, was mistaken in regard to the amount of hay he would cut that season, and stated to him that he was not half done haying and, in substance, asked him to wait and investigate further before rescinding the contract, and that he did not, at that time, know the amount of the shortage of the land.

It is undoubtedly the law that a party who is defrauded by false representations in the sale of property, upon the discovery of the false representations, is entitled to the right to rescind the contract, and that, if he would rescind by reason of the fraud, he must do so within a reasonable time after the discovery of the fraud, and that, when he has once elected to rescind, or not to rescind, he must abide by his decision, and that the party who is defrauded by false representations, made to induce him to enter into a contract, after having knowledge of the fraud and false representations, if he continues to retain the property and does not notify the seller of his election to rescind within a reasonable time, without excuse, that of itself affords plenary proof of an election upon his part to abide by the contract, which is irrevocable, except of course by mutual consent. To entitle the plaintiff to a verdict it was incumbent upon him to prove, (1) the fraud of the defendant upon which he, the plaintiff, relied in the making of the contract, (2) that he rescinded the contract within a reasonable time. The defendant does not urge his motions upon the grounds that he was not guilty of fraud, upon which the plaintiff relied. The jury having passed upon that question, it is admitted that there is sufficient evidence in the case to authorize the jury to find the fraud complained of.

It is the claim of the defendant that, by the giving of the note and mortgage for two thousand dollars on the 25th of July, 1910, the plaintiff not only elected not to rescind the contract, but that he also waived the right to rescind; that at that time he had all the knowledge it was necessary for him to have to know the fraud and misrepresentation of which he claims the defendant was guilty, and, if he did know, and executed the mortgage and the note as a part payment on the contract of purchase, he not only did not rescind the contract, but waived the right to rescind. But it is the contention of the plaintiff that he did not have full knowledge at that time, and that, at the request of the defendant, he put off the rescission until after he had

cut his hay upon the assurance of the defendant that he was not half through haying, and would have much more hay than he thought he would cut, and that at that time he did not really know the amount of the shortage in the acreage, and if the plaintiff did, at the request of the defendant, postpone his election to rescind until he had made a further investigation, then of course it would not be an election upon his part not to rescind, if further investigation proved that the defendant had falsely represented the acreage, and the amount of hay cut the year before upon the farm. After the transaction of July 25th the plaintiff left for his home in New Brunswick before the haying season was completed, and did not return until September 23rd. The day following his return the parties met, at which time it is claimed by the plaintiff that there was a rescission of the contract by mutual consent. The plaintiff is corroborated in his statement by the testimony of his wife, who testified that Mr. Estey asked Mr. Whitney for the money back, "and told him we weren't going to stay, and we were going to leave and we wanted the money back, and Mr. Whitney said for us to stay there, and that he was short at that time; he was buying potatoes and he did not have the money and to stay there and do the work and he would pay us for it and would fix it up later—make it satisfactory to us, and would fix the matter up later." The plaintiff testified to the same, and to other conversations of Mr. Whitney of the same tenor, and that, in pursuance of that talk and because of the promise of Mr. Whitney to "fix it up later," he agreed to stay and do the harvesting for the defendant.

The defendant denies the above conversation, and claims that letters and writings of the parties after that date are inconsistant with the arrangements as testified to by the plaintiff and his wife, and that those letters and writings show that no reliance should be placed upon their testimony. The letters and writings, unexplained, do show that there was no rescission on September 23rd, as testified to by the plaintiff and his wife; but they attempt to explain away the construction that the defendant places upon such letters and writings by saying that they related to another trade that the defendant had tried to enter into with them to purchase the farm for five hundred dollars less than the original contract price, and also referred to indebtedness of the plaintiff to the defendant for fertilizer and seed used by him in the planting of the farm, and the crops which, by

arrangement of the parties, were to be the property of the defendant, and the services the plaintiff was performing for the defendant at his request, that most of the letters were written by the defendant, that they were self-serving and purposely worded by the defendant to manufacture evidence that could be used by him if he saw fit to repudiate his contract of rescission.

If the plaintiff and the defendant did mutually agree on September 23rd, to rescind the contract and the defendant took back the property and agreed to settle with the plaintiff for what he had paid and invested in the farm, as testified to, in substance, by the plaintiff and his wife, but denied by the defendant, then of course this action can be maintained by the plaintiff to recover back the amount paid upon the contract, which the defendant, if the testimony of the plaintiff and his wife is true, agreed to pay back, for, although a party who seeks to rescind a contract must do so within a reasonable time after discovering the fraud, and if he does not, or, by his conduct and acts, elects to abide by the contract, he cannot afterwards rescind; yet it is competent for the parties to mutually consent to rescind, and, having mutually agreed to do so, they are bound by their agreement. The only issue of fact in the case is, was there a rescission, by mutual consent, on September 23, 1910? Upon one side there is the positive testimony of the plaintiff and his wife, which they claim is corroborated by their conduct in remaining upon the farm and looking out for the property at the request of the defendant, and upon the other side the denial of their testimony by the defendant, corroborated in part by the testimony of his son, and the letters and papers written and executed by the parties after said date. The testimony of the defendant might be looked upon with suspicion by the jury, as the evidence showed beyond question that he made false representations to the plaintiff to induce him to purchase the farm. It is urged that the defendant artfully wrote the letters and procured the writings which were produced that he might present written evidence to disprove that which he had previously agreed to. The jury saw the parties, they heard the explanations that each gave of their acts and their conduct; they were the proper tribunal to pass upon the question, and they had the right to say that the testimony of the plaintiff and his wife was true in regard to the agreement of the defendant to pay back the money, and to say whether the letters and writings upon which the defendant relies

did not relate to the contract mutually rescinded, but was in reference to another contract that the defendant was trying to enter into with the plaintiff, and that the plaintiff's contention in regard to the writings is the true one. At least, this court cannot say from the reading of the entire testimony that intelligent men could not honestly arrive at this conclusion. That being so, we have no right to substitute our judgment for that of the jury, and, as both cases must stand or fall together, the mandates should be,

Motions overruled.

STATE OF MAINE

vs.

INTOXICATING LIQUORS.

EASTERN STEAMSHIP COMPANY, Claimant.

Penobscot. Opinion July 9, 1914.

Consignee. Forfeiture. Interstate Common Carrier. Intoxicating Liquors. Search and Seizure.

1. It was not necessary that the presiding Justice should place on record specific findings of facts. His order of judgment of forfeiture meant, and it must be so assumed, that he found for the State upon all issues of fact necessary to sustain the libel.
2. It is a fundamental rule that exceptions will not be sustained, unless the excepting party shows affirmatively that he is aggrieved, and he cannot be aggrieved unless he has a legal interest in the subject matter of controversy.
3. The claim for the liquors must state specifically certain matters specified by statute, such as the nature of the right claimed and the foundation thereof.
4. Having filed such a claim, he is admitted as a party; the filing of the claim does not prove the right; it merely entitles the claimant to be heard.
5. It is not enough under the statute to show that the seizure was invalid. It must be shown that the claimant is the party entitled to the custody, and the burden on this issue is on the claimant.

6. No matter who else might be wronged by an invalid seizure, the wrongs of others cannot be redressed at the suit of the claimant, if it has not right to the custody on its own account.

On exceptions by claimant. Exceptions overruled.

This was a complaint and warrant, under Chap. 29, Sec. 48 of the Revised Statutes, issued by the Judge of the Municipal Court for the City of Bangor, on the 20th day of January, 1914, upon which the intoxicating liquors described in the officer's return thereon were seized and libeled. The Eastern Steamship Company appeared in said Municipal Court and filed its claim for said liquors. Upon hearing, in said Court, the Judge thereof gave judgment for a forfeiture of said liquors, and the claimant appealed to the Supreme Judicial Court at the February Term thereof, 1914. At the conclusion of the hearing in said case, the presiding Justice ordered the Clerk of said Court to enter judgment for forfeiture of the liquor seized, except so far as any of them have been lawfully returned.

The case is stated in the opinion.

Donald F. Snow, for the State.

E. P. Murray, and D. W. Nason, for complainant.

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

SAVAGE, C. J. The liquors in question were found by a deputy sheriff in the freight shed in Bangor, occupied in part, at least, by the Eastern Steamship Company, an interstate common carrier. They came to this shed from Bucksport on the cars of the Maine Central Railroad Company. There were many packages, and they were marked to eighteen different people in all. When found by the officer, they had been taken from the cars, and assembled in four separate piles near the delivery doors of the shed, and on the top of each pile was a card of pasteboard, bearing the name of a man. On the top of the pile containing the liquors in question the card bore the name of one O'Rell, a truckman. The liquors were taken from the shed by the officer, Sunday night, January 18, and on the following Tuesday afternoon, January 20, he made complaint in the municipal court under Revised Statutes, Chap. 29, Sec. 48, and obtained a "seizure warrant" so called, upon which he seized and libeled the liquors. Later the Eastern Steamship Company appeared and filed

its claim for them in the proper form. The case came by appeal to the Supreme Judicial Court and a hearing was had before the court without a jury. At the conclusion of the hearing, the presiding Justice ordered judgment to be entered for a forfeiture of the liquors, and the claimant excepted. No finding of specific facts was made. At the hearing the claimant offered no evidence, and the record does not show upon what grounds it claimed a right to the liquors, or the possession of them.

The claimant argues, in the first place, that the Justice below erred in not making a finding of facts, on which to base the judgment. If the complaint were well founded, the claimant can take no advantage of the failure to find facts, for it has taken no exception on that ground. But the complaint is not well founded. It was not necessary that the presiding Justice should place on record specific findings of facts. His order of judgment of forfeiture meant, and it must be so assumed, that he found for the State upon all issues of fact necessary to sustain the libel. *Chabot & Richard Co.* v. *Chabot,* 109 Maine, 403.

The complainant further contends that the complaint and warrant were defective and void, and that, as the libel is based upon the warrant, proceedings for forfeiture cannot be maintained. The objections to the complaint and warrant are that the warrant was not obtained within a reasonable time after the original seizure; that instead of taking out one warrant for all the liquor seized, the officer took out eighteen, presumably one for each party to whom the parcels were severally marked; that the officer in his complaint alleged that the liquors were kept by persons unknown, which was not true, so it says, and finally that the officer, having made out and signed the formal complaint, and filled out the warrant for signature, made out the return and signed it before he swore to the complaint.

Whether any of these objections would be tenable if interposed by one who had an interest in the liquors, and a right to have them restored to him in case the seizure was found to be invalid, we think we have no need to consider. It is a fundamental rule that exceptions will not be sustained unless the excepting party shows affirmatively that he is aggrieved. And he cannot be aggrieved unless he has a legal interest in the subject matter of the controversy. *Allen* v. *Lawrence,* 64 Maine, 175; *Merrill* v. *Merrill,* 67 Maine, 70; *Smith* v.

Smith, 93 Maine, 253. We think the claimant has failed to show that it has any valid claim to have the liquors restored to it, in any event.

The statute, R. S., Chap. 29, Sec. 51, provides that if any person appears and claims intoxicating liquors seized, he shall file a claim in writing and under oath. The claim must state specifically certain matters specified by statute, such as the nature of the right claimed and the foundation thereof. Having filed such a claim he is admitted as a party. Filing the claim does not prove the right. It merely entitles the claimant to be heard. Then the statute provides that "the magistrate shall proceed to determine the truth of the allegations in said claim and libel and may hear any pertinent evidence offered by the libellant or claimant. If the magistrate is, upon the hearing, satisfied that said liquors were not so kept or deposited for unlawful sale, and that the claimant is entitled to the custody of any part thereof, he shall give him an order in writing "for a return of the liquors to which he is found to be entitled." "If the magistrate finds the claimant entitled to no part of said liquors he shall render judgment against him for the libelant for costs, to be taxed as in civil cases before such magistrate, and issue execution thereon, and shall declare said liquors forfeited to the county where seized."

It will be noticed that in order to secure an order for the return of the liquors, two things must be found to be true, namely, that the liquors were not kept or deposited for unlawful sale, and that the claimant is entitled to their custody. *State* v. *Intoxicating Liquors*, 85 Maine, 304. And further, if it fails to appear that the claimant is entitled to their custody, judgment for costs against the claimant, and forfeiture of the liquors follow. The pivotal question in this case is, has it been made to appear that the claimant is entitled to the custody of the liquors? If it has, the judgment for forfeiture was error, but otherwise, it was not.

It is not enough under the statute to show that the seizure was invalid. It must be shown that the claimant is the party entitled to the custody. And the burden on this issue is on the claimant. *State* v. *Robinson*, 49 Maine, 285. It might show that it was the owner, or that it was a carrier, still responsible for the liquors to the shipper or consignee, or it might show any other facts which would entitle it to the custody. But it must show them. No matter who else might be wronged by an invalid seizure, the wrongs of others

cannot be redressed at the suit of the claimant, if it has no right to custody, on its own account. The injured party must seek his own redress.

The claimant has not sustained the burden of showing its right. The claimant's relation to the liquors does not clearly appear. It does appear that they came to the defendant's shed in Bangor, by way of the Maine Central Railroad from Bucksport, and one of the State's witnesses testified that he knew they came from the claimant's boat, which we presume was at Bucksport. And we may assume that the carriage from Bucksport to Bangor was part of a through transportation from some place in or out of the State to Bucksport by water, and thence to Bangor by rail, all controlled by the claimant. Now, doubtless, there are cases, where the situation of the liquors when seized may afford some legitimate inference as to whether a carrier still has them in transit, and whether for that or other reasons, it is legally entitled to the custody, if the seizure is not sustainable.

But we think no inference either way is warranted by the evidence in this case. The liquors involved in this case were a part of a large lot brought by the claimant to its shed in Bangor, Saturday night. Sunday night it was found that they had been unloaded, and had been assorted and piled in four piles close to the delivery doors of the shed, and each pile had been tagged with the name of some man, as if he were the owner, or a truckman for the owner. The pile containing the liquors in question was tagged with the name of a truckman. Who unloaded them? Who piled them up? Who tagged them? Had they been delivered by the claimant to the consignee? Was the steamship company still responsible for them? Or, had they been received by the consignee, piled and tagged, and merely left where they were to be removed at his convenience? If the latter conjecture is the true one, it is manifest that the steamship company has no ground for claiming a return of the liquors. It had no special property in the liquors.

The trouble is that we have no means of telling which of several conjectures is the true one. The claimant might have made it clear by evidence, but it offered none. Its right to custody is not proved. Hence it has no interest in the determination of the question whether the seizure was valid. Others may have, but the claimant has not. And having no interest, it could not be aggrieved by a ruling thereon,

and its exceptions cannot be maintained. So far as the claimant is concerned, the only flaw discoverable in the order of the presiding Justice is that he did not order judgment against the claimant for costs.

Exceptions overruled.

SETH MAY

vs.

CITY OF AUBURN.

Androscoggin. Opinion July 9, 1914.

City Ordinances, Chap. 10, Sec. 1. City Solicitor. Compensation. Salary. Professional Acts.

Chap. 10, Sec. 1, of the City Ordinances of the City of Auburn, provides; "The City Solicitor shall be an Attorney and Counsellor at Law of the Courts of the State. He shall act as the legal advisor and solicitor of the City, except the special cases in which the City Council may authorize, or require, him to secure the advice or services of such additional counsel as may be deemed best, and do all professional acts incident to the office, or which may be required of him by the Mayor, City Council, or either branch thereof, as provided in Section 4 of said Chapter."

Held:

1. That the services for which the plaintiff claims extra compensation clearly fall within these provisions.
2. The services rendered were plainly professional in their nature; they concerned the interests of the City and were required of him by the City Council, as appears by the vote passed by said council.
3. These elements brought the work into the official sphere of the City Solicitor, as prescribed by the Ordinances, and, therefore, the person holding that office was not entitled to extra compensation therefor.

Certified by Judge of Lewiston Municipal Court on agreed statement of facts direct to the Chief Justice of the Supreme Judicial Court. Judgment for plaintiff of $20.35.

This is an action of assumpsit on an account annexed, to recover from the City of Auburn for cash disbursements and for services as City Solicitor in preparing and presenting a bill in behalf of said City to the Legislature. The case was entered in the Lewiston Municipal Court at the April Term, 1914, and on an agreed statement of facts by the parties was certified by the Judge of said Court direct to the Chief Justice of the Supreme Judicial Court, under Sec. 10 of Chap. 636 of the Private and Special Laws of 1871.

The case is stated in the opinion.

Seth May, pro se.

Tascus Atwood, City Solicitor, for defendant.

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

CORNISH, J. The plaintiff was City Solicitor of Auburn for the municipal year March, 1912 to March, 1913. At a legal meeting of the City Council held on January 6, 1913, it was voted that "efforts be made to secure either a general law, which would apply to all cities and towns, or a special act which will authorize our City to acquire or control private cemeteries by purchase or eminent domain and that the City Solicitor be directed to present the matter to the Legislature."

Pursuant to this vote, the plaintiff prepared a bill for the purpose and presented the matter in behalf of the City at a hearing before the Judiciary Committee of the Legislature. For this service he seeks to recover in this action the sum of $35. The defendant raises no objection to the amount of the charge if legally collectible, but contends that the services rendered were embraced in his duties as City Solicitor, for which he received a stated salary, and therefore no separate charge could be made therefor. That is the single issue involved. The other items in the account are for cash disbursements and these are not disputed. A fair and reasonable construction of the City Ordinances relating to the duties of the City Solicitor sustains the contention of the defendant. Chap. X, Sec. 1, provides: "The City Solicitor shall be an attorney and counsellor at law of the Courts of the State. He shall act as the legal adviser and solicitor of the City, except in special cases in which the City Council may authorize or require him to secure the advice or services of such additional counsel as may be deemed best."

Sec. 2. "No money shall be paid from the city treasury for any legal advice or services, except as expressly authorized by this ordinance."

Sec. 4, after reciting several duties in detail, concludes with this general and comprehensive clause: "And do all professional acts incident to the office or which may be required of him by the mayor, city council or either branch thereof, or any committee thereof, or any administrative board or officers of the city."

The services under consideration clearly fell within these provisions. The drafting of a Legislative Act authorizing a city to acquire or control private cemeteries by purchase or eminent domain, and the presentation of the matter to the Legislature, must be regarded as coming peculiarly within the term "professional acts" such as the City Solicitor is bound to perform under the ordinances. The drafting of such an act, embracing as it does the element of eminent domain, is not to be expected of a layman, as the plaintiff would seem to argue, but is a matter for the trained lawyer; and its presentation to the Legislature, or a Legislative Committee, is ordinarily committed not to the layman but to an attorney. While a layman often presents his own matters to such a committee he is rarely employed to present those of another. The services rendered were plainly professional in their nature; they concerned the interests of the city and were required of him by the City Council as appears by the vote before recited. These elements brought the work into the official sphere of the City Solicitor as prescribed by the ordinances, and therefore the person holding that office was not entitled to extra compensation therefor. *Calais* v. *Whidden*, 64 Maine, 249, cited by the plaintiff, cannot be regarded as an authority for his claim because the services rendered were of a different nature, and the case fails to show the duties of the City Solicitor as prescribed by the City Ordinances.

The vote itself, in the case at bar, emphasizes the soundness of our conclusion. The party designated to do the work was not the plaintiff in his private capacity, but the City Solicitor. If the plaintiff did not care to perform it as City Solicitor, or thought it did not come within his official duties, he might have notified the City Council of the fact at the time. Instead he accepted the task and carried it out, without any objection, so far as the evidence discloses. Both parties at that time apparently contemplated that the duty was an official one.

The ordinance expressly prohibits the expenditure of money for extra legal services unless specially provided for by the City Council, by whom such legal assistance might be authorized or required in certain cases if it were deemed best. No such authorization was had nor legal assistance contemplated in this case. The law officer of the City was requested to perform certain professional acts and he and he alone was to perform them. The services so performed came within the line of his official duties and no extra charge is allowable therefor. As the balance of the account, $20.35, is conceded to be due, the entry must be,

Judgment for plaintiff for $20.35.

ALICE J. W. WALDRON

vs.

MIMA A. MOORE.

Waldo. Opinion July 13, 1914.

Agreement for Support of Plaintiff. Mortgage. Real Action. Rescission of Contract.

Writ of entry to foreclose mortgage given by defendant to plaintiff. The consideration for said mortgage was money loaned by plaintiff to defendant to purchase the real estate in question. Contemporaneously and as part of said transaction, the plaintiff and defendant entered into an agreement under seal, whereby the defendant undertook to support plaintiff for two years and six months, or during her life if she should die within said time.

Held:

1. Two contemporaneous writings between the same parties, upon the same subject matter, may be read and construed as one paper.
2. This rule applies, notwithstanding one of the writings is a promissory note, when the action is between the parties to it, or their representatives.

On report. Judgment for defendant.

This is a writ of entry, brought to foreclose a mortgage on real estate dated May 23, 1910, for the sum of twenty-two hundred dollars

and interest. At the time the mortgage was given, the plaintiff and defendant entered into a written agreement, under seal, wherein the defendant agreed to support the plaintiff for the term of two years and six months from the date thereof, or during her life, if she should die within said time, for the sum of one thousand dollars per year, which said sum of one thousand dollars was to be indorsed on said note.

Plea, general issue and brief statement.

The case is stated in the opinion.

Dunton & Morse, for plaintiff.

Arthur Ritchie, for defendant.

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

BIRD, J. This is a writ of entry dated November 25, 1912, for the recovery of a lot of land and buildings in Belfast. The plaintiff's pleadings declare upon a mortgage and at the second term after entry the plaintiff filed a motion for conditional judgment. The case is here upon report.

It appears of record that plaintiff loaned defendant the sum of twenty-two hundred dollars wherewith the latter purchased the lot and buildings in question. After the conveyance to the defendant of the premises by deed of May 23, 1910, she on the same day conveyed them to plaintiff in mortgage as security for the payment of a note for the same sum on two years and six months with interest at rate of six per cent payable semi-annually. Contemporaneously and as part of the same transaction, plaintiff and defendant entered into an agreement under seal whereby the defendant undertook to support the plaintiff for the term of two years and six months from date, (being same day as the date of the mortgage and note), or during her life, if she should die within said term, to give her exclusive use of certain rooms in the house upon the lot conveyed to defendant and to make for her certain other provisions for the sum of one thousand dollars a year to be endorsed on the note already mentioned. The plaintiff upon her part agreed in consideration of the undertaking of the defendant to indorse upon the note the sum of one thousand dollars per year until the note be fully paid, or as long as she lives if she die before the expiration of the note.

Under the agreement, the plaintiff entered into occupation of the rooms allotted her and remained until March 14, 1911, when she left the premises without stating to defendant why she left, whether or not she would return or anything as to a rescission of the contract. When the first semi-annual payment of interest was due, it was endorsed upon the note in part payment of the sum due defendant under the agreement. Whether or not defendant performed the part of the agreement by her to be performed was disputed. The evidence is conflicting but we think defendant shows a substantial compliance with its terms while plaintiff remained and that defendant was thereafter ready and willing to continue in its performance.

Can the defendant avail herself of the terms of the written agreement of the parties in this action? Two contemporaneous writings between the same parties, upon the same subject matter, may be read and construed as one paper; and this rule applies notwithstanding one of the writings is a promissory note, when the action is between the parties to it or their representatives. *American Gas, etc., Co.* v. *Wood*, 90 Maine, 516, 520, and cases cited. Here, as in the case cited, the agreement and note are of the same date and the former expressly refers to the note. They are "connected by direct reference or necessary implication" to use the language of *Davlin* v. *Hill*, 11 Maine, 434, 438. See also *Hunt* v. *Livermore*, 5 Pick., 395.

Judgment may be entered for defendant as provided in R. S., Chap. 92, Sec. 11. *Burnham* v. *Dorr*, 72 Maine, 198, 202.

BARTLETT PALMER, In Equity

vs.

FRANCIS PALMER, et al.

York. Opinion July 13, 1914.

Assignee. Assignment of Part of Fund. Creditors. Equity. Order. Residue. Testamentary Trustee. Trust.

The question presented is whether the plaintiff, as holder of the order, and therefore as assignee of part of this particular fund, can recover in equity from the trustee of the fund, who was duly notified of the order and who, at the time of the notice, had ample funds in his hands to meet it, but refused to accept or pay it, and who has since paid to subsequent creditors of assignor all of said fund.

Held:

1. It is familiar law that an entire demand or chose in action may be assigned, that the assignment is binding upon the debtor after notice, whether he accepts it or not, and that the assignee may enforce his rights in an action at law against the debtor, upon the acceptance, if accepted; otherwise, upon the original claim itself.
2. The assignment of a part only of an entire demand or chose in action, though invalid in law, except as between the parties, is valid in equity and binding upon the debtor, whether accepted and assented to by him or not, and may be enforced in equity against the debtor.
3. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another, but if assigned in fragments, the debtor has to deal with a plurality of creditors. A partial assignment would impose upon him burdens which his contract does not compel him to bear.

On report. Bill sustained. Decree in accordance with opinion.

This is a bill in equity inserted in a writ of attachment to recover from Francis Palmer, drawee in an order given Bartlett Palmer by Clinton C. Palmer on Francis Palmer, Trustee under the will of Elizabeth C. Palmer, deceased, the sum of eight hundred dollars and interest from April 19, 1910. The defendant Francis Palmer filed an answer to said bill and the plaintiff filed a replication. At the conclusion of the evidence, the cause was reported to the Law Court

upon bill, answer, replication and so much of the testimony as is legally admissible, the Law Court to render such judgment as the rights of the parties require.

The case is stated in the opinion.

Clinton C. Palmer, for plaintiff.

James O. Bradbury, Cleaves, Waterhouse & Emery, for defendant.

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

CORNISH, J. Bill in equity to recover from a drawee the sum of $800 with interest, the amount of an order dated April 16, 1910. Prior cases before this Court arising out of the same estate have fully set forth the preliminary facts and it is unnecessary to repeat them in detail. It is sufficient to say that one of the defendants, Clinton C. Palmer, has been held to possess an equitable estate in fee in a certain portion of the residuary estate of his mother, Elizabeth C. Palmer, which was held in trust for him by Francis Palmer the other and real defendant, "to be used for his comfort and necessities according to the direction" of said trustee. *Holcomb* v. *Palmer*, 106 Maine, 17, the opinion in that case being rendered on September 8, 1909.

Clinton C. Palmer had previously given to George F. Haley two promissory notes of $500 each, for money loaned, one in November, 1908, and the other in March, 1909. An equitable trustee process was brought on these notes against Clinton C. Palmer the maker and Francis Palmer the testamentary trustee, under R. S., Chap. 79, Sec. 6, Par. IX, and was sustained, the decree of the single Justice being entered on March 24, 1910, and, on appeal, was affirmed by the Law Court on November 9, 1910. *Haley* v. *Palmer*, 107 Maine, 311.

On April 16, 1910, Clinton C. Palmer gave his brother, Bartlett Palmer, the plaintiff, the following order,

"Philadelphia, Pa., April 16, 1910.

$800.

Pay to Bartlett Palmer, for value received, eight hundred and no / 100 dollars out of the fund constituting the trust established by the residuary clause of the will of Elizabeth C. Palmer, deceased, and charge the same to the account of Clinton C. Palmer.

To Francis Palmer, trustee under the will of Elizabeth C. Palmer, deceased.

Trenton, New Jersey. Clinton C. Palmer."

This order was presented to Francis Palmer for payment at Trenton on April 19, 1910, but payment was refused by him the reason assigned being, as appears by the indorsement, "Funds are under the control of the Courts." This order is the basis of the present bill in equity.

On November 15, 1910, Clinton C. Palmer gave to Fred A. Tarbox as collateral for a promissory note, an assignment of all his residuary interest in his mother's estate, subject to the lien established by the decree in the Haley case. The defendant, Francis Palmer, refused to honor the assignment or to make the payment, and therefore another equitable trustee process was instituted by the assignee and was sustained, the opinion of the Law Court being rendered on May 17, 1913. *Tarbox* v. *Palmer*, 110 Maine, 436. The amount remaining in the hands of Francis was insufficient to pay the Tarbox claim in full so that when the present bill was brought on June 11, 1913, the trust estate had become exhausted.

The precise question presented therefore is whether the plaintiff as holder of the order and therefore as assignee of part of this particular fund can recover in equity from the trustee of the fund, who was duly notified of the order but refused to accept or pay it, who at the time of notice had ample funds in his hands with which to meet it, but has since paid the same to a subsequent creditor of the assignor under a decree of Court. This case is of somewhat novel impression as the controversy has usually arisen between attaching creditors and the equitable assignee, where the debtor or drawee assumed the position of stakeholder and stood ready to pay to which-ever party might be declared by the Court entitled to the funds, as in *Exchange Bank* v. *McLoon*, 73 Maine, 498, and *Harlow* v. *Bangor*, 96 Maine, 294, trustee actions at law, and in *Kingsbury* v. *Burrill*, 151 Mass., 199, a bill in equity in the nature of interpleader.

In such cases the debtor stands indifferent. Here however the debtor is a contending party as he has paid the funds to the assignor's creditors, regardless of the previous partial assignment to the plaintiff, so that the issue here is between the assignee and the debtor and depends upon the force and effect of the assignment itself, after notice to the debtor. Is the debtor still liable to the assignee notwithstanding the payment he has made?

This question must be answered in the affirmative.

It is familiar law that an entire demand or chose in action may be assigned, that the assignment is binding upon the debtor after notice, whether he accepts it or not, and that the assignee may enforce his rights in an action at law against the debtor, upon the acceptance if accepted, otherwise upon the original claim itself. In like manner the assignment of a part only of an entire demand or chose in action though invalid in law, except as between the parties, is valid in equity and binding upon the debtor whether accepted and assented to by him or not, and may be enforced in equity against the debtor. This distinction and the reason for its existence are clearly set forth in the leading case of *Exchange Bank* v. *McLoon*, 73 Maine, 498, as follows: "The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and subdivided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have instead of a single contract a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear. . . . . In a court of equity, however, the objections to a partial assignment of a demand which are formidable in a court of law disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court and run no risks as to its proper distribution. . . . . In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned." In other words the assignee of a part of a particular fund has the same rights in equity that the assignee of an entire demand has in law. His remedy in equity arises when notice of the assignment is given to the debtor and does not depend upon acceptance by the debtor. The fund is from that time forward impressed with a trust; it is, as it were, impounded in the debtor's hands, and must be held by him not for the original creditor, the assignor, but for the substituted creditor, the assignee. Mr. Pomeroy states the rule thus: "In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of

money or debt actually existing or to become so in future upon which the assignment may operate, and the agreement, directions for payment, or order must be in effect an assignment of that fund or of some definite portion of it. . . . . The agreement, direction or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned; the same doctrine applies to an equitable assignment of any definite part of a particular fund. The doctrine that the equitable assignee obtains not simply a right of action against the depositary, mandatary or debtor but an equitable property in the fund itself, is carried out into all its legitimate consequences. . . . . The fund in this respect resembles a fund impressed with a trust." 3 Pomeroy Eq. Jur. Sec. 1280.

In *Bank of Harlem* v. *Bayonne*, 48 N. J. Eq. 246, 21 At. 478, the Court on this point say:

"It is evident from this statement of the incidents of an equitable assignment that acceptance by the debtor of the order or assignment is not, in equity, necessary to its validity as a transfer pro tanto of a fund in his hands. It takes effect from the acts of the assignor and assignee, and the debtor, so far as the right to the fund is concerned, is but the instrument through whom the transfer is to be actually made. The debtor's acceptance or promise gives the assignee an action at law against him, not on the assignment, but on the promise; it neither creates, increases nor diminishes his liability to the assignee." See also the same principles accepted in *Lazarus* v. *Swan*, 147 Mass., 330; *Warren* v. *Bank of Columbus*, 149 Ill., 9, 25 L. R. A., 746; *Todd* v. *Meding*, 56 N. J. E., 83, 38 At. 349: *Merchants & Miners Nat. Bank* v. *Barney*, 18 Mont., 335, 47 L. R. A., 737.

It is clear then on this first proposition that the plaintiff's order not only gave him the right of property in the amount assigned, but also that on demand it became the duty of Francis Palmer, the drawee, to pay the sum so assigned, and on his refusal this bill in equity would lie. It therefore follows that after notice of the assignment the debtor cannot lawfully pay the amount assigned either to the assignor or to his attaching creditors, and if he does make such payment it is at his peril. The payment of the Haley judgment in no way affects the rights of the parties here because final decree was entered by the single

Justice in that proceeding nearly a month before the plaintiff's order was given and therefore clearly had the priority. But the assignment to Tarbox was not given until seven months after the plaintiff's order, and the equitable proceedings in that case were not concluded until the final decree was affirmed by the Law Court on May 17, 1913. When the bill in equity in that case was served upon the defendant, Francis Palmer, in which Tarbox claimed the entire balance of the trust fund, less the Haley judgment, it was the plain duty of Francis in his answer to set up this prior assignment to Bartlett Palmer, and to ask the Court to pass upon both claims and determine their validity and priority. This he neglected to do. He revealed the true situation neither in his answer nor by evidence. Had the Court been apprised of the facts the plaintiff could have been made a party and his rights determined in that proceeding. Not having done this, which it was his duty to do, the trustee paid the Tarbox claim at his peril. He was knowingly using the property of the plaintiff to pay the debt of another and the mere fact of having thus expended all the fund affords no defense to the claim of the rightful owner. Here again the rights of the parties to an assignment of an entire claim are analogous. Payment under trustee process at law will not protect a debtor who had notice of a prior assignment and neglected to set up the assignment in his disclosure. *Brill* v. *Tuttle*, 81 N. Y., 454, 37 Am. Rep., 515; *Milliken* v. *Loring*, 37 Maine, 408; *Bunker* v. *Gilmore*, 40 Maine, 88; *Larrabee* v. *Knight*, 69 Maine, 320; and notice even after attachment but before disclosure is seasonable. *Horne* v. *Stevens*, 79 Maine, 262. For the same reason payment under an equitable trustee process cannot protect a debtor who had notice of a prior assignment and neglected to set it up in his answer or to show it in evidence. That is the situation in which the defendant, Francis Palmer, is now placed, and his liability therefore is established.

But even conceding the original liability of Francis Palmer on the equitable assignment, his learned counsel raises two other objections to the maintenance of his bill.

First because the plaintiff has failed to show the relation of debtor and creditor between the assignor and assignee. This claim however rests upon suspicion rather than proof. As was said in *Dix* v. *Cobb*, 4 Mass., 508, "The assignment in this case may be fraudulent, but on its face it appears to be regular and for a valuable consideration;

and we cannot presume fraud." *Robbins* v. *Bacon*, 3 Maine, 346. The plaintiff's order was expressed to be for value received and that is sufficient prima facie evidence of consideration. The defendant offered no evidence to overcome this and therefore the consideration remains unshaken, so far as proof is concerned. *Tarbox* v. *Palmer*, 110 Maine, 436-441.

In the second place the defendant, Francis, sets up estoppel and laches, but we fail to find in the record sufficient proof to warrant the application of either of these equitable defenses.

As concerns estoppel, the plaintiff did nothing and said nothing which in any way misled the drawee or caused him to change his position. Nor did he keep silent when he should have spoken. He notified the drawee of the order immediately after it was made and after payment was refused they had no further dealings. The plaintiff resided in Philadelphia, Francis in Trenton, New Jersey, and they did not meet. Francis acted entirely on his own motion in the Tarbox suit and was not placed in his present position by any conduct on the part of the plaintiff. The elements of estoppel are lacking. *City Bank of New York* v. *Wilson*, 193 Mass., 161-6.

The plaintiff was not obliged to repeat his notice, nor to watch court proceedings in Maine in order to ascertain if other parties subsequently claimed his property. It was the duty of the drawee to disclose the assignment, not of the assignee to take precautions to intervene in a proceeding which never came to his knowledge so far as appears from the evidence. It is true that the original assignor, who is now counsel for the assignee in this proceeding as well as a nominal party defendant, was cognizant of all the proceedings in the Tarbox case and took part therein, but there is no evidence that he was acting for the plaintiff at that time nor that he informed him in regard to the matter. And even if he had it might well be questioned whether such knowledge of itself would relieve the drawee of the duty which rested upon him in order to protect himself from the legal consequences of the assignment of which he had been given due and prompt notice.

Nor can the plaintiff be held to lose his property because of laches. When he gave notice to the drawee in April, 1910, his request was refused and the reason assigned was that the funds were "under the control of the courts." He refrained from enforcing his claim for a little over three years but we cannot hold that his rights are thereby

precluded. By the plaintiff's delay the defendant has lost no evidence necessary to a fair presentation of the case on his part and has been deprived of no just advantage and subjected to no hardship, tests which are always applied. *Spaulding* v. *Farwell*, 70 Maine, 17. The hardship which exists arises not from the fault of the plaintiff, but from the unfortunate inadvertence or neglect of the defendant himself, and for this the plaintiff should not be made to suffer.

Bill sustained with costs.
Decree in accordance with opinion.

CLINTON C. PALMER, In Equity
vs.
FRANCIS PALMER, et al.

THE NORTHWESTERN INVESTMENT COMPANY, In Equity
vs.
FRANCIS PALMER, et al.

York. Opinion July 13, 1914.

Advances. Decree. Distributive Share. Equity. Lien. Residue. Revised Statutes, Chap. 66, Sec. 65. Will.

1. An action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been ascertained in the Probate Court, and the same rule should prevail in equity, at least, in the absence of other and compelling reasons.
2. The final account cannot be rendered, nor the decree of distribution made until the controverted claims are determined, and the proper tribunal for the determination of those claims is the Probate Court, which has full jurisdiction of the subject matter and of the parties.

On appeal. Bill in each case dismissed without prejudice and with single bill of costs.

In the bill of Clinton C. Palmer, he seeks to establish a lien on the share of Bartlett Palmer in the residue of the estate of Elizabeth C.

Palmer, in the hands of the executors of her will, to secure payment of advances made by him to said Bartlett Palmer, and to collect from the executors the amount secured by said lien.

In the bill of The Northwestern Investment Company, it seeks to reach the balance of Clinton C. Palmer's share in the residue of the same estate in the hands of said executors.

Answers and replications were filed in each case. Upon hearing before the sitting Justice, decrees were entered dismissing both bills without prejudice and without costs; from which decrees, the defendants in each case appealed to the Law Court.

The cases are stated in the opinion.

Clinton C. Palmer, pro se, and as Attorney for The Northwestern Investment Company.

Robert B. Seidel, for Bartlett Palmer.

Cleaves, Waterhouse & Emery, and James O. Bradbury, for Francis Palmer, et al.

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

CORNISH, J. On appeal from the decision of the sitting Justice dismissing the bill in each case.

Clinton C. Palmer in his bill seeks to establish a lien on Bartlett Palmer's share in the residue of the estate of Elizabeth C. Palmer in the hands of the executors of her will, to secure payment of advances aggregating $175 made by him to said Bartlett, and to collect from the executors the amount secured by the lien.

The Northwestern Investment Company in its bill seeks to reach the balance of Clinton C. Palmer's share in the residue of the same estate remaining in the hands of the executors and to apply the same on account of a $1500 note of said Clinton taken by the Company, of which Clinton is Treasurer and which had a paid up capital of only $300, in payment of fifteen shares of its capital stock.

The defendants in each bill allege among other things that the estate is in process of settlement in the Probate Court of York County, that their second account has been filed and is still open for further hearing, that no order of distribution has been made, and that upon final settlement of said estate nothing will be found due to said Bartlett because of advances already made, and the amount, if any, due to said Clinton is uncertain.

From the allowance of the second account in the Probate Court an appeal was taken both by Clinton C. Palmer and the executors to the Supreme Court of Probate which modified to a slight extent the findings below. The executors abided by the decree of the Supreme Court of Probate, but Clinton excepted to the allowance of seven items of credit and the case was heard in this Court on those exceptions. Three of these exceptions were overruled, and four were sustained. Clinton C. Palmer, Applt., 110 Maine, 441. One of these four pertained to the "private account" of Francis Palmer, an executor, and in disallowing it as not being "particularly stated" as required by R. S., Chap. 66, Sec. 65, the Law Court said, "The statute is peremptory. The claim if not properly stated cannot be saved by proof. Upon the present statement the claim should be disallowed as a matter of law, and this exception must be sustained. Whether it ought to be disallowed without prejudice to the right to present it properly in a further account is a question which must be determined when the matter comes up for further hearing in the Supreme Court of Probate." Clinton C. Palmer, Applt., supra, at p. 447-8. Another exception related to the allowance of commissions of five per cent on $37,901.02, while the total amount with which the executors charged themselves in that second account was only $18,538.85. The record failed to disclose how much was accounted for in the first account, or that the entire estate aggregated the $37,901.02 on which commissions were computed. For this technical reason the exception was sustained, but the Law Court add: "The omission was doubtless inadvertent. If we were permitted to supply the omission by the knowledge of the situation which we have gained in other litigation between these parties, we might do so. But we have no right to do this. We are limited to the record before us. We cannot go outside of it. *Hunter* v. *Heath*, 76 Maine, 219, and many other cases. We must leave the omission therefore to be supplied on a further hearing. Reluctantly, therefore, we are compelled to say that the exception must be sustained." Clinton C. Palmer, Applt., supra, at p. 448-9.

This decision was rendered on May 20, 1913, and on June 5, 1913, the executors filed a written motion for further hearing in the Supreme Court of Probate, as suggested in the opinion of the Law Court, upon the matters above referred to, and another motion was pending to

strike out from said second account an item of $2800 which the executors claim was improperly inserted.

The sitting Justice in his decree, in each case after making a finding of facts, held: "that until the matters mentioned in the three preceding findings are determined, the balance, if any, belonging to the estate of Elizabeth C. Palmer and in the hands of these executors as such cannot be determined." It was then ordered that each bill be dismissed without prejudice and without costs.

This decree should stand. The estate of Elizabeth C. Palmer remains unsettled. It is in process of such speedy settlement as continuous and protracted litigation will permit. The final account cannot be rendered nor the decree of distribution made until the controverted claims are determined, and the proper tribunal for the determination of those claims is the Probate Court which has full jurisdiction of the subject matter and of the parties. The Law Court in the opinion before cited has in effect so stated, and we merely reiterate it. An action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been ascertained in the Probate Court. *Graffam* v. *Ray*, 91 Maine, 234. *Hawes* v. *Williams*, 92 Maine, 483-492. And the same rule should prevail in equity, at least in the absence of other and compelling reasons.

The decree of the sitting Justice in each case is affirmed, except in the matter of costs, which we think under all the circumstances the defendants are entitled to. The decree as modified should be in each case,—"Bill dismissed without prejudice and with a single bill of costs."

So ordered.

DAVID E. RUSSELL

vs.

FRANK B. CLARK, et al.

York. Opinion August 12, 1914.

Breach. Contract. Delivery. New Contract. Personal Property. Sale. Waiver.

1. The question whether a sale of personal property is completed or only executory, in cases between buyer and seller and where neither the statute of frauds, nor the rights of third parties are involved, depends upon whether it was the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer.
2. And where anything remains to be done to identify the particular property to be sold; or to ascertain the price to be paid for it by selecting it as to quality, or weighing or measuring as to quantity; or where the seller is to do certain things to the property to put it in that condition in which it may or ought to be accepted by the buyer, the performance of those things are to be deemed presumptively a condition precedent to the passing of the title to the buyer.
3. Where under the agreement between buyer and seller it is the duty of the seller at his own expense, on receipt of orders from the buyer, to select, haul, and load lumber on cars to be procured by him, before the buyer was bound to receive the lumber or make payment for it, such agreement will not be construed as an executed contract of bargain and sale, and the seller cannot recover for the lumber unshipped in an action for goods sold and delivered.
4. Where an agreement for the sale and purchase of lumber was made on Aug. 27, 1910 providing for its shipment within six months, the acceptance by the seller of a subsequent agreement, on Feb. 10, 1911, which modified and extended the original agreement must be held to be a waiver of the buyer's neglect to give orders under which all of the lumber might have been shipped within the six months.
5. In the absence of any provisions in the agreements to the contrary it was the defendant's right to have the different kinds of lumber shipped out as they ordered it, provided they furnished orders under which it could all have been shipped reasonably within the terms of the agreements.

On report. Judgment for the plaintiff for $215.88, with interest thereon from August 6, 1912.

This is an action of assumpsit to recover for oak lumber claimed to have been sold and delivered to the defendants in August, 1912,

amounting, with interest, to $1387.68. Defendants plead the general issue, with brief statement of tender.

The case is stated in the opinion.

George A. Goodwin, and Cleaves, Waterhouse & Emery, for plaintiff.
E. P. Spinney, for defendants.

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

KING, J. This case is before the Law Court on report. It is an action of assumpsit. There are four counts in the declaration. The first is on an account annexed, as follows:

Springvale, Me., Aug. 29th, 1912.

Messrs. Clark & Cleale,

To David E. Russell, Dr.

To	29806 ft. 2 in. oak plank & outs at	$20 per M		596.12
"	4452 " White " "	30 " "		133.56
	12038 " 3 in. Red.	25 " "		300.00
Jun. 10, 1912	Car 35793 B. & M.			
To	3507 ft. White oak	$30		93.48
"	4890 Red	25		122.40
				$1249.51
	Interest from Feb. 27, 1911 to Aug. 27, 1912 on $1249.51			112.17
	Taxes for 1911 & 1912			26.00
				$1387.68

There are some slight errors in computation in the above account, but they need not here be considered.

The second count alleges in substance, that the plaintiff was the owner of 150658 feet of oak plank and boards located at Newfield, Maine; that on the 27th day of August 1910 he "sold and delivered" the same to the defendants, at prices specified, and that they "accepted and took into their possession" the same and have paid him the purchase price for 94262 feet thereof, leaving a balance of 46396 feet unpaid for, amounting to $1249.51, which the plaintiff claims to recover with interest, and also $26 paid for taxes on said lumber.

The third count alleges in substance, that the plaintiff was the owner of 150658 feet of oak plank and boards, and that on the 27th day of August 1910 the defendants agreed "in consideration of the plaintiff keeping said oak plank and boards for the said defendants, and not disposing of them to any other party, to take, buy, and receive all of said oak plank and boards," at prices specified, f. o. b. cars at loading point, "the same to be all ordered and taken within six months from August 27, 1910, which said agreement was confirmed in writing at that date and later reaffirmed and extended and said defendants again agreed to so take and to pay for all of said oak plank and boards as aforesaid," that the plaintiff has fully performed said agreement on his part, but that the defendants have refused to accept and pay for a portion of said lumber (describing the portion unpaid for as specified in the account annexed), and the plaintiff claims to recover under this count the same amount, with interest and the taxes paid, as stated in the first and second counts.

The fourth is a general or omnibus count, with a specification that the plaintiff claims to recover thereunder for the same lumber specified in the account annexed.

The plaintiff's alleged cause of action arises out of two agreements between the parties, the first having been made on August 27, 1910, and the other on February 10, 1911. It will materially assist in the determination of the meaning and scope of those agreements and the rights and liabilities of the parties thereunder, to point out briefly the circumstances and situation of the parties at the time the agreements were made, and also what has since been done by them acting under said agreements.

Prior to August 27, 1910, the plaintiff had piled in his lumber yard at Newfield, Maine, about 150000 feet of sawed oak lumber of different dimensions and qualities, but consisting chiefly of two, three, and four inch plank. It was piled closely in large piles and for that reason it was not readily examinable. The defendants comprised a copartnership doing business in Boston as wholesale lumber dealers. On August 27, 1910 Mr. Cleale, representing the defendants, examined the lumber to some extent in company with the plaintiff. He overhauled three or four of the piles to show the plaintiff what would be accepted and what rejected under the proposition he then made to purchase some of it. Thereupon the parties entered into an agreement, whereby the defendants were to take certain of the lum-

ber, to be selected as shown, and at prices specified f. o. b. cars at loading point. Confirming the agreement the following memorandum was signed by the parties in duplicate.

"Waterboro, Me., Aug. 27, 1911.

One carload more or less Short Oak Red and White		F. O. B. cars	$30.00
C-L Oak Side Bds. Clear			30.00
			Boston
All White Oak Plank Selected as shown	$30.00	F. O. B. Loading point.	
All Red Oak Plank Selected as shown	$25.00	F. O. B. Loading point.	

To be shipped within six months from date. About 125 M. feet more or less."

We think it clear that this agreement contemplated that the shipments were to be made at the option of the defendants, and such appears to have been the understanding of the parties. But it was the duty of the defendants to furnish orders so that the lumber embraced in the agreement could be all shipped within the time specified, unless that time was extended. The agreement covered all the oak plank, to be selected as shown, including the two inch stock as well as the 3 and 4 inch. But it appears that the 2 inch plank did not cull to advantage, a large percentage of it being rejected, and accordingly it was a cause of some controversy between the parties, and became the subject of further negotiations which resulted in the agreement of February 10, 1911.

At the time the first contract was made shipping orders were given for three carloads, one was to contain three and four inch white oak, another the short oak, and the other the side boards. The carload of the short oak, and that of the side boards were paid for without controversy, but it was otherwise with the other carload. As to that the defendants claimed that the plaintiff did not ship the 3 and 4 inch stock as ordered, but instead sent a full carload of the 2 inch plank, for which they then had no order or use. Accordingly payment for that carload was held back and much dispute resulted on that account.

No more lumber was shipped till January 2, 1911. In the meantime the parties had much contention, but finally they came to an understanding whereby the defendants should send a check for the unpaid carload and the plaintiff would ship more of the lumber. December 9, 1910 the check was sent, but it was not satisfactory in amount and more controversy followed culminating almost in a conclusion of each party to have nothing further to do with the other in the premises. But on December 22, 1910 the plaintiff wrote the defendants that he had decided "to try two cars more but if I run up against any more experiences of the past our deal will close forever." Accordingly on January 2, 1911 he shipped the fourth carload. This was received as satisfactory and on January 13, 1911 the defendants sent a check for the same with an order for another carload of 3 and 4 inch stock. The plaintiff replied asking if he might make one-half of the carload 2 inch stock, but this was not assented to. Then followed correspondence as to the 2 inch plank with the suggestion from the defendants that they might get an order at $20 per thousand for all the 2 inch "taking it right through, culls and all." On February 9, 1911 Mr. Cleale came to Newfield and the parties made an additional agreement which was confirmed in a letter of Feb. 10, 1911 from the defendants to the plaintiff as follows:

"Confirming talk with you yesterday, we will take all the balance of the 2 inch Oak which you have there, taking the good and the outs, at $20 per thousand, f. o. b. the cars loading point. This takes the place of our previous arrangement and applies to the 2 inch only. The balance of the contract stands as agreed. Ship Clark & Cleale, Heywood Mass.

Don't put many outs on first cars and mix them in pretty well."

It was understood between the parties at the time the agreement of Feb. 10, 1911 was made that an order for a carload of 2 inch selected stock was to be shipped at $25 per thousand, and this was done. After that several carloads of the 2 inch stock were shipped to Heywood, but the plaintiff frequently requested that he might have an order to ship some of the thicker stock, as it was in his way, but the defendants did not grant his request, insisting that he should keep on shipping the 2 inch stock to Heywood, and on March 13, 1911 they wrote the plaintiff: "Regarding the balance of the Oak, kindly load

up and ship *immediately* the balance of the 2 inch Oak for Heywood, cleaning up everything in 2 inch that you have there with the exception perhaps of a half a car, which you could hold to fill out a car of thicker stock later on, . . . but at the present time I want you to load up and ship at once all the 2 inch, as I have an order now which I can apply your stock on, and which I will not have later on." After that letter shipments of the 2 inch stock to Heywood continued. On April 11, 1911 an order for a carload of 3 inch and 4 inch stock was given and it was shipped. This the defendants claimed was not properly selected, and another controversy arose, and no more lumber was shipped for more than a year. Once more, however, the parties got together, and on June 10, 1912 another carload of the 3 inch stock was ordered and shipped. August 6, 1912 a check for $195.10 was sent in payment for that last carload. The amount of the check was less than the bill rendered, the defendants claiming that the plaintiff had charged in excess of the prices agreed for that carload. The check was not accepted, but returned. That is the carload of lumber sued for in the writ, and it appears by the pleadings that the defendants have brought into court the amount of that check for $195.10. No more of the lumber was ordered or shipped. August 28, 1912 the plaintiff's attorney wrote the defendants saying: "There is only one question. Will you give us directions to ship this lumber to you as per the original contract as shown and confirmed by your letters to Mr. Russell." It does not appear that that letter was answered, and this action soon followed.

If there was a breach of the agreement of August 27, 1910 on the part of the defendants in not ordering the oak shipped within the six months, we think the plaintiff must be held to have waived it by accepting the agreement of Feb. 10, 1911 which modified and extended the original agreement. Under the new arrangement the defendants were to take the balance of the 2 inch oak without culling it, taking the good and the outs, at $20 per thousand f. o. b. the cars at loading point, and they were also to take all the other oak remaining unshipped under the terms of the original agreement, that is, to be selected as shown on August 27, 1910, and at the original prices.

There was some evidence in behalf of the plaintiff tending to show that Mr. Cleale said in the interview of February 9, 1911 that all of the lumber should be shipped "before mud time." No time however was stated in the memorandum of February 10, 1911, within which the

lumber was to be taken, and we think that whatever may have been said in this regard was understood to be an expression of expectation rather than the assertion of a definite time limit which the parties understood to be of the essence of the contract. Nevertheless, as the new arrangement contemplated that the two inch stock, as well as the thicker stock that was to be selected as shown, was to be shipped as ordered by the defendants, it was their duty to furnish the plaintiff with orders so that the lumber could be shipped within a reasonable time after February 10, 1911.

It is claimed in behalf of the plaintiff, that by virtue of the contracts of August 27, 1910 and of February 10, 1911, and the shipments of a part of the lumber thereunder and payment therefor, the defendants became the owners of all of it; and that upon their neglect and refusal to furnish the plaintiff with orders for its shipment they became liable for what remained unshipped at the contract prices as for goods sold and delivered. We do not think that claim is sustainable.

The question whether a sale of personal property is completed or only executory, in cases between buyer and seller and where neither the statute of frauds nor the rights of third parties are involved, depends upon whether it was the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer; and when no such intention is expressed in the contract itself, then all the facts and circumstances under which the contract was made are to be examined to discover if such an intention is the meaning of the acts of the parties. Keeping in sight always the fact that it is the real intention of the parties that is to control, courts have adopted certain rules to aid them in discovering that intention. And it is too well settled to require the citation of authorities, that where anything remains to be done to identify the particular property to be sold; or to ascertain the price to be paid for it by selecting it as to quality, and weighing or measuring it as to quantity; or where the seller is to do certain things to the property to put it in that condition or situation in which it may or ought to be accepted by the buyer, the performance of those things are to be deemed presumptively a condition precedent to the passing of the title to the buyer.

Under the contract of August 27, 1910, it was the duty of the plaintiff, on receipt of shipping orders from the defendants, to select the lumber as to kind and quality "as shown," to haul it to the railroad

and load it upon cars to be procured by him. The agreement of February 10, 1911, changed the original contract only in respect to the two inch stock remaining, which thereafter was not to be selected, but as to that it was still the plaintiff's duty to separate it from the general mass, haul it to the railroad, procure cars and load and ship it as ordered. In view of the fact that the plaintiff was to do those things at his expense before the defendants were bound to receive the lumber or make payment for it, it seems clear that it was not the intention of the parties that the title to any of the lumber should vest in the defendants immediately and before those things were done. We are therefore of the opinion that neither of the agreements constituted an executed contract of bargain and sale of the lumber, but only an executory contract for the sale of it, and accordingly that the plaintiff cannot recover for the lumber unshipped under the first and second counts in his writ, as for goods sold and delivered.

Has the plaintiff shown that he is entitled to recover under his third count in the writ wherein he alleges a breach of the contracts on the part of the defendants in not taking, or ordering the lumber shipped, as they had agreed to do? In determining that question we are concerned only with the acts of the parties after February 10, 1911, for, as before suggested, if there was any unreasonable neglect on the part of the defendants to furnish shipping orders prior to that date, we think it was waived by the plaintiff's acceptance of the new arrangement.

Under the contract of February 10, 1911, as well as under the first contract, the defendants had the option as to the order of shipments in respect to the kinds and qualities of the lumber. They were wholesale lumber dealers. They did not contract for this lumber for their own use, but to fill orders to be procured by them from others, a fact well understood by the plaintiff, and it was their right to have the different kinds of lumber shipped out as they ordered it, provided they furnished orders under which it could all have been shipped reasonably within the terms of the contract. If it would have been more convenient for the plaintiff to have had shipping orders so that the different kinds of lumber could have been shipped out in some particular order he should have so provided in the contract, and in the absence of any such provision it was not for the plaintiff to dictate the order in which it was to be shipped.

In the memorandum of February 10, 1911 the following shipping order was given: "Ship Clark & Cleale, Heywood, Mass. Don't put many outs on first cars and mix them in pretty well." That order applied to the 2 inch stock only, and until it was withdrawn it was not only the plaintiff's right but his duty to make shipments thereunder as fast as they could reasonably be made. It is clear from the correspondence that the defendants then had an order for that 2 inch stock, and from February 10, 1911 they were urging the plaintiff to ship it as fast as possible. On March 6th, 1911 they wrote him, in answer to his request for an order for the thicker stock, "I do not want any of this thick oak in here just at the present time, but, I do want you to clean up the 2 inch for Gardner. Ship along all the 2 inch you have there before you start out to ship anything else, or talk about shipping anything else." To that the plaintiff made the significant reply: "In regard to loading all the 2 inch oak before I ship the thick 3 in. would be wrong as I want the 2 inch to help out the culls." The defendants replied by letter of March 13, 1911, from which we have above quoted, urging the plaintiff to "ship *immediately* the balance of the 2 in. oak for Heywood, . . I have an order now which I can apply your stock on, and which I will not have later on."

It appears from the evidence that only 4 or 5 carloads of the 2 in. stock were shipped after February 10, 1911, the last carload being shipped March 31, 1911, and on that day the plaintiff wrote the defendants to "give an order for the thick oak at once as I have nothing to do with the teams." Mr. Cleale testified that up to that time the plaintiff never had any orders to stop shipping the two inch stock to Heywood, and we do not find from the evidence that that was not the fact, yet according to the plaintiff's writ there remained unshipped "29806 ft. 2 in. oak plank & outs." The defendants contend that the plaintiff had ample opportunity to ship all the two inch plank and outs to Heywood and that it was his fault and not theirs that it was not all shipped, and that on account of his neglect to so ship they were obliged to have their order at Heywood filled from elsewhere. On the other hand the plaintiff testified that after February 10, 1911, he shipped to the defendants some box boards at their request (those not being included in these contracts, and that he shipped out as much of the 2 inch stock as he could with the teams he had, and that finally the defendants notified him not to ship any

more. But after a careful study and consideration of all the evidence the court is constrained to the conclusion that the non-shipment of the balance of the two inch plank and outs is not reasonably attributable to the defendants' neglect to order it shipped, but rather to the plaintiff's own fault in not shipping it more promptly to Heywood under the defendants' order.

As already noted, on March 31, 1911, when the last carload of the 2 in. stock was sent, the plaintiff asked for an order for the thick oak, and he repeated that request on the 3rd of April, in response to which, on April 11th, the defendants sent an order for "a full carload of the 3 in. and 4 in. selected oak." The plaintiff admits that he did not ship that till May 18th, more than a month after the order was given. Answering the plaintiff's notice to them that this car had been shipped, the defendants wrote him that on account of his delay in filling the order they had been obliged to fill orders elsewhere, saying: "I don't understand why you were so long in shipping this, and I can't tell now when I can send you more orders for this." And on May 23rd they wrote him that they had examined the carload and were extremely dissatisfied with it, saying: "You have put considerable stock into this car which is not worth twenty-five ($25.00) dollars, and which I had no intention of taking at that price, when I bought it. We do not care for any more of the lumber, so you had better try and dispose of it elsewhere. We mean what we say in regard to this. We absolutely do not want any more of this, as it is running too poor, the way you are sorting it."

Mention has already been made of the fact that no more lumber was ordered or shipped for more than a year, and that then the parties tried to do business with each other once more and the last carload was shipped, for which the check that was returned was sent.

Taking into account the amount of the different kinds of lumber that was shipped after February 10, 1911, together with the amount of the different kinds that the plaintiff claims remains unshipped, it appears that very much the greater part of the unshipped lumber on February 10, 1911, was the two inch stock, which we think both parties understood was the more difficult stock to dispose of. And we do not think it should be held that the defendants broke their contract in not giving orders for the shipment of any of the thicker stock while they were urging the plaintiff to ship the two inch stock on the order they had for it at Heywood. The plaintiff sent out his

last carload of the two inch stock on March 31, 1911, and then requested an order for the thicker stock which the defendants gave him on the 11th of April 1911. Up to that time we do not think it could be fairly held that the defendants had broken their contract as to the thicker stock. The order of April 11th was not filled till May 18th, and after the carload arrived and was inspected by the defendants they notified the plaintiff that the order had not been filled according to the contract, and that they would give him no more orders for any of the lumber, claiming a breach of the contract on his part. And that is the vital question on this branch of the case, whether the plaintiff had reasonably kept and performed his part of the agreement, and given no justification for the defendants' refusal to furnish shipping orders under the contract. In passing on this question the situation of the parties and their previous contentions should be kept in mind. The defendants claim that from the very beginning the plaintiff had not selected the lumber "as shown" in filling their orders, and that his delaying and mis-filling their order of April 11, was not merely an isolated instance of neglect by him to live up to his contract, but another instance in a quite regular course of conduct on his part in disregard of the contract. On the other hand, the plaintiff with equal insistence contends that the defendants were from the beginning carrying out a purpose to get the best quality of his lumber and then on some pretense refuse to take the poorer grades, and that their complaints as to the kind and quality of the lumber shipped on their orders were spurious and without any foundation in fact.

The question may not be free from doubt, but the burden was on the plaintiff to establish by a preponderence of the evidence that he had kept and performed his part of the agreement, and that the defendants had on their part repudiated it without justification. Upon a consideration of all the evidence the court is led to the conclusion that the plaintiff has not sustained that burden, and that he is not entitled to recover damages for a breach of the contract by the defendants.

It may be added also that if it could have been found that there was a breach of the contract on the part of the defendants in not accepting the lumber, there is not sufficient and definite evidence presented from which the damages could be reasonably ascertained and computed. There was no evidence introduced in behalf of the plain-

tiff as to the amount of the different kinds and qualities of the lumber remaining unshipped, except the testimony of Mr. Carleton who surveyed it. But he did not clearly show what part of the oak is white and what part red, and as to the dimensions of 19391 feet of it he made no division, answering that it was "Two and three inch oak." Nor is there any evidence of the market value of the remaining lumber at the time and place for its delivery under the contract.

It remains to consider if the plaintiff is entitled to recover for the carload of lumber sued for at the prices claimed by him. This carload was received and kept by the defendants, but they claim that there was an agreement whereby the price for it was to be $25 per thousand. On the other hand the plaintiff claims that there was no such an agreement, but that the carload was ordered and shipped as selected stock under the terms and prices of the original contract. From an examination of the correspondence between the parties just prior to the shipment of this carload we are of the opinion that the defendants' contention that there was a new contract as to the price of this carload is not sustained by the evidence. Accordingly we find that the plaintiff is entitled to recover for that carload of lumber as claimed in his writ, and it avails the defendants nothing that they have brought into court the amount of the check tendered in payment for it since the check was less than the amount due therefor.

The conclusion of the court therefore is that the plaintiff is entitled to judgment for $215.88 with interest thereon from August 6, 1912.

So ordered.

EVERETT C. LUNNEY

vs.

INHABITANTS OF SHAPLEIGH.

York. Opinion August 14, 1914.

Impassable. Encumbered with Snow. Notice. Public. Revised Statutes, Chap. 23, Sec. 62. Road Commissioner. Town. Way.

1. In case a way becomes blocked or encumbered with snow, the Road Commissioner shall forthwith cause so much of it to be removed or trodden down, as will render it passable.
2. In case of sudden injury to ways or bridges, the Road Commissioner shall, without delay, cause them to be repaired.
3. Any person sustaining damages in his business or property, through neglect of such Road Commissioner, or the Municipal Officers of such town to so render passable ways that are blocked or encumbered with snow, within a reasonable time, may recover therefor of such town by a special action on the case.

On motion by defendant for new trial. Motion overruled.

This is an action on the case brought under Revised Statutes, Chap. 23, Sec. 62, to recover damages alleged to have been sustained by said defendant peculiar and different from those sustained by the public generally, on account of a certain way in said town being encumbered by snow and thereby rendered impassable. Plea, general issue. The jury returned a verdict for the plaintiff of $25.00. The defendant filed a motion to set said verdict aside.

The case is stated in the opinion.

E. P. Spinney, George W. Hanson, for plaintiff.

Allen & Willard, for defendant.

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

SPEAR, J. This is an action on the case brought by Everett C. Lunney against the Inhabitants of the Town of Shapleigh for dam-

ages, which he alleges he sustained peculiar and different from those sustained by the public generally, by reason of a certain way in the Town of Shapleigh being, as he alleges, so encumbered with snow as to be impassable during a certain portion of the winter of 1912. This action is brought under Sec. 62 of Chap. 23 of our Revised Statutes, which reads as follows: "When any ways are blocked or encumbered with snow, the road commissioner shall forthwith cause so much of it to be removed or trodden down, as will render them passable. The town may direct the manner of doing it. In case of sudden injury to ways or bridges, he shall, without delay, cause them to be repaired. And all damage accruing to a person in his business or property, through neglect of such road commissioner or the municipal officers of such town, to so render passable, ways that are blocked or encumbered with snow, within a reasonable time, may be recovered of such town by a special action on the case."

The jury returned a verdict for the plaintiff, and the defendant, after verdict against it, asks this Court to set aside the verdict, and to grant a new trial, because there is no basis for such a verdict against it, and must have been the result of prejudice, passion, partiality, and bias on the part of the jury.

We have examined the evidence in this report carefully and find it a case peculiarly adapted to the judgment of men who are familiar with country roads in the winter time and particularly with the manner in which the country cross-roads, and little used roads, are treated by the town authorities. While each case brought under this statute is to be decided upon the evidence touching the particular conditions involved, yet, the weight of that evidence and its application to the conditions, are subject to interpretation through the experience and knowledge of the jurymen who are acquainted with the methods with which these roads are treated. Applying this rule we think the jury, who understood in a general way the local conditions, were more capable than this court can possibly be, by reading the report, of balancing the bulky and conflicting testimony, and determining the merits of the contradictions. While the case might have been decided either way, we are yet inclined to the opinion that the jury were not altogether wrong. There are certain admitted facts throughout the evidence which rather tend to show that this piece of road was not broken out in compliance with the statute under which the action is brought. This statute, it is evident, was enacted to

meet what might perhaps be called emergencies. It requires that ways blocked or encumbered with snow shall be forthwith made passable; that is, in a reasonable time. The undisputed evidence seems to show that the snow along this road for some distance was from four to six feet deep; that single teams had gone over the top of this snow, thus hardening a single track over which one team, with the exercise of sufficient care, might keep in the track and pass over the road. It further appears, and seems to be undisputed, that teams could not turn out. The manner in which they broke the road on March 8th is also significant of the condition in which it had been for several days previous. It seems that on this day, besides a crew of men, they used a harrow to break up the snow. If this piece of road had not been in an entirely different condition from the other roads, no such special effort would have been required to break it out. Another marked feature as to the condition of the road was shown by one of the defendant's witnesses, who admitted that he stopped over night with the mail carrier on account of information as to the impassability of this piece of road. He claimed that had he known the condition as it actually was he might have passed over it. The plaintiff also gave notice to the selectmen of the condition of the road and requested them to make it passable. Upon notice one of the selectmen said: "I sent a notification to the surveyors to open the road." And again says: "The road was opened." This language of a town officer is quite significant of the condition of the road before "it was opened."

All these things, and many others which appear in the testimony, furnish fairly good evidence to those acquainted with country roads and the method of breaking them, that this piece of road was actually in a pretty bad condition, and fairly presented to the jury for determination the question, whether it was so bad as to come within the meaning of the statute, under a fair, clear and discriminating charge given by the presiding Justice. They said it did, and gave a small verdict to the plaintiff. It cannot be regarded as excessive. We do not feel required to set it aside.

Motion overruled.

HAROLD C. ROLLINS

vs.

CENTRAL MAINE POWER COMPANY.

Kennebec. Opinion September 1, 1914.

Costs. Damages. Demurrer. Exceptions. Judgment. Revised Statutes, Chap. 84, Sec. 35. Waiver.

At common law, when exceptions to the overruling of a demurrer to the declaration were overruled, judgment on the demurrer, or that plaintiff recover, followed and was final.

By Revised Statutes, Chap. 84, Sec. 35, the severity of the common law was relaxed, wherein it was provided that if the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs, from the time when it was filed, unless adjudged frivolous and intended for delay.

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

This is an action on the case to recover of the defendant damages for personal injuries received by him on September 2, 1912, at Gardiner, in the County of Kennebec. The plaintiff was, at the time of the accident, employed and working as conductor on one of the cars of the Lewiston, Augusta and Waterville Street Railway, and while he was attempting to turn the trolley pole on said car, it came in contact with the glass globe of an arc light, located and maintained by the defendant, breaking said globe so that a portion of the glass struck the plaintiff in one of his eyes, entirely destroying the sight thereof. Plea, general issue. The defendant filed a demurrer, and the court ordered judgment upon said demurrer for the plaintiff. Upon said judgment, the jury assessed the damages at $4935. The defendant excepted to the ordering of judgment upon demurrer and filed a motion for a new trial upon the ground of excessive damages.

Benedict F. Maher, Harold H. Murchie, Samuel Titcomb, for plaintiff.

Harvey D. Eaton, for defendant.

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

BIRD, J. This is an action for the recovery of damages for personal injuries. It is here upon exceptions to the ordering of judgment upon demurrer and defendant's motion for new trial upon the ground of excessive damages.

As to the exceptions; upon the facts set out in the plaintiff's bill, we think the exceptions to the ordering of judgment must be overruled. At common law, when exceptions to the overruling of a demurrer to the declaration were overruled, judgment on the demurrer, or that plaintiff recover, followed and was final. The legislature, relaxing the severity of the common law has provided "If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time when it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered at the next term of court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the district to the clerk of such county, and not before, judgment shall be entered on the demurrer, unless the costs are paid, and the amendment or new pleadings filed on the second day of the term." R. S., Chap. 84, Sec. 35; *State* v. *Peck*, 60 Maine, 498. A new right is thus given, not to the plaintiff, whose rights at common law are abridged, but to the defendant whose rights are enlarged upon his compliance with the conditions named. The defendant filed his new pleadings on first day of the "next term" but made neither payment nor tender of the costs upon either the first or second day.

A jury being empanelled for the trial of the cause, plaintiff moved on the fourth day of the term for judgment on the demurrer. To the granting of this motion the defendant objected because "there had been no taxation of costs, nor request for payment thereof, nor any mention whatever previously made in regard to costs." The court ruled as matter of law that the filing of the plea without payment of costs did not make a good plea and granted the motion. The objections thus overruled cannot avail. They are based upon failures and omissions of defendant. The plaintiff was under obligation to do none of the things alleged to be undone.

The defendant argues that the plaintiff waived the payment of costs. If this be open to defendant under his bill of exceptions, we

are forced to conclude that there was no waiver. Certainly none was expressed nor do we consider that any can be inferred. Whether the cause was to be tried upon its merits or only upon question of damages, nothing was done during the first two days of the term which was not required in the way of preparation for trial by court or counsel in either event. Until adjournment at the end of the second day of the term plaintiff could not know if defendant had forgone his right. At the close of the second day the rights of the parties were fixed, and we are unable to find in the action of plaintiff thereafter conduct from which a waiver of his rights as determined can be inferred. *Hanscom* v. *Ins. Co.*, 90 Maine, 333, and *Haskell* v. *Brewer*, 11 Maine, 258, relied upon by defendant seem to be inapplicable. There are aspects of hardship in the case, but to grant relief would transcend the function of the court.

Upon entry of judgment upon the demurrer, the damages were assessed by the jury in the sum of $4935 which defendant claims to be excessive. Defendant offered no evidence. The plaintiff was at the time of his injury twenty-three years of age and earning in the employ of defendant two dollars per day. The sight of one eye was destroyed and later the eye was removed. The evidence indicates that his earning capacity has been reduced, the other eye affected and that annoyance and disfigurement must be experienced throughout life. Considering these elements of damage in view of his expectation of life, his pain and expenses, the court is unable to say that the amount of the verdict shows bias, prejudice or improper conduct on the part of the jury.

The exceptions and motion must therefore be overruled.

So ordered.

ROMEO ELIE, Pro Ami,

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin. Opinion September 1, 1914.

Inducement. Invitation. License. Trespass.

To come under an implied invitation as distinguished from mere license, the visitor must come for a business connected with the business in which the occupant is engaged, or which he permits to be carried on there.

There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant.

It is true that when a use has been so long continued as to induce the public to believe that the owner invited such a use, a liability has been held to arise as from an implied invitation.

In the absence of wanton or recklessly careless conduct on the part of the defendant, the plaintiff, although a child of tender years, if a trespasser, occupies no better position and has no greater rights than an adult.

If a child trespass on the premises of defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly inflicted by, or was due to, the recklessly careless conduct of the defendant.

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

This is an action brought to recover damages for the loss of an arm on the first day of April, 1910. The plaintiff, who brings this suit by next friend, was four years of age and riding on the platform of one of the defendant's cars, and in alighting from said car while in motion received the injuries complained of. The plea was the general issue. The jury rendered a verdict for the plaintiff of $3500, and the defendant filed a general motion for a new trial.

McGillicuddy & Morey, for plaintiff.

Newell & Skelton, for defendant.

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

BIRD, J. An action on the case to recover damages for injuries sustained by plaintiff, a child of the age of four years, in alighting from a moving car of defendant. The verdict was for plaintiff and the defendant files its general motion for new trial.

The declaration alleges that the plaintiff was riding upon the platform of the car by the permission and invitation of the defendant. There was no pretence that plaintiff had paid his fare or intended to do so and the contrary may be legitimately inferred from the evidence. Express invitation there was none. And it has been recently held by this court that "to come under an implied invitation as distinguished from mere license, the visitor must come for a business connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Stanwood* v. *Clancy*, 106 Maine, 72, 75. The rule has been otherwise stated as follows:— The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it: *Bennett* v. *Railroad Co.*, 102 U. S., 577, 584-5.

In the case before us there was no express permission, or license. Nor do we think an implied license is shown. There was evidence tending to show that other boys, of greater age however, had stolen rides upon other cars of the defendant, going upon the platform at the time the car started on its return trip and jumping from the car while in motion at a point some two hundred feet distant. But such acts were criminal (R. S., Chap. 52, Sec. 7) and we should more than hesitate to hold that such acts on the part of others, even if brought to the knowledge of plaintiff, could be held such an inducement or holding out on the part of defendant as to give the plaintiff the rights either of one upon the cars by invitation, or of a licensee even: *Barney* v. *The Hannibal & St. Joseph R. R. Co.*, 126 Mo., 372, 392: *The Chicago, etc., Ry. Co.* v. *Eininger*, 114 Ill., 79, 85.

While it is true that when a use has been so long continued as to induce the public to believe that the owner invited such a use, a

liability has been held to arise as from an implied invitation, in this case, assuming the requisite continuance, there could have been no such belief entertained by the public. See *Nolan* v. *New York, etc., R. R. Co.*, 53 Conn., 461, 474; *Hughes* v. *B. & M. R. R.*, 71 N. H., 279.

The plaintiff was a mere trespasser. As such he was protected only against the wanton or wilful or reckless injury of defendant. *Russell* v. *M. C. R. R. Co.*, 100 Maine, 406, 408; see also *Reardon* v. *Thompson*, 149 Mass., 267, 268. It is contended by plaintiff that he alighted from the car while in motion in obedience to a gesture of the conductor. A careful reading of the testimony in this regard leads us to conclude that this is not supported by the weight of evidence but that by far the greater weight of evidence indicates that there was no wilful nor negligent act upon the part of the servants of the defendant.

In the absence of wanton or recklessly careless conduct on the part of defendant, the plaintiff, although a child of tender years, if a trespasser, occupies no better position and has no greater rights than an adult. In *McGuiness* v. *Butler*, 159 Mass., 233, 236, it is said, "if a child trespass on the premises of defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly inflicted by, or was due to the recklessly careless conduct of the defendant." In full accord are *Hughes* v. *B. & M. R. R.*, 71 N. H., 279, 285; *Barney* v. *The Hannibal & St. Joseph R. R. Co.*, supra; *The Chicago Railway Co.* v. *Eininger*, supra; *Central, etc., R. Co.* v. *Henigh*, 23 Kan., 347; and see *The Gulf, etc., Railway Co.* v. *Dawkins*, 77 Tex., 228, 231-2; see also *Johnson* v. *B. & M. R. R.*, 125 Mass., 75. The motion must be sustained.

Motion granted;
Verdict set aside;
New trial ordered.

SCOTT WILSON, Attorney General,

GEORGE R. HALL, Relator,

vs.

C. H. MCCARRON.

Androscoggin. Opinion September 10, 1914.

Appointment. City Marshal. Expiration of Term. Officer. Petition. Police Force. Quo Warranto. Term. Vacancy.

1. When an office is created by Statute which provides that it shall be filled by election, or appointment, for a term of years, and is silent in regard to the time when the term shall commence, and there are no special provisions for filling the vacancy in the office, it must be held that the term of the office begins when the appointee is appointed and qualified.
2. When it becomes necessary to appoint a Chief of Police under the new Charter, by reason of death, removal or resignation, or to fill the place of one whose term has expired, the appointee holds this office for three years from the date of his appointment and qualification, unless sooner removed.
3. The Charter, as amended by the Act of 1896, does not fix the time when the term of office of Chief of Police shall commence. It only provides for his appointment and that he shall hold the office for three years, unless sooner removed.

On report. Petition dismissed with costs.

This is a petition in the nature of quo warranto, to determine the title to the office of city marshal of the city of Lewiston, held by the respondent and claimed by the relator, George R. Hall. McCarron filed an answer to the information, and said Hall filed a replication to the answer of said McCarron. By consent of the parties, the cause was reported to the Law Court for determination upon the evidence submitted, including the agreed statement of facts.

The case is stated in the opinion.

Newell & Skelton, for George R. Hall, relator.

John A. Morrill, Louis J. Brann, for defendant.

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

HALEY, J. This is a petition in the nature of quo warranto, to determine the title to the office of city marshal of the city of Lewiston, and is before this court upon report.

Prior to 1880 the city marshal, and all members of the police force of the city of Lewiston, were chosen for one year, being elected by the City Council on the third Monday of March, or as soon thereafter as convenient, and served from the first day of April.

In 1880 the legislature enacted Chap. 293 of the Private and Special Laws, which was approved by the Governor on March 16, 1880, and took effect upon its approval by the City Council of the city of Lewiston prior to March 25th of that year.

Sec. 1 of said Act reads:

"The city marshal, deputy marshal and policemen of the city of Lewiston, shall hereafter be appointed by the mayor, by and with the advice and consent of the aldermen. The city marshal shall hold his office for the term of two years, and the remainder of the police force shall hold their office for the term of three years; providing, however, that the first year after this act shall take effect, one-third in number, as near as may be, of said police force, shall be appointed for the term of one year, one-third in number, as near as may be, shall be appointed for the term of two years, and one-third in number, as near as may be, shall be appointed for the term of three years, and there shall be appointed each year thereafter, one-third in number, as near as may be, of said force, subject, however, after a hearing, to removal at any time by the mayor by and with the advice and consent of the aldermen, for inefficiency, or other causes."

The police force was organized under this act by appointments made March 25, 1880, when Hillman Smith was appointed and confirmed as city marshal for two years, and March 20, 1882, he was reappointed and confirmed for two years. January 16, 1883, the resignation of Hillman Smith as city marshal was accepted. On January 16, 1883, George W. Metcalf was appointed and confirmed to fill the unexpired term of Hillman Smith. March 12, 1885, John French was appointed and confirmed as city marshal for the term of two years from April 1, 1884. March 22, 1885, Daniel Guptil was appointed and confirmed as city marshal for two years. The last

two appointments resulted in a petition for a writ of mandamus by John French, which case is reported in the 79th Maine, 426, and is relied upon by the petitioner in this case as giving the correct construction of the act in question. After said Guptil had served out his term other marshals were appointed for the term of two years, were all confirmed and served their terms down to March 28, 1910, when Arsene Callier was appointed city marshal by the mayor, but his appointment was rejected by the aldermen. April 1, 1911, Arsene Callier was appointed and confirmed city marshal for two years, and on March 18, 1913, C. H. McCarron, the respondent, was appointed and confirmed city marshal for the term of two years from the first day of April of that year. March 31, 1914, George R. Hall, the relator, was appointed and confirmed for a term of two years from April 1, 1914.

It is the claim of the relator that the terms of office of city marshal are successive terms of two years each, reckoning from the first acceptance of the act and terminating the last day of March of the even years, regardless of what vacancies occur during any term, and that such being the case, Callier's appointment of April 1, 1911, legally entitled him only to serve out the unexpired term then existing, that his occupancy after March 31, 1912, was de facto only; that the office was in law vacant, and that, when McCarron was appointed on March 18, 1913, there remained to be filled only the unexpired term of two years from April 1, 1912. When the act of 1880 was passed and accepted by the City Council, the charter provided that the City Council should annually, on or after the third Monday of March, elect and appoint all subordinate officers for the ensuing year, the same to be chosen and vacancies filled for the current year, but that provision does not apply to the city marshal of the city, because, by Sec. 2 of Chap. 293 of the Special Laws of 1880, it is provided that "all acts and parts of acts inconsistent with this act are hereby repealed," and as the act provides that the city marshal shall hold his office for the term of two years, it is inconsistent with the provisions of the charter stating that subordinate officers shall be elected and vacancies filled for the current year, and we must look to the act of the legislature of 1880 in determining the term of office of city marshal, whether appointed to fill a vacancy caused by death, resignation, removal, or the refusal of the aldermen to advise and consent to the appointment (by the mayor) of a person to that office.

The petitioner claims that the case of *French* v. *Cowan*, 79 Maine, 426, is conclusive of the question in issue in this case. That was a petition for a writ of mandamus, and in that proceeding it was sought to try out the title to the office of city marshal of the city of Lewiston by rival claimants, under the act of 1880. The respondent claims that, as that case decided that mandamus was not the proper proceeding to try out the title of a public office, the only rule of law declared in that case was upon that branch of the case, and that the case was correctly decided because, as the respondent says, it is clear that mandamus was not the proper remedy. It is true that in the opinion the court discussed the question of when the term of office of an incumbent of the office of city marshal begins, and rules that the office of city marshal begins the first day of April of the even year; but it was not necessary to decide that question to dispose of the case, and there was a dissenting opinion filed upon that branch of the case. And the respondent contends that, so far as *French* v. *Cowan* holds, the term of office of the city marshal begins April first of the even year, and continues until the last day of March of the succeeding year, it not being necessary for the decision of the case that the question should be re-examined.

The opinion of the Justices, 61 Maine, 602, holds that judges and registers of probate who are elected to those offices are entitled to hold them for a term of four years from the first day of January next succeeding their election, although their elected predecessors may have vacated their offices before the expiration of the full term for which they were chosen. The opinion shows the distinction between the case of a person holding an office for a definite term, and where the office holder is a member of a board, whose terms expire at different times, and holds "that the court of county commissioners consists of a board of officers, the election of whom was so fixed by law as to occur upon different years. There was to be an annual election of one of its members. The mere expiration of time did not and could not leave the court vacant. Vacancies might occur in the board by death or resignation. To meet this contingency, and still preserve the annual election of one of its members, the statute provided for a choice to fill the place that was vacant," explaining the opinion of the Justices in the 50th Maine, 608.

The case of *Hall* v. *Brown*, 59 N. H., 555, cited in *French* v. *Cowan*, was an action of assumpsit in which a contractor sought to enforce a

lien upon timber and lumber that the complainant had cut and hauled by himself and servants in his employ, and it was sought to enforce the lien both for his services and of the men in his employ, and does not bear upon the question in issue in this case.

In *People* v. *McCleve*, 99 N. Y., 83, cited in *French* v. *Cowan*, the question in issue was the term of office of a person appointed as police commissioner of the city of New York. Sec. 25 of the act in question "vested in the mayor the power to nominate and, with the consent of the board of aldermen, to appoint heads of departments and all commissioners, including the commissioners of police, (with certain exceptions not material here), but provided that the officers of all such heads of departments, and persons other than those first appointed, shall commence on the first day of May, but the heads of departments, consisting of a board of commissioners first appointed after the passage of this act shall, except as herein otherwise expressly provided, be two, four and six years, respectively, and the board of commissioners of police first appointed as aforesaid, shall hold their offices, one, two, three and four years, respectively. The person first appointed shall take office on the expiration of the term of office of the present incumbent, and further provided any nomination or election to fill any vacancy which shall hereafter occur by reason of the expiration of the term of one officer, or from any other cause, and which shall not be created by anything in this act providing for the termination of the term of office of any person, or persons, now in office, shall be made to the board of aldermen within ten days from the day of the date of any such vacancy, and any person who shall be appointed to fill any such vacancy shall hold his office for the unexpired term of his predecessor." The court say, "this clause places it beyond doubt that an appointee to fill a vacancy caused by the death, resignation or removal of an incumbent during his term, holds only for the remainder of such term or period, which of course may be much less than six years."

In that case the act expressly provided that a person appointed to fill a vacancy should only hold for the unexpired term, while the act of the legislature of 1880, now under consideration, does not contain any such language; but does provide that the city marshal shall hold his office for the term of two years, which is clearly distinguishable from the New York case, as is the case of *State* v. *Mayor of LaPorte*, 28 Ind., 248, in which case the act of incorporation provided, "that,

after the first general election said officers shall hold their offices for two years each," and that annually there shall be chosen by the legal voters of their respective wards, "one councilman to be determined by lot at the first regular meeting after the election, shall hold office for two years, and the other to be determined in like manner, shall hold his office for four years; and biannually thereafter, one councilman shall be elected by the voters of each ward," and the court held the evident intent of the section cited was that only one councilman for each ward should be elected every two years for a period of four years, not the case of an officer appointed to the office for a definite term, but the case of one member of a board going out of office, and as it was the evident intent of the legislature that it shall be a continuing board, it is clearly distinguishable from this case, as clearly explained in the opinion of the Justices, 61 Maine, 602, holding that judges and registers of probate are appointed to hold their offices for the term of four years, in the following language: "It will be perceived that no other limitations than four years is imposed, except in the case of executive appointments. This term seems to be a fixed and positive term attached to an election. The only mode of permanently filling the office, however it becomes vacant, is by election, in which case the constitution says they shall hold their office for four years. These provisions are clear and unambiguous."

There is no provision of the law of 1880 to fill the office of city marshal of Lewiston, except by the mayor and aldermen of the city, and the law states, in clear and unambiguous language, that the marshal shall hold his office for the term of two years. There is no different rule of construction of that act of the legislature than of the constitution; they both speak in clear and unambiguous language.

The petitioner urges upon our attention the case of *Baker, Governor,* v. *Kirk,* 33 Ind., 523, but an examination of the case shows that it is not a similar case to the case at bar, and that the principles of law governing that case are the same that this court applied to the board of county commissioners. In that case the question was when the term of office of one member of the board of prison directors began, and the court uses this language: "It is very evident that the term of office of a prison director, as fixed by the above law, after the expiration of the term of office of the person first elected, is for a period of four years. It is equally plain that the object of the legis-

lature in providing that one of the directors first elected under this law should serve for two years, and that two of them should serve for four years, was to prevent the directors from all going out of office at the same time."

The same question in this case was passed upon in *Smith* v. *Cosgrove*, 71 Vt., 196, and the case is so similar that we quote: "Sec. 215 of the charter as amended by the act of 1896, provides for a regular police force for the city, consisting of a chief of police, who shall be appointed by the mayor and shall hold his office for three years, unless sooner removed, and such number of other police officers as the mayor shall deem necessary for the welfare of the city, who shall hold office for such term, not exceeding three years, nor less than one year, as shall be designated by the mayor in his appointment.

"By this section, it is clear that, whenever a chief of police is first appointed under the charter, he holds his office for three years from the date of his appointment, unless sooner removed; and we look in vain for any authority in the charter, as made to read by the act of 1896, for appointing a chief of police for a shorter period. Sec. 277 of the act provides, in part, that the city officials holding office therein under and by virtue of the general law of the State, or the acts or parts of acts thereby amended or repealed, shall hold office until the expiration of their current term. . . . . When it becomes necessary to appoint a chief of police under the new charter by reason of death, removal, or resignation, or to fill the place of one whose term has expired, the appointee holds this office for three years from the date of his appointment, unless sooner removed. The language of this section is plain and unmistakable, and there is nothing in the charter relating to the filling of a vacancy in the office of chief, or appointment to that office, that in any way limits or qualifies its provisions. The charter, as amended by the act of 1896, does not fix the time when the term of office of the chief of police shall commence. It only provides for his appointment, and that he shall hold the office for three years, unless sooner removed. In the absence of any provision of the charter fixing the time when his term shall commence, it must be held that his term begins when he is appointed and qualified, and continues for three years, unless he be sooner removed. When a statute creates an office and provides that it shall be filled by election or appointment for a term of years, and is silent in regard to when the term shall commence, and makes no

special provision for filling a vacancy in the office, or respecting the term for which one appointed to fill the vacancy shall hold the office, and there are no general provisions of the statute that are applicable, there are no grounds for inferring an exception in case of a person elected or appointed to the office when it has become vacant by reason of the death, resignation or removal of his predecessor." The court cites *People* v. *Green*, 2 Wend., 266; *Crowell* v. *Lambert*, 9 Minn., 283; *People* v. *Burbank*, 12 Cal., 378; *People* v. *Townsend*, 102 N. Y., 430, and *Sansburg* v. *Middleton*, 11 Md., 296, as holding to the same effect.

In *Winter* v. *Sayre*, 118 Ala., McClellen, J., upon page 61, says: "For what the legislature has done, as clearly shown by the act, is this: They have provided that each incumbent by executive and senatorial appointment shall hold his office for six years, not that each term shall endure for six years—the word term is not used in the act, except in reference to the then incumbent who was in for a fixed term of six years—not that the incumbency of the office shall be divided into terms of six years each, but that each judge so appointed shall be entitled to hold the office for that period. The legislature could not make him hold it for that period, it could not keep him from dying or resigning; but it could secure to him the right to hold for that length of time if he chose, and lived, to exercise it. And that is what they have done and all they intended to do in this statute. . . . . They have not marked the office off into fixed terms of election with equal periods between. They have secured to the incumbent the right to serve for a given period. If he serves that period it is all well and good. If he dies, or resigns, or is removed, the period ceases; and the appointee who comes after him takes for a like period, not for so much of the time his predecessor was entitled to hold as he did not in fact hold, but for the full period of six years initiated upon his confirmation by the Senate."

In *Hope* v. *Richie*, 100 Ky., 66, it was held that where by statute an inspector of illuminating oil "shall remain in office for four years" and the incumbent dies during that period, the appointment of his successor is only for the unexpired part of the term, and not for a full term of four years, although the order of appointment so recited. The opinion in the above case cites no cases to support the position taken by the court, and it says: "It is conceded that the apparent weight of authority is against the conclusion we have reached," and

quotes from Throop on Public Officers, Sec. 319: "The authorities are not entirely harmonious respecting the duration of the term of an officer elected by the people or appointed by the governor, or some other officer or board of officers, to fill a vacancy, where the constitution has failed to specify the duration of his term, or where a provision upon that subject is of doubtful construction; but the weight of authorities is decidedly in favor of the proposition that a person so chosen holds for a full term, and not merely for the unexpired term of his predecessor's term."

It is to be noticed that in the above case the court said: "We have concluded, though with some hesitation, that the apparent purport of the peculiar language of the statute must yield to the general legislative purpose prevalent in this State." The following cases are to the same effect as the opinion of the Justices, 61 Maine, 602; *Attorney General* v. *Bruents*, 3 Wis., 787; *People* v. *Contant*, 11 Wend., 132; *Keys* v. *Mason*, 3 Sneed, 6.

In Mechem on Public Officers, Sec. 386, it is stated: "The statutes creating public officers usually prescribe the limits of the terms provided for, fixing the dates at which they will begin and end. The date of the commencement of the term is ordinarily fixed for some appreciable period after election or appointment, in order to give the newly chosen officer time to arrange his affairs and to qualify in the manner prescribed. Where, however, no time is fixed, the term will begin on the date of the election in the case of an elective officer, and at the date of appointment where the officer is appointed."

The words of the act of 1880, in fixing the term of the office of marshal, are; "The City Marshal shall hold his office for the term of two years." In *State* v. *Tallman*, 24 Wash., 426, the court, in discussing the meaning of the word "term" as applied to an office, says, upon page 430: "Term as applied to time, signifies a fixed period, a determined definite or prescribed duration. A term of office is a fixed period prescribed for holding office. *People* v. *Brundage*, 78 N. Y., 403. The word "term" when used with reference to the tenure of office, ordinarily refers to a fixed and definite time. Mechem on Public Officers, Sec. 385. In fact, the expression "term of office" so clearly defines itself, the words used are so well understood, and their meaning so generally accepted, that it is useless to attempt to further define it." Webster's Dictionary defines "Term," "As a

limited or definite extent of time; the time for which anything lasts, as a term of five years, the term of life, a presidential term."

If the marshal should die, resign or be removed one week before his term expired, if the petitioner's contention is right, then his successor, if appointed within the week, would only hold the office for the balance of the week, although the statute under which he was appointed expressly states, "The city marshal shall hold his office for the term of two years." He could not have held it before his appointment, and during the legal term of his predecessor, if we give to the language of the act the obvious import of the words, the ordinary popular significance of which is, that the marshal holds his office for the term of two years from his appointment, if he so long live, unless he resigns, is removed or the legislature changes the law.

The word "term" used in the act of 1880, describing the term of the city marshal, was used to designate a fixed, definite period of time that a person appointed to the office should hold the office.

In *French* v. *Cowan*, in discussing the question of successive terms, the court considered both the office of marshal and of police officers, as if their terms were the same, as appears from the following from page 433: "In the case before us the statute, it is true, does not designate any definite point of time from which the term of the several officers therein mentioned shall commence, yet, the evident purpose of the statute requires, for the police force at least, that a definite time be fixed from which the several terms shall begin." And upon page 432, the opinion reads: "If we were to give any other construction to this statute in relation to commencement, and duration of the terms of office of the marshal and the policemen, the term of service of the appointees might soon become such as to entirely destroy the force of the provision that one-third, as near as may be, shall be appointed each year." While the above statement as to the police officers may be the correct interpretation of the law as to those officers, it is not applicable to the office of city marshal which, by the statute, is for a fixed and definite term of years. There is nothing in the act of 1880 providing that one appointed city marshal to succeed one who had not served a full two years, shall only serve out the unexpired term of his predecessor.

The opinion does not notice the distinction between the terms of office of the city marshal, which is for a fixed and definite term, with authority in the appointing power to fill a vacancy in the office

by appointment, and that, in the office of policemen, who are members of a continuing board of public officers, and the plain intent of the act being that one-third of the members of the police officers should be appointed each year, so that always the board should consist of at least two-thirds of experienced officers, a distinction fully explained in the opinion of the Justices, 61 Maine, 602. As the act of 1880 provides that the city marshal shall hold his office for the term of two years, and does not provide that the person appointed to that office to succeed one who did not serve out the full term for which he was appointed, shall serve only the unexpired term of his predecessor, the plain and obvious meaning of the act, as well as the weight of authority, is that, whenever there is a vacancy caused by death, removal, resignation, or the failure of the mayor to appoint, or the board of aldermen to confirm an appointment to that position, there is a vacancy in the office and not in the term, and that when Arsene Callier was appointed and confirmed as city marshal on April 1, 1911, he was entitled to hold the office, by virtue of that appointment, for the term of two years from his appointment, that is, to April 1, 1913, and when the respondent was appointed city marshal and confirmed March 18, 1913, for the term of two years from the first day of April, 1913, he became entitled to hold the office for the full term of two years, that is, to April 1, 1915, and the respondent is entitled to judgment.

Petition dismissed with costs.

IVORY A. HOVEY *vs.* BURNHAM J. BELL.

Aroostook. Opinion September 12, 1914.

Exceptions. Fraud. Lease. Reference. Report. Rule.

1. It is well settled in law that the referee has full power to decide all questions arising, both of law and fact, and in the absence of fraud, prejudice or mistake, on the part of the referee, his decision is final.
2. Objections to the report should be made when the report is offered for acceptance.
3. The referee, in this case, did not exercise his full powers, for by reserving the right of exception to the defendant, he properly gave the defendant an opportunity to submit questions of law to this court.
4. To sustain exceptions to the ruling of the referee, as a matter of law, that upon the facts found the plaintiff is entitled to recover, the defendant must show that the facts found by referee, as preliminary to his ruling based on those facts are not sustained by the evidence, and upon this point the burden is upon the defendant.

On exceptions by defendant. Exceptions overruled.

This is an action in assumpsit on an account annexed to recover the sum of $222.00 and interest from date of demand, for 222 barrels of potatoes claimed to have been sold and delivered to the defendant at $1.00 per barrel. At the April term of Court, the case was referred to Hon. A. M. SPEAR under a rule of Court. The referee found and ruled as matter of law, upon the facts found that plaintiff was entitled to recover two hundred and forty-five dollars and interest from date of writ, and upon this ruling reserved the right of exception to defendant. Upon motion of plaintiff's counsel, the Justice at nisi prius at September term, 1913, accepted the report and ordered judgment for plaintiff, and the defendant excepted to said order.

The case is stated in the opinion.

Harry M. Briggs, Willard S. Lewin, for plaintiff.

Shaw, Burleigh & Shaw, for defendant.

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

PHILBROOK, J. This is an action in assumpsit on the following account annexed:

BURNHAM J. BELL, to IVORY A. HOVEY, Dr.

1911, June 1,	To 222 barrels of potatoes Sold and delivered you at $1.00 per bbl.	$222.00
	To interest since due and demanded	23.00
		$245.00

The cause was sent to a referee who reported as follows:

"In this case I find as a matter of fact that Ivory A. Hovey, the plaintiff, was a bona fide lessee of Ulmont H. Hovey, of the five acres which he claims to have planted to potatoes upon the Pennington farm, and that the two hundred barrels of potatoes harvested by him therefrom, were his property, as between him and his son, Ulmont. In other words, I find that the plaintiff's claim was not a fraudulent one set up for the purpose of preventing these potatoes from becoming as asset of Ulmont's bankrupt estate.

But as a matter of law the defendant claims, even admitting the plaintiff's good faith, that the title is prevented from vesting in him by the terms of the lease, which "reserved the title to said crops to secure the payment of the said rent, etc." Under this reservation the defendant contends that all the crops by whomsoever cultivated became the property of the lessor, George L. Pennington, through whom the defendant, though nominal, derived his title.

The defendant further contends that the fact that the plaintiff was sublessee, without the written consent of the lessor, as required by the terms of the lease, left the plaintiff without any rights greater than those of the lessee, Ulmont. Upon this contention I find two things: first, that the lessor had no knowledge of the operation of the plaintiff as sublessee; and second, that the lessor had no title to the premises when he executed the lease to the lessee, Ulmont.

Without going into further details, I rule as a matter of law, upon the facts found, that the plaintiff is entitled to recover the sum

of two hundred and forty-five dollars, and interest from the date of the writ. Upon this ruling I reserve the right of exception to the defendant."

Upon motion of plaintiff's counsel the Justice at nisi prius accepted the report and ordered judgment for the plaintiff. Thereupon the defendant presented the following bill of exceptions, which was allowed, and the case is before us upon these exceptions.

"The referee found the facts upon hearing, which are set forth in his finding and ruled, as a matter of law, that upon the facts found, the plaintiff is entitled to recover.

The report was submitted to the court and the presiding Justice ruled that the ruling of the referee was right and ordered judgment for plaintiff, upon the report; to which ruling and order of the presiding Justice, the defendant excepts, and prays that the exceptions may be allowed.

The finding of the referee is made a part of the Bill of Exceptions."

The record presented to this court consists only of copies, (1) of the writ; (2) of a lease from George L. Pennington to Ulmont H. Hovey of a certain piece of land in Houlton; (3) of a paper signed by said Pennington acknowledging receipt from Burnham J. Bell, the defendant, of $222.00, "the same being the value of 222 barrels of potatoes raised on land leased by me to one Ulmont Hovey, and sold to said Bell by Ivory A. Hovey, the title to which said potatoes are in dispute," the paper also containing an agreement by Pennington to hold Bell harmless from loss by reason of the claim of any other person to the proceeds of the potatoes; (4) copy of rule of reference; (5) copy of findings of the referee; (6) bill of exceptions. In the plaintiff's brief he says that the evidence given before the referee "though taken by a stenographer, is not before this court," and no such evidence is contained in the record.

The rule of reference contains the stipulation that judgment rendered on the report of the referee shall be final and conclusive and the law is well settled that in such a case the referee has full power to decide all questions arising, both of law and fact, and in the absence of fraud, prejudice, or mistake, on the part of the referee, objections to which should be made when the report is offered for acceptance, his decision is final. *Piscataquis Savings Bank* v. *Herrick*, 100 Maine, 494; *Armstrong* v. *Munster*, 103 Maine, 29. The powers of the referee, were unrestricted. The whole case, both as to law and fact,

were submitted to his determination. *Hooper* v. *Taylor*, 39 Maine, 224. In the case at bar the referee did not exercise his full powers, for, by reserving right of exception to the defendant, he virtually gave the defendant an opportunity to submit questions of law to this court. This course was legitimate and proper. *Hooper* v. *Taylor*, supra. The difficulty here is to ascertain precisely what questions of law are properly presented by the bill of exceptions.

There are several findings by the referee. He finds as matter of fact, that Ivory A. Hovey was a bona fide lessee of Ulmont H. Hovey. This finding is not exceptionable if there is any evidence to support it. *Palmer's Appeal*, 110 Maine, 441. In the case at bar no report of the evidence is furnished, except as above stated, and we find nothing in such as is furnished that will warrant this exception being sustained. After stating certain legal claims made by defendant the referee finds that the lessor had no knowledge of the operation of the plaintiff as sublessee, and that the lessor had no title to the premises when he executed the lease to Ulmont. These seem to be findings of fact and for reasons just given are not exceptionable. Finally the referee rules "as a matter of law, upon the facts found, that the plaintiff is entitled to recover," and upon this ruling reserves the right of exception to the defendant. Here again it would appear that in order to sustain his exceptions the defendant must show that the findings of fact by the referee, as preliminary to his ruling of law based upon those facts, are not sustained by any evidence. The burden at this point is upon the defendant. *Rawson* v. *Hall*, 56 Maine, 142. In our opinion the burden has not been sustained and the entry must be,

Exceptions overruled.

STATE OF MAINE *vs.* CUMBERLAND CLUB.

Cumberland. Opinion September 26, 1914.

Common Nuisance. Intoxicating Liquors. Locker Room. Place of Resort. Revised Statutes, Chap. 22, Sec. 1.

The defendant, an incorporated club, owned and maintained a club-house, in which there was a "locker room." In the locker room were sideboards equipped with glasses and mixing utensils, and two hundred and fifty lockers. These lockers were severally owned by individual members of the club. No one but the owner had access to a locker. It was customary for members owning lockers to keep intoxicating liquors therein, and to drink the same in the locker room and in the dining room, when they so desired. The locker room was most used by members of the club on week days between the hours of four and seven in the afternoon, and on Saturday evenings, during which time the average number of members present in the room was ten. Three or four times a year the number of members present was twenty. Ordinarily, about 140 or 150 lockers were owned and in use by members, and the lockers contained in the aggregate about 1000 bottles of intoxicating liquor, the property of the respective owners of the lockers. Neither the club, nor any of its officers, agents or servants, participated in any way in the purchase or sale of these liquors, or in the payment therefor. No other liquors were on the premises, and none were sold, or kept with intent to sell. Forty per cent of the members of the club neither kept nor drank intoxicating liquors on the premises of the club:—

Held:

1. That these facts constituted a statutory liquor nuisance, within the meaning of Revised Statutes, Chap. 22, Sec. 1.
2. To constitute a "place of resort" within the meaning of Revised Statutes, Chap. 22, Sec. 1, it is not necessary that the place be open to every one. It is enough if it be commonly and habitually resorted to by a limited class, as members of a club, or by individuals not constituting a class.
3. A club-house is none the less a place of resort, within the meaning of Revised Statutes, Chap. 22, Sec. 1, because it is resorted to only by members of the club.
4. A club house, where intoxicating liquors are given away, or drank by individual members of the club, and which is commonly and habitually resorted to by the members for drinking or giving away such liquors is a liquor nuisance, within the meaning of Revised Statutes, Chap. 22, Sec. 1, notwithstanding it is not unlawful to drink intoxicating liquors or to give them away.

Report on agreed statement of facts. Case to stand for trial.

This is an indictment against defendant, found at the January Term, 1914, of the Superior Court for the County of Cumberland, which charges this respondent with the offense of keeping and maintaining a liquor nuisance, as defined in Sec. 1, of Chap. 22 of the Revised Statutes of Maine. The case was reported on an agreed statement of facts to the Law Court, with the stipulation that if the Court determines that the facts, as set forth in the agreed statement, constitute the offense charged in the indictment, the case is to stand for trial; otherwise, respondent to be discharged.

The case is stated in the opinion.

Samuel L. Bates, County Attorney, for the State.

William C. Eaton, for respondent.

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

SAVAGE, C. J. By Revised Statutes, Chap. 22, Sec. 1, "all places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided by law, are common nuisances." The defendant has been indicted for a violation of this statute. The case has come before the court upon an agreed statement of facts, with a stipulation that if the facts therein set forth constitute the offense charged in the indictment, the case is to stand for trial; otherwise the respondent is to be discharged.

The agreed statement of facts shows, besides other things not material, that the defendant is a corporation chartered in 1878, for the purpose of establishing a club-house in the city of Portland, and of promoting literary and social intercourse among its members. It has the power to fix and limit the right of members in and to the corporate property, and the manner in which the same shall determine. Since 1878 the club has owned and maintained a club-house in Portland. The club-house at the time of the alleged offense was a three story building, containing reception and reading room, dining rooms, kitchen, pantries, refrigerating room, card rooms, billiard room, sleeping rooms, etc. The club also maintained a "locker room." In this room were two sideboards and two hundred and fifty "lockers." The lockers were built of practically uniform size, twelve inches high, twelve inches wide and eighteen inches deep.

These lockers were not rented, but, excepting those which were empty and unused, each had been purchased and was owned by an individual member of the Club, and would remain his property so long as he continued a member. Each locker was fitted with a lock and key, and no two keys were interchangeable, nor was there any master key nor any method of unlocking any locker except by means of the key of the owner. The two sideboards were equipped with glasses and mixing utensils. In the center of the room was a large circular table, and the room was otherwise furnished with several small tables and chairs. It was usual and customary for such members as owned lockers to keep intoxicating liquors therein, and to drink the same in this room and in the dining room, when they so desired. The locker room was most used by members of the Club on week days between the hours of four and seven in the afternoon, and on Saturday evenings, during which time the average number of members present in the room would be ten. On rare occasions, not exceeding three or four times a year, the number of members present in this room at one time would be as high as twenty.

"On the 15th day of November 1913," a time within the period covered by the indictment, "146 lockers were owned and used by members of the Club, and contained in the aggregate 1003 bottles, each bottle containing more or less intoxicating liquor. These liquors consisted of whiskey, gin, vermouth, rum, champagne, wine, beer, ale and other liquors, the property of the respective owners of the lockers. It is agreed that the condition so existing on said November 15 is a fair example of the condition there existing during all the period covered by the indictment."

"Any and all intoxicating liquor so kept and drank in the Club during the period covered by the indictment, was purchased and owned by respective members of the Club, and no officer, agent, servant or employe of the Club participated in any way in the purchase or sale of such liquor or in the payment therefor. During the period covered by the indictment there has not been in the said club-house, nor anywhere on the premises of the Club, any intoxicating liquor except such as was owned by an individual member thereof, and kept by him in his individual locker, as aforesaid, nor during said period has there been in the club-house or anywhere on the premises of the Club any intoxicating liquors sold or kept with intent to sell by any person, co-partnership or corporation whatsoever."

"During the period covered by the indictment, each member of the Club, who bought or sent intoxicating liquor to the club-house to be placed in his locker, paid to the Club a service charge of twenty five cents a bottle for spirituous liquors and four cents a bottle for beer and malt liquors. This service charge was imposed and collected as payment for ice, sugar, the use of glasses and mixing utensils and attendance of servants."

"During the period covered by the indictment, the number of resident members has been approximately one hundred and sixty; of non-resident members, ninety five; and of Army and Navy members, five; and at least forty per cent thereof, during said period, have neither kept nor drank intoxicating liquors on the premises of the Club."

"The rules and regulations adopted by the Club relative to the introduction to the club-house of non-members are rigidly and impartially enforced."

Though the house rules were made a part of the agreed statement, the court has not been furnished with a copy. But we deem them to be immaterial for present consideration. The grounds of decision will be found within a narrow compass.

Inasmuch as it is admitted that the place complained of was kept and maintained by the defendant, the only remaining questions are, whether the place was a "place of resort" within the meaning of the statute, and if so, whether intoxicating liquors were there kept, or sold, or given away, or drank, or dispensed in any manner not provided for by law. If both questions be answered in the affirmative, the offense is made out. For it cannot be doubted that it was resorted to in part for the purpose of drinking intoxicating liquors, whether it was a statutory "place of resort," or not.

The defendant contends that the club-house, in legal contemplation, was not a place of resort, for two principal reasons, first because it is not a public place, to which the public generally resorted or had a right to resort, and secondly, because the members who actually did go to the place, by virtue of their membership, essentially owned the place, that they used it as members, but did not in legal meaning resort to it; that in the language of *State* v. *Dodge*, 78 Maine, 439, "the building may be, and is *used* by the occupant or keeper. It it *resorted* to by other persons." We think neither ground is tenable.

It is unnecessary to discuss the fine distinctions suggested by counsel. In the statute, there are no such limitations upon the meaning of the phrase "place of resort" as counsel seeks to incorporate. The statute is clear and plain. It does not say "all places of public resort." It says "all places of resort." It does not say "all places of resort, except those to which admission is limited to members of the corporation keeping them." It says "all places of resort." It would be a perversion of terms to say that a club-house is not a place of resort, merely because it was resorted to only by members of the Club owning and maintaining it. What is a club? Why is a club formed and maintained but to furnish a common meeting ground to which the members may resort? Words in a statute are to be taken in their common and popular sense, unless the context shows the contrary. If a club-house is not a place of resort in the ordinary acceptation of the term, it is difficult to conceive what can be. To constitute a place of resort it is not necessary that it be open to every one. It is enough if it be resorted to by a limited class, as for instance, the members of a Club, or by certain individuals not constituting a class.

The defendant's club-house was a place of resort, not only with respect to the persons who resorted there, but also with regard to the manner and frequency of their resorting there. One well recognized definition of "place of resort"—and there are others—applies particularly well in this case, namely, a place to which persons commonly and habitually resort. *State* v. *Kapicsky*, 105 Maine, 127; *State* v. *Fogg*, 107 Maine, 177.

As to the remaining question, the case shows that the defendant's club-house was a place of resort where intoxicating liquors were kept and were drank. It was resorted to for that purpose, in part. But the defendant contends that they were not kept or drank in any such way as to bring the case within the teeth of the law. Its learned counsel argues that the phrase "in any manner not provided for by law" qualifies and limits not only the word "dispensed" which it immediately follows, but also the preceding words "kept," "sold," "given away," and "drank," and that the phrase in that connection is equivalent to "in violation of law," or "unlawfully," so that the statute should be interpreted to mean that "all places of resort where intoxicating liquors are unlawfully kept, or unlawfully sold, or unlawfully given away, or unlawfully drank, or unlawfully dispensed, are

common nuisances." And upon this premise it is argued that if the keeping, the drinking, or the giving away, etc., were lawful, the place where it is done is not a nuisance.

We think the fallacy of this argument is patent when we consider that there is no such thing as the unlawful drinking or the unlawful giving away, or the unlawful dispensing, except by sale, of intoxicating liquors. There is no statutory prohibition of drinking liquor, nor of giving it away. The qualifying phrase that is used is applicable to liquor that is kept or sold, but not to that which is drank or given away, and the statute should not be construed so as to make it applicable. It would seem that the legislature, having named certain specific conditions which would render a place of resort a nuisance, deemed it wise to add a sweeping clause to cover all contingencies, and to say that all places of resort where intoxicating liquors are "dispensed in any manner not provided for by law" are nuisances. By this construction the statute is rendered harmonious and effective. It is in harmony also with what may be supposed to be the purpose of the statute or one of its purposes. *State* v. *Kapicsky*, supra.

The evils which it seems this statute seeks to remedy are not those of merely drinking or giving away intoxicating liquors. They are rather the evils which may follow from drinking or giving away liquors at a place of resort, to which men commonly and habitually resort, where men socially inclined are apt to congregate for that purpose. If each member of this Club drank his own liquor and only his own, the club-house would still be a place of resort where intoxicating liquor was drank. But the universal conduct of men under such circumstances goes to show that ordinarily drinking at such a place is not so limited.

The court are of opinion that the facts agreed upon describe a statutory nuisance.

In accordance with the stipulation,

Case to stand for trial.

OLIVER G. PERRY *vs.* FRED Y. AMES, App't.

Knox. Opinion October 3, 1914.

Award. Exceptions. Finding of Referees. Law and Fact. Reference by Rule of Court. Reservation.

1. In the absence of fraud, prejudice or mistake on the part of a referee, appointed under Rule of Court, his finding is conclusive on questions both of law and fact.
2. The fact that the referee states in his report findings of law which, upon examination by the Court might be deemed unsound, is immaterial. The determination of the referee is final.
3. The word "mistake" used in this connection does not mean an error in judgment but some unintentional error such as a mathematical computation.
4. Rule of Court XLV, adopted in 1908, provides that "in references by Rule of Court no stipulation will be allowed for a review by the Court of the decision of the referee upon any question of law or fact submitted, but the referee may find the facts and report questions of law for decision by the Court."

On exceptions by defendant. Exceptions overruled.

This is an action on the case to recover part of the expense in repairing a wharf at Matinicus. The action was entered and tried in Police Court of Rockland, Knox County. Judgment in said Court was for the plaintiff; from which judgment, defendant appealed to the Supreme Judicial Court. The case was then referred, by Rule of Court, to a referee, who made a report of his findings to said Court. The presiding Justice accepted said report, and the defendant excepted to said ruling accepting said report.

The case is stated in the opinion.

Frank H. Ingraham, for plaintiff.

A. S. Littlefield, for appellant.

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

CORNISH, J. Exceptions by appellant to the ruling of the presiding Justice accepting the report of the referee to whom the pending cause had been referred by agreement of the parties and under rule of court in the ordinary form.

The objection raised by the appellant to the acceptance of the report is that "the referee made an error in law in his decision holding the defendant liable" and he states the reasons for his contention based upon the terms of the report itself. But this objection, even if true, is unavailing. In the absence of fraud, prejudice or mistake on the part of the referee his finding is conclusive on questions both of law and fact. This rule has been reiterated in a long line of decisions from *Smith* v. *Thorndike*, 8 Maine, 119, down to *Armstrong* v. *Munster*, 103 Maine, 29, and *Stewart* v. *Leonard*, 103 Maine, 128. The reason for the rule is that the parties, having submitted their cause without reservation to a tribunal of their own choosing, are bound by a decision of that tribunal and should not be permitted to afterwards return to the tribunal which they once abandoned and seek there a correction of the award on the ground that the referee has made an erroneous decision. The award must stand even though it is contrary to law. *Portland Mfg. Co.* v. *Fox*, 18 Maine, 117; *Brown* v. *Clay*, 31 Maine, 518; *Mitchell* v. *Dockrary*, 63 Maine, 82; *Deering* v. *Saco*, 68 Maine, 322.

Whether or not the referee states in his report his findings of law and whether upon examination the Court might deem them unsound is entirely immaterial. The finality of the award upon questions of both law and fact rests not upon whether the grounds of the decision are discoverable and if so reviewable, but upon the fact that the independent tribunal, from which no appeal lies to the Court, has determined the issues and that determination, in the absence of fraud, prejudice or mistake, must stand. The word "mistake" used in this connection does not mean an error in judgment either upon the facts or the law, but some unintentional error, as for instance in a mathematical computation. It is used in much the same connection as in R. S., Chap. 89, Sec. 1, Par. VII, authorizing the Court to grant reviews. *Pickering* v. *Cassidy*, 93 Maine, 139.

It was formerly the frequent practice to refer cases under a Rule of Court, both parties reserving the right to except in matters of law. This practice however was prohibited by the Rule of Court adopted in 1908, Rule XLV, which reads: "In references of cases by rule of Court no stipulation will be allowed for a review by the Court of the decision of the referee upon any question of law or fact submitted; but the referee may find the facts and report questions of law for decision by the Court."

In the case at bar, the reference was made without reservation in compliance with this Rule of Court, and the referee reported no question of law for decision by the Court.

The parties were therefore bound by the award and the report was properly accepted.

Exceptions overruled.

ROBERT F. SHACKFORD

vs.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Cumberland. Opinion October 3, 1914.

Burden of Proof. Directing Verdict. Exceptions. Guy Wire. Highway. Negligence. Permit to Erect and Maintain Poles on Streets. Personal Injuries. Reasonable Care.

The plaintiff, having been injured by one of the defendant's guy wires, alleged to have been placed within the limits of a public way upon which the plaintiff was a traveler, it was necessary, in this case, to show, among other things, that the guy wire was within the limits of a public way. The evidence does not show, nor would it authorize a jury to find, that the guy wire was placed within the limits of any way as located, or within the limits of any right of way acquired by the public by prescription.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case to recover for personal injuries sustained by plaintiff on July 15, 1908. Plea, general issue and brief statement of special matters in defense. At the conclusion of the evidence, the presiding Justice directed a verdict for the defendant, and the plaintiff excepted to that direction.

The case is stated in the opinion.

William Lyons, for plaintiff.

Payson & Virgin, for defendant.

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

SAVAGE, C. J. Action on the case to recover for personal injuries sustained by the plaintiff, July 15, 1908. The writ is dated May 20, 1913. At the conclusion of the evidence the presiding Justice directed a verdict for the defendant, and the case comes before this court on the plaintiff's exceptions to that direction.

In considering exceptions of this kind, it is not the province of the court to weigh conflicting evidence and ascertain its comparative value, but only to determine whether the evidence, considered most favorably for the plaintiff, would have warranted a verdict in his favor. *Johnson* v. *N. Y., N. H. & H. R. R.*, 111 Maine, 263.

The plaintiff alleges that on the day of the accident he was driving southerly on the road from White Rock to South Windham, and that at a point in the road at the top of Ward's Hill in Gorham, while passing a standing automobile, his horse became frightened and shied, so that the off forward wheel of his wagon ran against and locked into a guy wire placed there by the defendant to sustain one of its poles, whereby he was violently thrown from the wagon and injured. The guy wire was stretched from the top of the pole to the ground about six feet towards the traveled part of the road from the bottom of the pole. The plaintiff further alleges that the pole and guy wire were within the limits of the road; and he contends that the bottom of the guy wire was placed so near the wrought or traveled part of the road as to constitute a dangerous obstruction to travel upon the road.

The defendant pleaded the general issue, and further, by way of brief statement, that pursuant to the provisions of Chap. 378 of the Public Laws of 1885, it had obtained, on June 1, 1895, a written permit from the selectmen of Gorham to erect and maintain poles and wires thereon upon all the streets and highways in Gorham, and that if the guy wire complained of was within the limits of the road on which the plaintiff was traveling, it was a legal structure, by virtue of the permit so obtained.

The statute referred to in the plea provided that no telephone company should "construct lines upon and along the highways and public roads of any city or town, without first obtaining a written permit, signed by the mayor and aldermen, or selectmen, specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may be run." The case shows that the

selectmen of Gorham issued a permit to the defendant to "erect and maintain poles and wires thereon on all streets and highways in the town of Gorham."

We have no occasion now to pass upon the validity of this permit, but if we assume that it was sufficiently specific as to places where poles might be erected upon and along the roads and streets, the defendant should unquestionably be held to the exercise of reasonable care in so placing them within road limits as not unreasonably to interfere with the rights of travelers upon the road. The selectmen were vested with the power of prescribing the precise location of each pole and the necessary sustaining structure like a guy, and a pole and guy placed as so prescribed would, without any question, be a legal structure, and the defendant would not be liable for the consequences of maintaining it as prescribed. But where as in this case the permit was general, and the location of poles not specific, the company erecting the poles would be bound to exercise reasonable care in selecting places so as not unreasonably to obstruct public travel. And in this case, assuming that the guy complained of was within the limits of the road, it was a question for the jury to say whether the defendant had exercised reasonable care and judgment in placing the guy where it was. A verdict for the defendant should not have been directed on that ground.

But the plaintiff's right to recover, if he may be entitled to a verdict in other respects, depends in the end upon whether the guy wire was within the road or without it. If the guy was within the road, or if upon the evidence a jury would have been warranted in so finding, then the direction of a verdict for the defendant was erroneous. In such a case the question of liability is for the jury under proper instructions. But if the guy was outside the road limits, upon private property, or if a jury would not have been warranted in finding that it was within the road limits, then, under the circumstances of this case, the plaintiff is not entitled to a verdict. If the defendant is liable at all, it is because he has interfered with the rights of the plaintiff as a traveler upon the road. This is conceded, and requires no discussion.

The burden was on the plaintiff, then, to show that the guy was within the road limits. He introduced evidence which the jury might believe, that the bottom of the guy was placed within about two feet outside of the traveled or wrought part of the road. We

think it cannot be said that it was within two feet of the direct line of travel up and down the road, but of the line of travel widened as it may have been at that point by the intersection of a cross road. He also introduced evidence of other features in the situation, such as the ditch by the side of the road and so forth. Some of that evidence is disputed.

The plaintiff offered no evidence of the original location of the road, but seems to have relied upon such inferences as to road lines as might be drawn from the location of the wrought portion of the road with respect to the guy, and from general appearances. And as to general appearances, it may be said that there is little or nothing at this point, outside of the traveled part of the road, to indicate where the road lines are. There are no fences by the road side. There are no monuments of any kind. There are no physical aspects which help to decide the question. The adjacent field extends in appearance to the shoulder of the road ditch. Northerly of the point in question there are or have been fences on both sides of the road, but it is not shown whether their location would, or not, throw any light upon the location of the road lines at the point of the accident.

The defendant contends that in fact the guy was placed 2.7 feet outside the road limit, and on private property. It produced at the trial the record of the original laying out of the road by metes and courses, by the selectmen of Gorham in 1820. It has surveyed and retraced, as it claims, the lines of the original location, and its engineers testified that their survey shows that the original road line was, as we have stated, 2.7 feet inside of the guy, and thus that the guy is excluded from the road. But they also testified that they depended upon the statements of men, subject to the defects of human memory, for the location of certain monuments not now in existence, that some lines had to be shortened and others lengthened to fit the supposed termini of the lines as located; that some courses had to be changed for the same reason; and that the variation of the compass seemed to be uneven, less in some places than in others. All this seems to indicate that either the original survey or the one made by the defendant's engineers is inaccurate. And it is more likely that this is true of the former. *Magoon* v. *Davis*, 84 Maine, 178. The engineers also testified that in some places they found the wrought or traveled road outside the location on one side, and in some places

on the other, which indicates that the position of the wrought road is no certain evidence of where the side lines of the location are.

But without further discussion of the defendant's survey, we will say that we do not think that even an admittedly accurate resurvey of the old line, as recorded, nearly four miles long, as this was, with the conditions and results already named, imports such an absolute verity as to the original line of the road as actually laid out, within 2.7 feet, as would justify the court in taking the question from the jury, if there were any credible evidence opposed to it. In this case there is no such evidence. The plaintiff does not admit the correctness of the defendant's survey, but he does not show wherein it is wrong in any respect. And we think that if the public right, which includes the plaintiff's right, depends upon showing that the guy was within the road lines as located in 1820, the plaintiff cannot maintain this action. With all its imperfections, the evidence of the original location, unexplained, and without modification, is too certain to be disregarded by court or jury.

But the plaintiff says that the limits of the original location afford no certain criterion of the limits of the plaintiff's rights. He says, and it is true, that a public way may be proved by prescription or dedication. *Com.* v. *Old Colony & F. R. R. Co.*, 14 Gray, 93. And where there is a located way as in this case, its limits may be enlarged by prescriptive use. The public may appropriate by use land adjoining an existing highway. It may widen the road by prescription. But the prescriptive rights of the public extend only as far as they have used the land prescriptively. Not only has the plaintiff failed to show that the guy was within the limits of the road as originally laid out, but he has not shown that it was within the limits of any land acquired by the public by prescription, if any such there is. The testimony introduced by the plaintiff himself shows that the guy was about two feet outside of the line of public travel, and so outside of any rights which the public may have acquired by prescription. In no respect of the case has the plaintiff sustained the burden of showing that the guy was within the limits of the public way. The direction of a verdict for the defendant was right.

Exceptions overruled.

LEVI H. MAY *vs.* DOCITE LABBE.

Aroostook. Opinion October 3, 1914.

Boundaries. Description. Identity. Possession. Real Action. Title. Writ of Entry.

1. In a real action tried upon a plea of nul disseisin, a warranty deed to the plaintiff, or a warranty deed to one from whom the plaintiff has a quitclaim deed, is sufficient prima facie evidence of title in the plaintiff to authorize a verdict in his favor, unless the defendant proves a better title.
2. A grantee's occupation, in the absence of evidence to the contrary, is presumed to be under and in accordance with his deed, and co-extensive with the premises therein described.
3. Where in the deeds to the plaintiff the tract is bounded on the east "by land *occupied* by" the defendant, in the absence of evidence to the contrary, the presumption is that the east line of the plaintiff's tract is the west line of the defendant's land as it is described in his deed.
4. There was evidence sufficient to authorize a jury to find that the land described in the deeds to the plaintiff included the same land described in his writ.

On exceptions by plaintiff. Exceptions sustained.

This is a real action to recover a certain described tract of land situate in the town of Fort Kent, in the County of Aroostook. The defendant pleaded the general issue and filed a disclaimer as to a part of the described premises. At the conclusion of the plaintiff's evidence, the presiding Justice directed a verdict for the defendant. The plaintiff excepted to the ruling directing said verdict.

The case is stated in the opinion.

James D. Maxwell, for plaintiff.

J. A. Laliberte, A. S. Crawford, for defendant.

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

KING, J. This action is a writ of entry to recover a tract of land in the town of Fort Kent, Aroostook County. The plaintiff claims to own the westerly part of that portion of lot 18 south of the St.

Francis Road, and the defendant owns the easterly part thereof. Their ownerships adjoin, and the real controversy between the parties is the location of the line, extending from the St. Francis Road southerly to the south line of lot 18, which marks the eastern bound of the plaintiff's land and the western bound of that of the defendant.

The demanded premises are thus described in the writ: "Commencing at an iron pin driven near the center of Campbell Brook at the bridge where the St. Francis Road crosses said brook, thence southerly parallel with the east line of said lot 18 to the south line of said lot 18; thence westerly along the south line of lot 18 forty eight rods to the southwest corner of lot 18; thence northerly along the west line of lot 18 to the St. Francis Road; thence easterly along the line of the St. Francis Road to the place of beginning."

The defendant filed a disclaimer as to all the premises demanded except a strip 183.8 feet wide on the easterly side thereof, between the two lines as claimed on the one side and the other as the true line, and as to that strip he pleaded *nul disseisin.*

The plaintiff introduced several deeds of conveyance to himself, and to others under whom he claimed, and also the testimony of two surveyors each of whom had made certain surveys and a plan of the premises, and rested his case, whereupon, on motion therefor a verdict was directed for the defendant, and the case is before this court on exceptions to that ruling.

There was no evidence of actual possession of the demanded premises by the plaintiff or those under whom he claimed title. But in a real action tried upon a plea of *nul disseisin,* a warranty deed to the plaintiff, or a warranty deed to one from whom the plaintiff has a quitclaim deed, is sufficient prima facie evidence of title in the plaintiff to authorize a verdict in his favor, unless the defendant proves a better title. *Rand* v. *Skillin,* 63 Maine, 103.

The plaintiff introduced, among others, two conveyances to himself containing full covenants of warranty, one a warranty deed from Susan R. Mitchell, and the other a warranty mortgage deed from Charles Wiles which had been foreclosed.

But the defendant contends that there was no sufficient proof to identify the land described in the writ as the same land described in those warranty deeds to the plaintiff. In both of them the description of the land conveyed is substantially the same, and in the mortgage deed it is as follows: "The west part of Lot (Road) number

(18) eighteen. Being my homestead on which I now live, and bounded on the northerly side by the St. John river, on the easterly side by land occupied by Docite Labbe, on the southerly by the rear line of said lot number 18, and on the westerly side by land of John White."

It is suggested that neither of the boundaries of the land as described in the mortgage is the same as the corresponding boundary of the lot as described in the writ, but we apprehend that the defendant relies chiefly on his claim that the eastern line in the mortgage description is not shown to be the same as the eastern line in the writ description. We will, however, briefly refer to each of the boundaries.

1. An examination of the plan shows that lot 18 is bounded on the north by the St. John river and that the St. Francis Road crosses the lot from east to west some distance south of the river. The tract described in the mortgage is the west part of lot 18, extending the length of the lot from its rear on the south to the St. John river on the north, while the lot described in the writ extends only from the south line of lot 18 to the St. Francis Road. If, however, the land described in the mortgage included that described in the writ, it cannot be a material objection that it includes more than that.

2. It seems certain that the southerly line of the tract described in the writ is the same as the southerly line of the tract described in the mortgage, for the writ description bounds it on the south by "the south line of lot 18," and the mortgage description bounds it on the *south* by "the *rear* line of said lot number 18," and that must be the south line of the lot.

3. In the writ description the tract is bounded on the west by "the west line of lot 18," while in the mortgage description the language is "and on the westerly side by land of John White." But in the mortgage the tract described as conveyed is called "the *west part*" of lot 18. Where is the westerly boundary of the "west part" of lot 18? Is it not the west line of the lot? We think it should be so inferred, prima facie at least. And the fact that the mortgage description specifies the westerly boundary of the lot as land of John White is not inconsistent with the fact that it is also the west line of lot 18. The writ tract is bounded on the west by the west line of lot 18, and we think the mortgage tract is so bounded on the west, by a fair construction of its description.

4. In the writ the easterly line of the lot is described as follows: "Commencing at an iron pin driven near the center of Campbell Brook at the bridge where the St. Francis Road crosses said brook, thence southerly parallel with the east line of said lot 18 to the south line of said lot 18." In the mortgage the tract is bounded on the east "by land *occupied* by Docite Labbe." No evidence was introduced to show the western line of Labbe's occupation at the time the mortgage was given, July 31, 1896. But the plaintiff introduced Labbe's deed (a warranty deed to him dated September 28, 1881) containing the following description: "A parcel of land in Fort Kent being a part of lot No. 18 of the Saint John River lots and bounded as follows: Commencing at the southeast corner of lot No. 18, thence running northerly on the east line of lot No. 18 to the Campbell Brook, thence in a southerly course of said brook to a post on the south side of the County Road, thence southerly parallel with the east line of said lot No. 18 to the rear line of said lot, thence easterly to the first mentioned bound."

A grantee's occupation, in the absence of evidence to the contrary, is presumed to be under and in accordance with his deed, and co-extensive with the premises therein described. *Moulton* v. *Edgecomb*, 52 Maine, 31. In the absence of any evidence in this case showing that Labbe was in occupation of any land west of the line described in his deed, that line is presumed to be the line of his occupation. It follows, then, that the tract described in the mortgage to the plaintiff is bounded on the east by the west line of the tract as described in Labbe's deed. Where is that line? Is it substantially the same as the east line of the lot described in the writ? Each line extends from a point at the County Road, called also the St. Francis Road, "southerly parallel with the east line of said lot" to the rear or south line of the lot. Do those lines commence at the same point? From a study and consideration of the deeds, the plans of the surveyors and their testimony, we think the reasonable conclusion is that they do commence at substantially the same point.

The northeast corner of the land described in the Labbe deed is at the point where the east line of lot 18 crosses the Campbell Brook, and the plan shows that point to be not far south of the St. John River. From that point the boundary called for in the deed, taken in connection with the deed therein referred to and introduced, is *up the brook* in a southerly or southwesterly course "to a post on the

south side of the County Road." The plan shows the location of the Campbell Brook, and from that it clearly appears that the brook crosses the St. Francis Road only at one point. It follows, therefore, from the description in the Labbe deed, considered in connection with the plan, that the location of the post called for in the deed as on "the south side" of the County Road is at the place where the road crosses the brook. The iron pin called for in the writ description is also at the place "where the St. Francis Road crosses said brook." In the deed the post is designated as on the "south side" of the road, and in the writ the "pin" is described as driven "near the center" of the brook. It is true that it is not shown that the location of the pin is identical with that of the post, but if their locations are not precisely the same, they cannot be but a few feet apart, for they are both where the road crosses the brook, and the brook is quite small.

It seems perfectly clear that the northwest corner of Labbe's lot as described in his deed is at the junction of the road and brook, and from that point his west line runs southerly parallel with the east line of lot 18. It is equally clear that the northeast corner of the lot described in the writ is also at the same junction of the road and brook, and that from there its east line also runs southerly parallel with the east line of lot 18. And we think it is a proper inference, from all the evidence in the case, and in the absence of any proof to the contrary, that the west line of the Labbe lot is substantially the same as the east line of the lot described in the plaintiff's writ.

It is therefore the opinion of the court, after a careful examination of the deeds introduced, considered in the light of the facts disclosed by the plan and the testimony of the surveyors, that there was at least prima facie evidence that the plaintiff had title to the disputed strip or to some part of it.

Accordingly the entry must be,

Exceptions sustained.

STATE OF MAINE *vs.* JOHN G. LITTLEFIELD.

York. Opinion October 5, 1914.

Goods in Stock. Interstate Commerce. Itinerant Vendor. License. Order for Goods. Sale. Wares and Merchandise.

1. The words "in stock," as used in the Statute, means on hand for sale. The Statute means that whenever a stock of goods is moved into a town for the purpose of being put upon sale and sold in the town, the owner or person having them in possession for that purpose must obtain the license specified in Chap. 45 of Revised Statutes, before he engages in the business of selling them.
2. The soliciting of orders for goods to be shipped from another State, their shipment from another State to this State and the delivery of the goods to the persons who ordered them was interstate commerce, and the State cannot burden interstate commerce by compelling persons engaged in that commerce to pay a special tax for the privilege of engaging in such commerce.
3. In order to constitute a person a pedler, he must not only be an itinerant person, but must be engaged in vending or selling the articles mentioned in the prohibitory Statute as a business or occupation. It is not necessary that it should be his sole, or even his principal business, but it must be a considerable part of his occupation, business or vocation.

On report. Judgment for defendant.

This is a complaint and warrant against the defendant for conducting business as an itinerant vendor in the town of York, in the County of York, by selling goods, wares and merchandise at retail without a license, as required by Chap. 45 of Revised Statutes. At the conclusion of the evidence, the case was reported to the Law Court upon an agreed statement of facts, and it was stipulated that the report of the testimony is to be the agreed statement of facts upon which the Law Court is to render such judgment as the rights of the State and of the respondent require.

The case is stated in the opinion.

Hiram Willard, County Attorney, for the State.

Cleaves, Waterhouse & Emery, for respondent.

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

HALEY, J. This is a complaint and warrant against the defendant for conducting business as an itinerant vendor in the town of York in the County of York, by selling from a car, at retail, goods, wares and merchandise, without having procured the licenses required by Chap. 45 of the Revised Statutes, and is before this court upon report.

Section 1 of said chapter reads as follows:

"Every itinerant vendor who shall sell or expose for sale, at public or private sale, any goods, wares and merchandise without state and local licenses therefor, issued as hereinafter provided, shall be punished for each offense. . . . . ."

Sec. 15 of the same chapter defines the words "itinerant vendor" as follows:

"The words 'itinerant vendors' for the purposes of this chapter shall be construed to mean and include all persons, both principals and agents, who engage in a temporary or transient business in this state, either in one locality or in traveling 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, or who sell goods, wares and merchandise, at retail from a car, steamer or vessel."

The facts are undisputed, and it is agreed that the evidence may be considered an agreed statement of facts.

The defendant, at the time complained of, was a citizen of Wells, an adjoining town to the town of York, in the County of York, and was, and had been for a number of years, engaged in the grocery business at said Wells, and as a part of that business sold at retail and at wholesale flour, grain, sugar and feed. For a number of years prior to 1913 he had been selling flour, sugar and feed in carload lots to Mr. Plaisted, a merchant of York, but in the spring of 1913, Mr. Plaisted gave up the handling of those goods, and about six weeks prior to April first the defendant went to York, and solicited and took orders from residents of that town for grain, flour, sugar and feed, in quantities to load a freight car, with the understanding that defendant was to send the orders out of the State to be filled. The defend-

ant sent the orders out of the State for enough goods to fill the orders taken in York and other places and for his business at Wells, three or four carloads in all. The goods arrived at Kennebunk on the tracks of the Boston and Maine Railroad, and the defendant sorted out of the goods, those to fill the orders taken in York, placed them all in one car and forwarded them to York Village, some twelve to fifteen miles distant, by the Atlantic Shore Line Railway. The goods arrived at York Village on April third, and the defendant delivered from the car to the parties in York the goods ordered by them, and was paid the price agreed upon, the bills varying from fifty to one hundred and seventy dollars for each party, except that, as the goods did not arrive in York as early as expected, some of the parties who had given orders did not call for the goods, and those the defendant sold from the car, selling to one Ralph Merrill two 100 lb. bags of sugar, to Gilbert H. Martin two 100 lb. bags of sugar and one barrel of flour and two or three bags of grain, and to Charles Blake one 100 lb. bag of sugar. The State claims a conviction for two reasons.

First. The delivery from the freight car by the defendant of the goods ordered by the parties who received them, they having been ordered to be shipped from another State, and having been so shipped and delivered by the defendant.

Second. The sale and delivery to the three persons above named, who purchased the goods ordered by parties who did not call for them.

First. The acts of the defendant in soliciting orders for the goods, and delivering them from the car to the parties ordering them, were not unlawful. The facts upon this branch of the case are practically the same as in *Stewart* v. *Michigan*, decided by the U. S. Supreme Court, March 23, 1913, 232 U. S. Supreme, 665, in which case the defendant was convicted in the State court under a statute for doing without a license similar acts to the acts done by the defendant in this case, without a license, and it was held on a writ of error that the conviction was error. By the rules of law declared in that case, and in *Crenshaw* v. *Arkansas*, 227 U. S., 299, the acts of the defendant were not unlawful. The soliciting of orders for goods to be shipped from another State, their shipment from another State to this State, and the delivery of the goods to the persons who ordered them, was interstate commerce, and the State cannot burden interstate

commerce by compelling persons engaged in that commence to pay a special tax for the privilege of engaging in such commerce.

Second. Did the sale to the three persons above named of goods that had been ordered by other parties from the defendant to be shipped them from another State, which they did not receive by reason of not having called for them, render the defendant an itinerant vendor within the provisions of Chap. 45? The allegations of the complaint and warrant are, in substance, that the defendant did engage in a temporary or transient business in York, and did, for the purpose of carrying on such business, sell goods, etc., at retail from a car. The goods were sold from a car, and we must determine what the statute means by the words "temporary or transient business." Sec. 4 of said chapter provides that every itinerant vendor desiring to do business in this State shall make a deposit with the Secretary of State, and take out a State license. Sec. 6 provides that every application for a local license shall be signed by the holder of the accompanying State license, and shall specify the kind and line of goods then in stock in such town, with the name of the town in which said goods were last exposed or offered for sale. Such local license fee shall be computed and collected in each town, respectively, in which said goods shall be successively offered or exposed for sale.

The defendant had no line of goods in stock in the town of York. The words "in stock", as used in the statute, means on hand for sale. All the goods he had on hand in York had been bargained for and sold. They were in York for the purpose of delivery only. The statute means that whenever a stock of goods is moved into a town for the purpose of being put upon sale and sold in the town, the owner or person having them in possession for that purpose must obtain the licenses specified by chapter 45 before he engages in the business of selling them. The goods were not in stock for sale. They were not taken to York for sale, but were there to be delivered to the parties who had ordered them and for whom they had been shipped from another State, and the sale of them, when the persons on whose orders they had been shipped from another State, did not come for them, was a mere incident of the lawful business of the defendant; that is, the delivery of goods brought into the State by interstate commerce, and not the business of an itinerant vendor. "Business, in a legislative sense, is that which occupies the time, attention, the labor of men for the purposes of livelihood or for profit, a calling for

the purpose of a livelihood." *State* v. *Boston Club*, 45 La. Ann., 585, (20 L. R. A., 186). Webster: "Business; that which busies, or engages time, attention, or labor, as a principal serious concern or interest." "Business is the word that signifies and denotes the employment or occupation in which a person is engaged to procure a living." *Goddard* v. *Chafee*, 2 Allen, 395. "It is a synonym of employment, signifying that which occupies the time, attention and labor of men for the purposes of a livelihood or profit." *Martin* v. *State*, 59 Ala., 36.

In *Hay* v. *Commonwealth*, 107 Ky., 658, the respondent was prosecuted under a statute which prohibited all itinerant persons from vending various articles, and named among others goods, wares and merchandise. The defendant was a driver of an oil wagon owned by the Standard Oil Company, and the general agent of said company at Lexington had arranged with customers at Nicholsville to send an oil tank wagon to their places of business and to deliver them oil in wholesale quantities and at wholesale prices, fixed by said company from time to time; that said oil tank should come as often as was necessary to keep said customers supplied for their retail trade, and that the company sent its oil tanks regularly to Nicholsville for said purpose about every five days. The defendant sold and delivered to one Hendron, oil, who was not one of the regular customers of said company, and he also sold and delivered to one Klien, at the request of his clerk, who told defendant that his house sold oil; that said arrangement was made with said oil dealers in Nicholsville, because it was more convenient for them to get their oil in this way than to let it come from Lexington from time to time and have it shipped by rail. The above testimony was excluded and the court said: "We are clearly of opinion that the court erred in refusing to admit the testimony offered. Such testimony was competent, and, if believed by the jury, would have entitled the appellant to a verdict of not guilty, for the reason that, if true, it clearly showed that the defendant was not an itinerant person engaged in the selling of oil as a business or occupation. It would hardly be contended that a merchant of Nicholsville, having in charge a load of goods being hauled or shipped from Lexington to Nicholsville, might not on one occasion sell a few articles of goods on the road between the two points without violating the statute under consideration," and the judgment appealed from was reversed.

The court in the above case said: "It is undoubtedly true that, in order to constitute a person a peddler, he must not only be an itinerant person, but must be engaged in vending or selling the articles mentioned in the prohibitory statute as a business or occupation. It is not, however, necessary that it should be his sole business, or even his principal business, but it must, nevertheless, be a considerable part of his occupation, business or vocation."

The acts of the defendant upon this branch of the case, when judged by the above definitions and authorities, do not show that he was engaged in business as an itinerant vendor within the meaning of Chap. 45, R. S. Without deciding whether the sales were at retail or not, it is clear that the acts complained of do not show that he was engaged in the selling of the goods as a business, occupation or vocation, and the defendant is entitled to judgment, and the mandate must be,

Judgment for defendant.

STATE OF MAINE *vs.* INTOXICATING LIQUORS,

JOSEPH DONDIS, Claimant,

and

JOSEPH DONDIS, In Certiorari,

vs.

WILLIAM P. HURLEY, Judge,

and

LEWIS F. STARRETT, Recorder of Rockland Police Court.

Knox. Opinion October 6, 1914.

Certiorari. Claimant. Interest in Liquors. Intoxicating Liquors. Owner. Record.

1. The Statutes establishing the right of an owner to make claim for liquors under seizure, and secure their release, contemplated a case where the real owner should appear, either personally or by properly authorized representative, and make claim and produce proof sufficient to satisfy the court having jurisdiction of the justice of his claim and of his lawful possession and ownership in fact.
2. The claimant in this case does not measure up to the requirements of the Statutes. He is not such a party in interest as the law contemplates, nor does he show agency.

On report. Appeal dismissed. Writ quashed.

Two cases considered together. The first case is an appeal from the order of the Judge of the Police Court of the City of Rockland, condemning certain liquors described in the libel. The second case is certiorari, in which the claimant attacks the validity of the warrant, libel and monition, and the jurisdiction of the court. At the conclusion of the evidence, the cases were reported to the Law Court upon so much of the evidence as is legally admissible, the Law Court to render final judgment therein.

The cases are stated in the opinion.

Philip Howard, County Attorney, for the State.

M. A. Johnson, for respondent.

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

HANSON, J. These cases are before the court on report, and are to be considered together. The first is an appeal from the order of the Police Court of the City of Rockland condemning certain liquors described in the libel, in which the claimant attacks the validity of the warrant, libel and monition, and the jurisdiction of the court.

The second case is based upon errors claimed to exist in the record below, and the writ was issued upon the assumption that the errors assigned in the petition, existed in fact, and that the petitioner was entitled to relief.

The record presents two alleged records of the Rockland Police Court in a search and seizure process, and a libel and monition growing out of the same. The first record is that of the recorder of that court who issued the warrant and libel, assuming to act under authority of the act creating that court.

The other record is furnished by the Judge of that court, and is inconsistent with and in some respects a denial of the truth of the record made by the recorder, and counsel for the claimant relies to a great extent on the record and statements of the Judge to sustain his contentions in both cases.

While it is the stated purpose of the report to determine all matters in dispute in these cases, and the desire of the court as well to end litigation, we are confronted at the outset by a serious challenge of the truth of the original record, and the claimant presents as a true record copies of a record claimed to have been made by the Judge of the same court which are at variance with the record of his own recorder, and which, we must say, are not without fault, however erroneous the acts or records of the recorder may have been. We are not able with the report before us to determine which is the correct record, or if either is valid. An inspection of the original papers, and an examination of the witnesses involved would be necessary to a complete understanding of the cases, and meet the ends of justice, if injustice has been done.

Without passing further upon the validity of the proceedings, we do find, however, a grave objection to the maintenance of the appeal, or the writ of certiorari. The claimant urges his right to maintain both in the following language:

"And now comes Joseph Dondis, of Rockland in said county, who says that he is the agent and general manager of the Knox County Bottling Works, whose business is that of bottlers of soda, uno beer, and what is known as small beers, all non intoxicating, at said Rockland, and specifically claims as said agent and general manager, the right, title and possession in the items hereinafter named as having as said agent and general manager a right to the possession thereof at the time when the same were seized. And the foundation of said claim is that they were collected in from various sources and places in the building of said Knox County Bottling Works for storage, from which they were seized, and that they were to be shipped when further orders were obtained out of the state to their real owners thereof, and that in said capacity he had the right to the possession thereof at the time when the same were seized, and that they were taken from his lawful possession on the 29th day of March, 1912, from the frame building, additions thereto, outbuildings and appurtenances thereof occupied by said Knox County Bottling Works as a manufactory and storehouse, stated in the libel as a store, and situate on the north side of Sea Street, in said Rockland, by one Frank F. Harding, City Marshal of said Rockland, and this claimant declares that they were not so kept or deposited for unlawful sale as is alleged in the libel of said Frank F. Harding and in the monition issued thereon."

The claimant discloses no direct personal interest in the liquors in question. He says he is the manager of the Knox County Bottling Works, and as such manager had the right to possession of the liquors; that the liquors were in storage awaiting the time when, augmented by further orders and collections, they should be shipped to their real owners outside the State.

The statute establishing the right of an owner to make claim for liquors under seizure, and secure their release, contemplated a case where the "real owner" should appear, either personally, or by properly authorized representative, and make claim and produce proof sufficient to satisfy the court having jurisdiction of the justice of his claim, and of his lawful possession and ownership in fact.

The claimant in this case does not measure up to the requirements of the statute. *State* v. *Intoxicating Liquors*, 69 Maine, 524. He is not such a party in interest as the law contemplates, nor does he show agency. He cannot prevail in either contention. *Levant, Petitioners*

for Certiorari, v. *County Commissioners*, 67 Maine, 429. *State* v. *Intoxicating Liquors, Eastern Steamship Company, claimant*, 112 Maine, 138.

The entry will therefore be,

Appeal dismissed.
Writ quashed.

GEORGE W. ROSS *vs.* FOSTER S. REYNOLDS.

Washington. Opinion October 8, 1914.

Admissibility of Letter. Deceit. Exceptions. False Representations. Inducement. Sale.

1. To secure the reversal of a ruling, on exceptions, it is necessary to show not only that the ruling was erroneous, but that it was prejudicial.
2. When the terms of an oral contract are in dispute, it is proper, as a general rule, to let in the whole conversation concerning the contract, and the various negotiations leading up to it.
3. When a question asked of a witness is objected to, and is ruled to be admissible but no answer is made, exceptions are not sustainable.
4. The mailing of a letter properly addressed is prima facie evidence of delivery by due course of mail to the addressee.
5. A letter written by one party to a controversy to the other, touching the subject matter of the controversy may be admissible, although in a sense self-serving, and although it evoked no reply.
6. The fact that a witness for one party has been recently in litigation with the other is admissible to show bias or prejudice in the witness.
7. A representation made as an inducement in the sale of an automobile, as to its age or the length of time it has been in use, is material in an action for deceit.
8. A representation made as an inducement in the sale of an automobile, that it is in good running order, may be the expression of an opinion, or it may be a statement of fact. If the latter, it is actionable.

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

This is an action for deceit in the sale of an automobile. Plea, general issue. The jury returned a verdict for the plaintiff of $309.70. The defendant had several exceptions to the admission and exclusion of evidence, which are specifically considered in the opinion. Defendant also filed a motion for a new trial.

The case is stated in the opinion.

H. E. Saunders, W. R. Pattangall, R. J. McGarrigle, for plaintiff.

J. H. Gray, for defendant.

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

SAVAGE, C. J. Action for deceit in the sale of an automobile. The verdict was for the plaintiff, and the case comes up on the defendant's exceptions and motion for a new trial.

In his writ the plaintiff alleged that the defendant in making the sale to him deceived him in three respects, namely, that he said the car had not been in use for more than a year, and that it was in good running order and condition, and that the defendant agreed that he would give the car a thorough overhauling and put it in first class shape. The presiding Justice properly ruled that no recovery could be had in this case for failure to keep this agreement.

The exceptions are eight in number and relate to the admission and exclusion of evidence.

1. The plaintiff testified that in one of the conversations he had with the defendant relative to the purchase of the car, the defendant suggested that he make a trade with a Mr. Calkins with regard to the security to be given. Exception was taken to the admission of this testimony. This evidence may not be relevant to the issue of deceit, but it is not perceived how it can be regarded as prejudicial. To secure the reversal of a ruling, on exceptions, it is necessary to show not only that the ruling was erroneous, but also that it was harmful. *Bath* v. *Reed,* 78 Maine, 276. Besides, when the terms of an oral contract are in dispute, it is proper, as a general rule, to let in the whole conversation concerning the trade, and the various negotiations leading up to the trade. Though much that is said may not bear directly upon the disputed points, it may nevertheless throw valuable light upon the inquiry; it may help to strengthen the proba-

bilities and improbabilities, the one way or the other. When a witness is asked to narrate a conversation which ended in a contract, it is impossible to tell in advance how much of it may be wheat, and how much chaff. It must be left to the discretion of the court to keep the witness within as narrow limits as reasonably may be, for the eliciting of the truth and the whole truth. It is within bounds to say that few verdicts could stand if the admission of merely irrelevant evidence were a good ground for reversal.

2. There were certain obvious defects in the car, which the plaintiff knew about and which he alleges the defendant agreed to repair. His counsel was asking him about them in detail, for the purpose, as he stated to the court, of explaining why the plaintiff took the car immediately to the defendant's garage. The defendant then objected. The court ruled the evidence admissible for that purpose. But no answer was made to the question objected to, and no further question on this line was asked at that time.

3. The defendant objected to the plaintiff's testifying that he, the defendant, wanted a mortgage on certain real estate for security. Though the evidence was immaterial, it could not have been harmful.

4. The plaintiff was permitted to testify that he took the car to the defendant's garage to be overhauled. Whether it was because of the agreement to make repairs, or because of some newly disclosed defect in the car, the record fails to disclose. If the car was taken to the garage on account of some newly discovered defect, the evidence of it would be relevant to the alleged false representation that the car was in good running order and condition. If the car was taken to the garage for the repair of defects as agreed to be made, the evidence of it was immaterial, but in view of the express ruling of the court, not prejudicial.

5. The plaintiff was permitted to testify as to the contents of a letter which he said he wrote to the defendant, to the effect that he had misrepresented the car, that it was in bad condition, and not in good running order. The letter itself was not produced, and notice to produce was waived. The defendant objected that it was not competent to show the contents of the letter, until it was shown that the defendant received it. And in this contention the defendant was right. But the plaintiff testified that he mailed the letter properly addressed to the defendant. That is prima facie evidence of delivery

by due course of mail to the addressee. *Chase* v. *Surrey*, 88 Maine, 468; *Johnson* v. *N. Y., N. H. & H. Railroad*, 111 Maine, 263.

6. The next exception is to the contents of the letter itself. Such a letter is clearly admissible. Though in a sense self serving, it is admissible because, if the charge contained in it is untrue, it is calculated to evoke a reply. If no reply is made, that fact, unexplained, may afford an inference that the charge is true.

7. The subject matter of this exception is the same as that stated under exception 4, and this exception must fall with that one.

8. The plaintiff, on cross-examination of one of the defendant's witnesses was permitted to draw out from him the fact that he had within the preceding year been in litigation with the plaintiff. This was admissible to show bias or prejudice in the witness. It is a common and proper mode of impeachment.

No one of the defendant's exceptions can be sustained.

We will briefly discuss the motion for a new trial. The false representations relied upon as alleged are that the car had not been in use for more than one year, and that it was in good running order and condition. The trade was in 1912. The plaintiff claims that the defendant told him that the car was one year old then, and that in fact it was two years old. The defendant admits that the car was a 1910 car and claims that he told the plaintiff so. The plaintiff claims that the defendant represented that the car was in good running order and condition, and that in fact it was not. The defendant admits that he told the plaintiff that the car was in good running condition, and claims that it was so in fact. These are the issues.

A representation made as an inducement in the sale of an automobile, as to its age or the length of time it has been in use, is undoubtedly material as affecting value; and if false, it is actionable. A representation under like circumstances that it is in good running order may be the expression of an opinion, or it may be the statement of a fact. If the former, it is not actionable; if the latter, and false, it is actionable. If the representation is capable of being understood either as an expression of opinion or as a statement of fact, which it is must be determined in accordance with the understanding of the parties. If it was made as a statement of fact and was so understood it lays the basis for an action of deceit. So, if the statement was fairly susceptible of being understood to be a statement of fact, and

not a mere opinion, and the other party did so understand it. *Hotchkiss* v. *Coal & Iron Co.*, 108 Maine, 34, 46. If an automobile is represented to be in good running condition, when in fact, as is claimed in this case, there are hidden defects which prevent its proper operation, it is difficult to see why the representation may not be deemed to be a statement of fact, so far as those defects are concerned.

A careful examination of the evidence leads us to conclude that a jury would be warranted in finding for the plaintiff upon either issue presented. It cannot be said, we think, that the verdict is so manifestly wrong as to require or permit the interference of the court.

Motion and exceptions overruled.

THEODORE R. SOUTHARD

vs.

BANGOR & AROOSTOOK RAILROAD COMPANY.

Aroostook. Opinion October 8, 1914.

Damages. New Trial. Newly Discovered Evidence.

1. A motion by a defendant in an action for personal injuries for a new trial on the ground of newly discovered evidence may be sustained when the evidence taken under it shows such acts and doings of the plaintiff after the trial, but nearly related to the time of the trial, that if this testimony be true, the plaintiff at that time could not have been in the physical condition he said he was and could not have been suffering as he claimed. Such evidence may be regarded as newly discovered.
2. A motion for a new trial on the ground of newly discovered evidence will be granted, if the moving party is otherwise entitled to it, when it seems probable to the court that the verdict will be different when the case is submitted anew with the additional evidence.

On motion by defendant. Motion sustained. New trial granted on the question of damages only.

This is an action on the case to recover damages for personal injuries sustained on account of the negligence of the defendant. Plea, the general issue. The jury returned a verdict for the plaintiff of $8500. The defendant filed a general motion for a new trial and also a motion for a new trial on the ground of newly discovered evidence.

The case is stated in the opinion.

F. W. Halliday, for plaintiff.

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

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

SAVAGE, C. J. The plaintiff recovered a verdict of $8500 against the defendant for personal injuries. The only question submitted to the jury was that of damages, for the defendant admitted liability. The defendant filed a general motion for a new trial; also a motion based on newly discovered evidence.

As to the general motion, we think it only necessary to say that the verdict seems excessive. But we will not undertake now to discuss the question, for we think the motion based on newly discovered evidence should be sustained.

At the trial the vital question was,—what was then the plaintiff's physical condition, so far as it had been affected by the acts for which the defendant was responsible? Knowing this, the jury could determine past damages and draw reasonable inferences as to future damages. The claim of the plaintiff, which his testimony tended to support was that, as a result of his injuries, he was suffering from an incurable disease, that he was physically wrecked, and able to do but little, if any, manual labor.

The newly discovered evidence comes from several witnesses and relates to the acts and doings of the plaintiff after the trial, but nearly related to the time of the trial, of such a character, that if this testimony is true, the plaintiff at that time could not have been suffering as he claimed, and could not have been in the physical condition he said he was. Since the evidence must be submitted to a jury, we do not analyze it, but it tends to show that in the very next month after

the trial he went into the woods on a hunting trip, that within three or four months after the trial he engaged in heavy work, went to dances and danced, and did other things indicating that his physical condition was good, and it is strongly contradictory of what the plaintiff claimed at the trial.

That evidence of things happening after the trial may be regarded in some cases as newly discovered is settled in *Mitchell* v. *Emmons*, 104 Maine, 76. We think the evidence in this case should be regarded as newly discovered. Though it is evidence of acts which did not occur until after the trial, it is evidence of a condition which existed at the trial, and throws newly discovered light on that condition.

We think that justice requires that the defendant should have an opportunity to submit this evidence to a jury to be considered by them, together with any evidence the plaintiff may have to rebut it, and with such other relevant evidence as may be offered by either party on the question of damages. The evidence brings the case within the condition applicable to the granting of new trials on the ground of newly discovered evidence, namely, that it seems "probable to the court that the verdict will be different when the case is submitted anew with the additional evidence." *Parsons* v. *Railway*, 96 Maine, 503.

Motions sustained.
New trial granted on the question of damages only.

ALVAH LINDSEY *vs.* FRED R. SPEAR.

Knox. Opinion October 8, 1914.

Assumption of Risk. Negligence. Ordinary Care. Reasonably Safe Place.

1. It is the duty of a master to use reasonable care to provide a reasonably safe place for his servant to work in.
2. A servant assumes the risks which are ordinarily incident to his employment, and such other risks as are known to him, or which by the exercise of reasonable care he ought to know. He assumes the obvious risks.
3. When the evidence of negligence in an action to recover for personal injuries is of such a character that only one conclusion can be drawn by reasoning and reasonable men, its effect becomes a matter of law.
4. If the plaintiff's evidence in an action for personal injuries caused by the alleged negligence of the defendant would not warrant a finding by the jury that the defendant had been negligent, it was the duty of the court to direct a verdict for the defendant.

On exceptions by plaintiff. Exceptions overruled.

This is an action to recover for injuries which plaintiff claims to have sustained by reason of the negligence of the defendant. At the conclusion of the evidence, the presiding Justice directed a verdict for the defendant, and the plaintiff thereupon excepted to said directing of said verdict.

The case is stated in the opinion.

Philip Howard, for plaintiff.

Arthur S. Littlefield, for defendant.

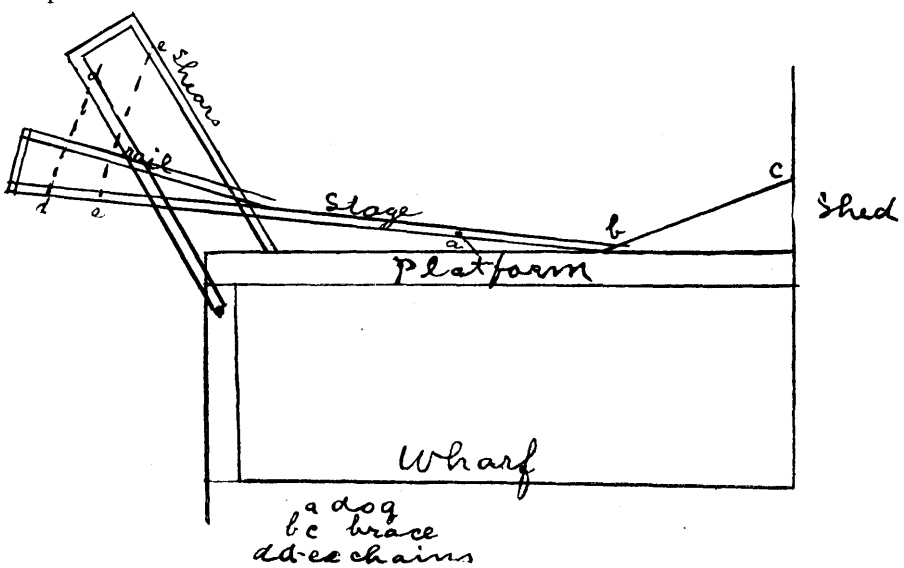
SITTING: SAVAGE, C. J., BIRD, HALEY, HANSON, PHILBROOK, JJ.

SAVAGE, C. J. Case to recover for injuries caused by defendant's alleged negligence. The presiding Justice directed a verdict for the defendant, and the plaintiff excepted.

The plaintiff was employed by the defendant in unloading coal from a vessel. The coal was being hoisted by means of shears and hoisting gear from the hold of the vessel in tubs to the level of the stage on which the plaintiff worked, and was then emptied from the tubs into wheelbarrows, and the plaintiff's particular duty was to wheel it from the tubs across the stage and dump it in the shed. It was also his duty, when a tub was hoisted, to assist in emptying or dumping it into his wheelbarrow. It took two tubs, about 1000

pounds of coal, to fill the wheelbarrow. When the accident happened one tub had already been emptied into the barrow, and another one was hoisted. The plaintiff describes what followed in these words:—"When this tub came up we dumped it. Those shears would certainly always have a shake; when this rocked, it rocked the whole stage, ... and something swiveled like that, and when it did I went over the line. . . . . Something seemed to travel. I noticed something slipped under my feet and when it did, it throwed me right over the line."

The stage was a completed structure. One end was suspended by chains attached to the shears overhead. The other end rested on a platform, which was several feet above the wharf. When not in use it appears to have been pulled in. When a vessel came to the wharf to be unloaded, it was pushed out with crowbars so that when ready for use both the shears and the front end of the staging extended over the side of the vessel. The stage was then fastened in position by iron dogs on either side driven into the platform on which it rested. It was further stayed by planks or bars on the platform extending from cleats on the inner end of the stage to the end of the coal shed. And so long as it remained stayed in this manner, no question is made but that it was reasonably safe for men to work upon. The following sketch will give a sufficiently approximate profile view of the situation.



A rope or life line was stretched from post to post across the front end of the stage, about two and one half feet from the floor. The ends were attached to the outer rail posts. Before the plaintiff was employed the stage had been pushed into place for work, and its condition remained unchanged until the time of the accident.

It is the undoubted rule that it is the duty of the master to use reasonable care to provide a reasonably safe place for his servant to work in. It is also the rule that the servant assumes the risks which are ordinarily incident to his employment, and such other risks as are known to him, or which by the exercise of ordinary care he ought to know. He assumes the obvious risks. These principles have been declared so many times that citation of authorities is unnecessary.

The plaintiff in his specifications alleges in substance that the accident was due to one or two or all of the following factors, namely, (1) the insufficiency in height and material of the "life line," which we assume was placed where it was to protect men from falling off the stage either by accident, or when it was shaken by the dumping of coal, (2) the rotten and decayed condition of the platform, so that the dogs would not hold, (3) the insecure fastening of the iron dogs, whereby the stage could sway, (4) the insecure fastening of the braces, so that they became displaced, with the same effect, and (5) that the staging was improperly fastened to the shears. As to the insufficiency of the life line, it need only be said that the defect, if defect it was, was an obvious one, the risk of which was assumed by the plaintiff. The plaintiff had worked on this stage many times and was perfectly familiar with its construction. As to the other supposed defects, there is absolutely no evidence of them, except the rocking or swaying of the stage testified to by the plaintiff, and by one other witness whose presence there is denied and is doubtful. There is no evidence that the dogs had failed to hold, or that the braces were out of place. If either of these things had occurred it must necessarily have been observed after the accident. There were six or eight men working on this coal operation. They were known to the plaintiff. It is not shown that they were unfriendly to him. If the iron dogs were found to be insecure, or the braces out of place, after the accident, it seems beyond belief that some of them would not have known of it, and if they had known of it, it seems equally beyond belief that the knowledge should not have come to the plaintiff. All the witnesses who noticed the

staging afterwards, and there were several, declare that there was no trouble with dogs or braces. It is testified to by one witness that planking in the platform was rotten, but that is of no consequence if the dogs held. The plaintiff suggests that the defects, if they existed, may have been remedied before the witnesses had opportunity to observe them. But there is no evidence to support the suggestion.

On the other hand, the case shows that the stage from the very manner of its construction was not and could not have been entirely steady and firm when great weights of coal were dumped from the tubs to the barrow. That it should shake or sway a little was inevitable. And this must have been known to the plaintiff, and was assumed by him.

Now it appears that the plaintiff had been drinking that morning. He admits it. The evidence shows beyond any reasonable question that he was more or less intoxicated, and that he had been warned that day by fellow workmen of the danger in working upon that stage in an intoxicated condition. His description of his sensations at the time of the rocking and swiveling of the stage are not unlike what might be expected in the case of an intoxicated man.

It is true, as the learned counsel for the plaintiff urges, that the questions we are discussing are questions of fact. It is true, too, that the jury is the proper tribunal to determine questions of fact. But when the evidence as to negligence in a case like this is of such a character that only one conclusion can be drawn by reasoning and reasonable men, it becomes a question of law. *Maine Water Co.* v. *Crane*, 99 Maine, at page 485, and the judgment of the court must follow the conclusion of fact. And if a verdict of the jury should happen to be contrary to that conclusion, it is the duty of the court to set it aside.

Again, the contention of the plaintiff rests solely upon an inference which it draws from what he calls a "rocking" of the stage. There is at least as strong an inference that the rocking which the plaintiff seemed to feel was due to his intoxication.

Upon the whole, we feel bound to say that the evidence, if it had been submitted to a jury, would not have warranted them in finding that the defendant had failed to perform his duty to the plaintiff, with respect to the safety of the stage on which the plaintiff worked. It was, therefore, the duty of the presiding Justice to direct

a verdict for the defendant. *Frederickson* v. *Central Wharf Towboat Co.*, 101 Maine, 406; *Young* v. *Chandler*, 102 Maine, 251; *Veano* v. *Crafts*, 109 Maine, 40.

Exceptions overruled.

FRED F. HALL AND NEWTON A. HALL

vs.

ALBERT W. HALL.

Knox. Opinion October 8, 1914.

Assignment. Justification. Notice to Co-tenant. Penal Statute. Pleadings. Revised Statutes, Chap. 97, Sec. 5. Statute of Limitations. Tenants in Common.

1. Revised Statutes, Chap. 97, Sec. 5, which provides that if a tenant in common cuts down wood without first giving thirty days written notice to his co-tenants, he shall forfeit three times the amount of damages, is not a penal statute within the meaning of Revised Statutes, Chap. 83, Sec. 97, which requires that actions for any penalty or forfeiture on a penal statute shall be brought within one year after the commission of the offense.
2. An assignee of a chose in action may bring suit thereon in the assignor's name without filing with the writ a copy of the assignment.
3. When a defendant would justify or excuse an act which is unlawful unless justified or excused, he must plead the justification.
4. In an action by tenants in common against a co-tenant for cutting wood without giving written notice, justification by permission must be pleaded.
5. To allow or refuse leave to a defendant to amend his pleadings so as to set up a justification by license is a matter of discretion, to the exercise of which exceptions do not lie.

On exceptions by defendant. Exceptions overruled.

This is an action brought under Revised Statutes, Chap. 97, Sec. 5, by two tenants in common against another tenant in common and

undivided land to recover three times the amount of damages done by cutting wood and timber by the defendant on said common and undivided land. The defendant pleaded the general issue and the Statute of Limitations. The jury returned a verdict for the plaintiff.

The case is stated in the opinion.

E. B. Burpee, for plaintiffs.

Rodney I. Thompson, for defendant.

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

SAVAGE, C. J. This cause is brought under R. S., Chap. 97, Sec. 5, which provides, so far as is necessary to state here, that if a tenant in common of undivided lands cuts down or carries away timber or wood, without first giving thirty days written notice to his co-tenants, he shall forfeit three times the amount of damages; also that any one or more of the co-tenants without naming the others may sue for and recover their proportion of such damages. Joseph Hall, dying in 1895, left five sons, of whom the plaintiffs are two and the defendant is one. Fred F. Hall was then a minor, and by his father's will was to have a living on the place until he should become twenty-one years old, which would be on July 1, 1908. The land upon which the cutting was done came, we assume, from their father, and was undivided and owned by them in common. The defendant cut wood and timber on the premises both before and after Fred F. Hall became twenty-one years old, the latest cutting being in 1910. He gave no written notice as the statute requires. In 1912 Newton A. Hall conveyed his interest in the land, and assigned his claim for the cutting, to his brother, Fred F. Hall. This suit was brought September 15, 1913, in the names of Fred and Newton jointly to recover two-fifths of the damages. The defendant pleaded the general issue and the statute of limitations; nothing else. The trial resulted in a verdict for the plaintiff, and the case comes up on the defendant's exceptions.

I. The first question presented relates to the statute of limitations. The defendant relies on the special statute, R. S., Chap. 83, Sec. 97, which provides that, "Actions and suits for any penalty or forfeiture on a penal statute, brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year after the commission of the offense; and if no person

so prosecutes, it may be recovered by suit, indictment or information, in the name and for the use of the State, at any time within two years after the commission of the offence, and not afterwards." The contention is that the statute, R. S., Chap. 97, Sec. 5, under which this action is brought, allowing as it does treble damages to the injured co-tenants, is a "penal statute" within the meaning of Chap. 83, Sec. 97, and that actions under it, if not brought within one year after the doing of the damage, are not maintainable. The presiding Justice overruled the contention. We think the ruling was right.

This question has been several times adjudicated by this court, in construing statutes essentially like this one, in that they authorized the recovery of double, treble or quadruple damages for acts forbidden by statute. In *Palmer* v. *York Bank*, 18 Maine, 166, the court said, "As it (the statute then under consideration) gives four times as much damage as is allowed by law for the detention of the other debts, it is certainly penal in character. But as it is given to the party injured, who seeks the recovery of a just debt, to which these increased damages are an incident, we are not satisfied that it is to be regarded properly as a penal action. In *Frohock* v. *Pattee*, 38 Maine, 103, an action under a statute to recover double damages for knowingly aiding a debtor in the fraudulent transfer or concealment of his property, the same special statute of limitations was set up in defense as has been in this case. The court, holding the double damage statute be to remedial and not penal, said that under R. S., 1841, Chap. 146, Secs. 15 and 16, which are now R. S., 1903, Chap. 83, Sec. 97, being the special statute of limitations invoked in this case, only such statutes were to be considered penal statutes as would authorize the commencement of a suit, indictment or information in the name and for the use of the State, and that the double damage statute was not such a statute. In *Black* v. *Mace*, 66 Maine, 49, it was held that a statute, R. S., Chap. 97, Sec. 11, giving treble damages for trespassing upon grass lands, was remedial and not penal. *Quimby* v. *Carter*, 20 Maine, 218; *Philbrook* v. *Handley*, 27 Maine, 53; *Thatcher* v. *Jones*, 31 Maine, 528; *Reed v. Northfield*, 13 Pick., 96. A statute giving a right to recover multiplied damages may be remedial or it may be penal, within the meaning of this statute of limitations. If the right of action be given to the injured party, and the increased damages are only incidental to the general right to recover, the statute and action are remedial. And it is immaterial whether the

statute says that the injured party may recover, or that the offending party shall forfeit to the injured party; the meaning is the same. But if the right of action be given to others than the injured party, the statute and action are penal. See *Cole* v. *Groves*, 134 Mass., 471; in *re Barker*, 56 Vt., 14. R. S., Chap. 97, Sec. 5, under which this action was brought clearly is a remedial statute to which the one year limitation pleaded does not apply.

II. In the next place, the defendant contended that a recovery could not be had of Newton A. Hall's one-fifth. This contention was overruled, and properly. Newton A. Hall, before suit was brought, assigned his claim to the other plaintiff, and the only contention is that a copy of the assignment should have been filed with the writ under the provisions of R. S., Chap. 84, Sec. 146, which was not done. At common law an assignee of a chose in action was obliged to sue in the name of the assignor. The statute in question permits an assignee to sue in his own name, but provides that in such case he must file with the writ the assignment of a copy thereof. Notwithstanding the statute, an assignor if he chooses may still sue in the assignor's name, and if he does so, he is not required to file a copy of the assignment. *Rogers* v. *Brown*, 103 Maine, 478.

III. The defendant did not plead justification or license, but he offered to show in evidence that his operations had been in accordance with a mutual understanding between him and the plaintiffs, which would be of course by license or permission. The evidence was excluded on the ground that this defense had not been pleaded. The exclusion was right. The rule is without exception, we think, that when a defendant would justify or excuse an act which is unlawful unless justified or excused, he must plead the justification. *Daggett* v. *Adams*, 1 Maine, 198; *Rawson* v. *Morse*, 4 Pick., 127; *Ruggles* v. *Lesure*, 24 Pick., 187; 38 Cyc., 1092. In an action of trespass quare clausum fregit, the defendant may show, under the general issue, that he is tenant in common with the plaintiff, because presumably in such case he would have good right of entry. But in the case at bar, which is essentially in the nature of an action of trespass, the statute has limited the rights of tenants in common, and presumably one has not the right to cut wood or timber upon the common land without giving written notice to the others. The act is presumably unlawful. Hence justification must be pleaded.

IV. The defendant at the trial asked leave to amend his pleadings so as to set up a justification by license. The presiding Justice declined to allow the amendment. The allowance of amendments by the trial court is a matter of discretion, to the exercise of which exceptions do not lie. *Clark, Applt.*, 111 Maine, 399.

V. The defendant was asked by his counsel whether he and his brother Fred, the plaintiff, had hired money for the benefit of the place. The answer was properly excluded, as irrelevant and immaterial.

We have examined the other suggestions made by counsel, but find no merit in them. No error appearing, the entry will be,

Exceptions overruled.

LUCY A. FARNSWORTH, Pet'r,

vs.

SAMUEL S. KIMBALL, et al.

Hancock. Opinion October 8, 1914.

"Fraud, Accident, Mistake or Misfortune." Mortgage. Petition for Review. Real Action. Revised Statutes, Chap. 91, Sec. 1, Clause III. Title. Warranty Deed.

1. A petition for review will be denied when it appears that the petitioner's predicament is due to his own fault and want of reasonable diligence.
2. A deed by a mortgagee, not having made entry, and being out of possession, conveys no legal title to the land, unless accompanied by a transfer of the mortgage indebtedness.
3. An admission that land, of which several parties successively held deeds, "is and always has been wholly uncultivated, that it has never been fenced nor built upon, that the only use ever made of it has been an occasional cutting of wood, that it has never been used as a wood lot belonging to a farm, and that there is now nothing upon it except a growth of wood," is not evidence that any particular one of the parties ever cut any wood, or had ever been in possession.

4. Where a mortgagee, not shown to be in possession, gave a warranty deed of the premises, without a transfer of the mortgage indebtedness, his grantee and all subsequent grantees were strangers to the title. In a real action by those holding the mortgagor's title against such a stranger, it is not a defense that the stranger has a claim against an heir of the mortgagee for a breach of his warranty, nor that the mortgage is in existence undischarged, and that the mortgage debt has not been paid.
5. A review will not be granted of such an action on petition of the heir of the mortgagee, who is also administratrix of the estate, to enable her to offer the mortgage and indebtedness in defense. The evidence would be irrelevant.

On report. Petition denied with costs.

The petitioner asks for a review of a real action in which the defendants, Kimball and Coffin, were plaintiffs, and George B. Dorr was defendant, which case went to judgment at the April term, 1913, of the Supreme Judicial Court for Hancock County.

The case is stated in the opinion.

White & Carter and Hale & Hamlin, for petitioner.

Deasy & Lyman and E. S. Clark, for defendants.

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

SAVAGE, C. J. This is a petition for a review of a real action in which the present defendants, Kimball and Coffin, were plaintiffs and one George B. Dorr was defendant, and comes before this court on report. That case was tried and went to judgment at the April term, 1913, of the Supreme Judicial Court in Hancock County. It is admitted that during the pendency of that action and before trial or judgment, the record title of Dorr, the defendant, passed to the Bar Harbor Water Company, and that the title of Kimball and Coffin, the plaintiffs, had been bought and paid for by the Bar Harbor Water Company and had been conveyed to a trustee for the benefit of that company. So that the Water Company at the time of the trial owned in law, or in equity, all the title of all the parties of record in the suit. It is also admitted that the suit was prosecuted to judgment by that company, at its expense; and inasmuch as it owned also the defendant's title, it is a fair inference that the same company maintained the defense. Except as the judgment might furnish the basis for ulterior proceedings against this present petitioner, it was entirely a moot case.

The Dorr title was deraigned from the warranty deed of William A. Farnsworth, the petitioner's father, and the petitioner, as she is the sole living heir of her father, and the owner of property and assets which came to her as such heir, and thus liable upon the covenants of warranty, if broken, was sufficiently vouched in to defend the original suit, but failed to do so, and is accordingly bound by that judgment, as it now stands.

It will be noticed that the petitioner was not a party of record in the original suit, and that Dorr, who was a party there, is not made a party to this proceeding. For her right to institute the proceeding, the petitioner relies upon R. S., Chap. 91, Sec. 1, cl, III, which provides that a review in civil actions may be granted "on petition of a party in interest who was not a party to the record, setting forth the fact of such interest, and upon filing a bond," and so forth. The petitioner's right to petition is not challenged, but we deem it proper to say that we think that her case fairly comes within the provision of the statute. It is probable that by strict construction the original defendant, Dorr, should have been made a party to this proceeding, but the point has not been made. And as he, as well as his former adversaries, are represented by the Bar Harbor Water Company, their grantee, which is making this defense, and makes no point of want of proper parties, we will pass the question. We merely mention the situation that it may not serve as a precedent.

It should be stated further as preliminary to a discussion of the questions involved, that the Bar Harbor Water Company, the present defendant in interest, has commenced an action against the petitioner as heir, upon her father's covenant of warranty, and the action is now pending.

A review may be granted "where through fraud, accident, mistake or misfortune, justice has not been done." R. S., Chap. 91, Sec. 1, cl. VII. But the words "fraud, accident, mistake or misfortune" are not without limitation. This court said in *Pickering* v. *Cassidy*, 93 Maine, 139, that "the words ordinarily import something outside of the petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for. It has long been regarded as essential to public order, security and confidence that when parties have had their full day in court . . . . they should abide the result. . . . It cannot have been the intention of the legislature to destroy this rule and destroy all reliance upon court judgments by requiring or even

authorizing the court to open them as often as the defeated party discovers some new evidence or argument." Following this rule, a review is denied when it appears that the petitioner's predicament is due to his own fault, and want of reasonable diligence. Mere mistakes in opinion or judgment do not bring a case within the statute.

The petitioner was seasonably vouched to defend. She then had in her possession all the evidence that she has now, for want of which, as she claims, an erroneous order of judgment was made. She showed it to her personal counsel. She furnished copies of it to the counsel defending the Dorr title. She says she was advised by her attorney that it was not necessary for her to respond to the voucher and that the attorneys for Dorr had told her attorney that they would do all they could in defense. If we should assume that the attorney did not give her good advice, as we do not, that would not be such mistake or misfortune as the statute contemplates. The statute certainly does not mean that when a lawyer gives poor advice it is a cause for review. But the record leads us to think that disinclination to be at any expense about it was the prime reason for failing to appear and defend. Notwithstanding the advice which she says was given her, she undertook to employ a firm of Ellsworth attorneys, but being unable to get them to name a price for which they would take care of the suit for her, she seems to have decided to let the matter go. For these reasons we might properly hold, we think, that the failure of the petitioner to act after being vouched was due to her own personal, palpable, neglect, for which the statute of reviews affords no remedy. But there are reasons why we think it proper to consider the case on its merits, and we will do so. The same result will be reached, either way.

The case shows that the land in question was once owned by Randall S. Clark. On January 8, 1855, he conveyed it to Charles Goodwin and George N. Severance. On the same day, Goodwin and Severance mortgaged it to Andrew H. Hall to secure the payment of three notes aggregating $2500. The deed of conveyance and mortgage were both recorded January 12, 1855. Hall assigned the mortgage to Sarah H. Gilmore, March 26, 1858, and the assignment was recorded May 23, 1859. On May 18, 1863, J. A. Deane, by an assignment purporting to be made by him as attorney for Sarah H. Gilmore, assigned the mortgage to William A. Farnsworth, Henry

Morse and Merrill Austin. The assignment was recorded the same day. No power of attorney appears of record and none can now be found. Previously in the same month, Sarah H. Gilmore gave a warranty deed to Deane, and Deane gave one to Farnsworth and his associates. The counsel for petitioner in argument speaks of these as covering the land in question. This is denied by the defendants, and the case does not show it. From the evidence and admissions in the case we think it may fairly be inferred that so far, the mortgage notes were transferred from party to party with the assignments of the mortgage. And we may say here, as well as anywhere, that we think that the circumstances indicate that the notes have never been paid, and we so find. And for the purposes of this case we shall assume that Deane had authority to assign the mortgage and transfer the notes to Farnsworth, Morse and Austin.

It appears then that in May, 1863, Goodwin and Severance were mortgagors and owned the equity of redemption. William A. Farnsworth,—and we need speak only of him,—was the mortgagee, or had the interest of a mortgagee. His associates by conveyance drop out of the case. Afterwards, in 1865 and 1868, it is said, and having no other title than that of mortgagee, Mr. Farnsworth gave warranty deeds of the land to two persons. At the commencement of the action in the case of Kimball and Coffin against Dorr, it is admitted that the plaintiffs, by mesne conveyances, held the title of Goodwin and Severance, mortgagors, the defendant, Dorr, held the title, such as it was, of the grantees in the warranty deeds of Farnsworth, and, as we shall see presently, the petitioner's rights were those of the mortgagee.

The petitioner's contention is based upon the claim that the chain of conveyances from the warranty deeds of Farnsworth down to Dorr gave the latter some title, namely, the mortgage title of Farnsworth. And upon this assumption she urges that if the mortgage deed and notes had been offered in evidence in the original action of *Kimball and Coffin* v. *Dorr*, they would have disclosed the defendant's mortgage title, and have furnished at least an equitable defense to the action, on the ground that a real action by the owner of the equity of redemption will not lie against the mortgagee or one having the interest of a mortgagee. *Woods* v. *Woods*, 66 Maine, 206; *Rowell* v. *Mitchell*, 68 Maine, 21.

The weakness of the petitioner's contention lies in the fact that it does not appear that the defendant had any valid title whatever. He claimed under the warranty deed of a mortgagee. It is not doubted that if a mortgagee in possession makes a conveyance by deed, the deed will operate as an assignment of the mortgage. The same result follows if the mortgage debt is assigned or transferred with the deed. But it is now well settled in this State that a deed by a mortgagee, not having made entry, and being out of possession, conveys no legal title to the land unless accompanied by a transfer of the mortgage indebtedness. *Lunt* v. *Lunt*, 71 Maine, 377; *Wyman* v. *Porter*, 108 Maine, 110. The reason is that until entry, the interest of the mortgagee is not real estate. *Lunt* v. *Lunt*, supra. The mortgage is a personal chattel, a chose in action. "It is but an incident attached to the debt, and in reason and propriety it cannot and ought not to be separated from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment." *Jackson* v. *Willard*, 4 Johns, 42.

It is very evident that when Mr. Farnsworth gave these warranty deeds he did not transfer the mortgage indebtedness. He died in 1876. After this controversy arose, not only the original mortgage, but also two of the mortgage notes, and an execution issued on a judgment on the third note were found by this petitioner among her father's papers. They apparently belong to his estate, of which she is the administratrix de bonis non. Nor is there any evidence that Mr. Farnsworth had made entry, and was in possession when he gave the deeds. The petitioner argues repeatedly that such was the fact, but the record does not show it. It shows on the contrary that efforts were made to ascertain whether Farnsworth had ever been in possession, and that the efforts were unavailing. The only thing in the case about possession is an admission in these words:—"It is also admitted that said land is and always has been wholly uncultivated, that it has never been fenced nor built upon, that the only use ever made of it has been an occasional cutting of wood, and that it has never been used as a wood lot belonging to a farm, and that there is now nothing upon it except a growth of wood." And here the cutting of wood is the only thing that relates to the question. It does not state when it was cut nor by whom. Surely here is not enough to warrant a finding that Farnsworth ever cut any wood, nor that he had ever been in possession.

The result is that we are compelled to find that the warranty deeds of Farnsworth conveyed no title. And if that is so, no title came to the defendant Dorr. It thus appears that the original action was a writ of entry by the owners of an equity of redemption against a stranger to the title. If the petitioner had been more diligent, had she assumed the defense, and offered in evidence the notes and mortgage, it would not have changed the situation. If a review should be granted, and she should offer them upon another trial, it would not change the situation. It would still be a suit by the owner of the equity against a stranger. Can it possibly avail in defense, that the stranger has a claim against the petitioner for a breach of her father's warranty? We think not. Even suppose the petitioner should plead puisne darrein continuance that the real plaintiff, the Bar Harbor Water Co. had become the owner in equity of the interest of the defendant Dorr, so that it had become the real defendant, and suppose for that reason the suit should abate. Will the situation of the petitioner be any different then from what it is now? Will she not then, as now, be the holder of an undischarged mortgage and entitled to hold it until the debt it secured is paid? And will she not then, as now, be liable for the breach of her father's covenants of warranty, to the extent of the assets received from him as heir? Her father warranted the title. If there is damage by reason of a breach must she not pay? And entirely irrespective of the result of the Kimball and Coffin suit? She is indeed bound by that judgment. But what was that judgment? No more than this, so far as we are now concerned. It was adjudged that Kimball and Coffin had a title to the land, and that Dorr did not have one. And is not that precisely the state of the title as we now find it to be? The petitioner was not injuriously affected. Her rights under her mortgage were not adjudged nor affected. Her liability under the warranty was not changed.

The petitioner suggests as a reason why she ought to have a review granted, that she is endeavoring to foreclose the mortgage, and wishes to be able before the case is again tried to effect a foreclosure, so that the title thereby effected will enure to the benefit of the grantees under her father's warranty. It hardly need be said that this does not furnish legal ground for a review. To speak of only one contingency. If she has a right to foreclose, the present owner

of the equity has a right to redeem, and we must assume that it will do so. There will be nothing then to enure to the benefit of grantees. And the breach will remain unsatisfied.

To repeat. We think the petitioner has stated no ground that would serve as a defense if a review should be granted. It will therefore be useless to grant one.

Petition denied with costs.

INHABITANTS OF FRENCHVILLE

vs.

MICHAEL GAGNON.

Aroostook. Opinion October 8, 1914.

Condition. Covenant. Deed. Forfeiture. Intention. Trespass.

1. Language in a deed will not be construed into a condition subsequent, unless the terms of the grant will admit of no other reasonable interpretation.
2. When the language in a deed makes it doubtful whether a condition or a covenant be meant, it is always to be construed as a covenant.
3. A deed to a town for a schoolhouse lot contained the following language:— "In addition to the consideration of two hundred and twenty five dollars paid by the Inhabitants of the town of Frenchville aforesaid, the above piece or parcel of land is conveyed on condition and in consideration of a promise made by said Inhabitants that a good and substantial fence shall be forever maintained by them inclosing the said premises."

Held, that the language should be construed as a covenant, and not a condition.

On report. Judgment for plaintiff for $20.

This is an action of trespass quare clausum to recover damages for entering upon a lot of land situate in Frenchville and destroying trees, grass, etc. At the conclusion of the testimony, the case was reported to the Law Court, upon so much of the evidence as is

legally admissible, the Court to render such judgment as the rights of the parties require. It was further stipulated by the parties that, if the Law Court sustains the contention of the plaintiff, that the trespass was committed, damages are to be $20.

The case is stated in the opinion.

Hersey & Barnes, for plaintiff.

Peter C. Keegan and Madigan & Pierce, for defendant.

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

SAVAGE, C. J. Trespass quare clausum. The case comes before this court on report, with a stipulation that if the plaintiff is entitled to recover, the damages shall be assessed at twenty dollars. The premises in question were conveyed by the defendant to the plaintiff town in 1898 for a schoolhouse lot by a warranty deed which contained between the description and the habendum the following language:—"In addition to the consideration of two hundred and twenty-five dollars paid by the Inhabitants of the town of Frenchville as aforesaid, the above piece or parcel is conveyed on condition and in consideration of promise made by said inhabitants that a good and substantial fence shall be forever maintained by them inclosing the said premises." The plaintiff contends that the foregoing language should be regarded as a covenant merely, for breach of which an action would lie. On the other hand the defendant says that it is a condition subsequent. And acting upon that assumption, in 1912 he entered and took possession of the premises, as for a breach of condition, with the intention of revesting title in himself. This constitutes the trespass complained of. Whether the language in the deed constitutes a covenant or a condition, in either event, the case shows a breach. It follows that if it be a covenant, and not a condition, the title remains in the plaintiff, even though there has been a breach, and the town is entitled to judgment. On the contrary, if it be a condition subsequent, the title is in the defendant, he committed no trespass, and he must have judgment.

Courts are reluctant to declare forfeitures. Conditions subsequent as the basis of forfeiture are not favored in law. This is the rule in this State and everywhere else. *Bray* v. *Hussey*, 83 Maine, 329. Language in a deed will not be construed into a condition

subsequent, unless the terms of the grant will admit of no other reasonable interpretation. The language is to be construed strictly against the grantor. No language will be construed into a condition subsequent contrary to the intention of the parties, when the intent can be gathered from the whole instrument read in the light of surrounding conditions. *Weir* v. *Simmons*, 55 Wis., 643. The strongest words of condition will not work a forfeiture of the estate unless they were intended so to operate. *Bragdon* v. *Blaisdell*, 91 Maine, 326. Apt words from which a clear implication arises are necessary for the creation of a conditional grant, but the use of apt words does not always create a condition. *Bray* v. *Hussey*, supra. The intention shown by the whole deed controls. Sometimes the use of words such as "null and void," indicative of an intention of forfeiture, or the insertion of a clause of re-entry, are held conclusive on the question of intention. But a condition subsequent may be created without either a forfeiture clause or clause of re-entry. *Thomas* v. *Record*, 47 Maine, 500.

In the clause under consideration, the words "on condition" are apt words to create a condition; but the additional words, "and in consideration of promise made by said inhabitants" are not. In a deed, they are words appropriate to covenant. When the language in a deed makes it doubtful whether a condition or a covenant be meant, it is always to be construed as a covenant. *Bragdon* v. *Blaisdell*, supra; *Hoyt* v. *Kimball*, 49 N. H., 322; *Woodruff* v. *Woodruff*, 44 N. J. Eq., 349.

It is sufficient for the purposes of this case to say that the language used if it be not construed strictly as a covenant, leaves it in doubt whether the parties intended to create a condition or a covenant; whether they intended the grantor's remedy for breach should be by forfeiture whereby the town would lose not only the land, but the schoolhouse, if any, upon it; or whether it should be by ordinary action at law for damages. In accordance with the principles already stated, that doubt must be resolved in favor of a covenant and against a condition, so as to avoid forfeiture.

Judgment for plaintiff for $20.

STATE OF MAINE

vs.

FRANCES A. VANNAH, alias FRANK VANNAH.

Kennebec. Opinion October 10, 1914.

Change of Venue. Ex Post Facto Law. Exceptions. Indictment. Jurisdiction. Murder. Retroactive. Legislation.

1. Section 4 of Public Laws of 1913, Chap. 220, plainly relate to procedure and remedy, and having for its obvious purpose the conduct and disposition of a pending case, is constitutional, and wholly within the legislative power and control, and is not, as to this case, an ex post facto law, or retroactive in its nature or tendency.
2. The right to a change of venue is not a common law right. It is created and regulated by Statute, and is also a matter of procedure authorized by the Legislature under its sole and plenary power to determine what course shall be pursued in the administration of justice, as well as in all other matters concerning the public good.
3. The right to have a jury selected from another county, or district, is not one of the rights within the words and intent of the Constitution prohibiting the passage of ex post facto laws, under Art. I, Secs. 9 and 10.
4. It is well settled that a mere change in the constitution of the trial court, which leaves unchanged all the substantial protections which the law in force at the time of the commission of the alleged offense threw about the accused, is not ex post facto.
5. So far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place.
6. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully dispense with any substantial protection with which the existing law surrounds the person accused of crime.

On exceptions by respondent. Exceptions overruled.

This is an indictment for murder, found by the Superior Court for the County of Kennebec at the April term, 1913, of said Court. The respondent was tried and convicted at the January term of said Court, of murder. The respondent filed four motions at said January term, all of which were overruled by the presiding Judge of said Court, and the respondent excepted to the order overruling said motions.

The case is stated in the opinion.

Scott Wilson, Attorney General and *W. H. Fisher*, County Attorney, for the State.

B. F. Maher and *William H. Miller*, for defendant.

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

HANSON, J. This case is before the court on exceptions to the order of the Justice of the Superior Court for the County of Kennebec overruling four motions filed at the January term of that court, 1914. The respondent was indicted for the murder of one Edward E. Hardy, at the April term of that court, 1913, and at the September term, on his own motion, was committed to the State Hospital for observation. He was tried at the January term, 1914, and was found guilty of murder.

The motions in their order were (1) To continue to the Supreme Judicial Court. (2) To continue to a later term of the Superior Court, when a Justice of the S. J. Court may preside. (3) Refusing to plead. (4) In arrest of judgment. The reasons stated in the several motions are the same. The first motion is as follows:

"And now comes the respondent and moves:

First: That the Superior Court is without jurisdiction of the offense alleged in the indictment.

Second: And the respondent further moves that said Superior Court is without jurisdiction in offenses such as charged in the aforesaid indictment because the alleged offense was committed on the twentieth day of March, A. D. 1913, and said Act attempting to confer jurisdiction upon the aforesaid Court was passed on the

seventh day of April, A. D. 1913, and took effect July 1, 1913, and was accordingly in its attempt to reach the aforesaid case at bar retroactive legislation and ex post facto in its nature.

Third: And the respondent further moves that said Superior Court is without jurisdiction of the offense charged in this indictment because Chap. 220 of the Public Laws of 1913, wherein jurisdiction was sought to be conferred upon said Court in Sec. 4 of said Act by its terms would not apply to this particular case and was in effect the creation of a Court to try a particular case.

Fourth: And the respondent further moves that he was deprived of one of his constitutional rights to seek and obtain change of venue for cause sought, which cause he says exists because of the silence of the Act wherein jurisdiction for offenses such as is charged in this indictment is sought to be conferred upon said Superior Court.

Fifth: And the respondent further moves because by virtue of the statute in such case made and provided in offenses such as charged in this indictment one of the Justices of the Supreme Judicial Court to be designated by the Chief Justice thereof shall preside, which designation has not been made and no such Justice presiding, this Court is without jurisdiction to proceed in the absence of such designation in conformity with the statute.

WHEREFORE, and because of the aforesaid reasons, now before the empanelling of a jury the respondent moves that the said cause be continued to the next term of the Supreme Judicial Court to be held within and for said County having jurisdiction of the offense alleged."

Counsel for the respondent argues, (1) That it has never been the policy of the State to allow a court of limited and inferior jurisdiction to determine the rights of a man charged with murder. (2) That the respondent was denied the constitutional right to a change of venue; that if such change were sought and ordered he would then receive only what the law insures, the right to a trial before a Justice of this court. (3) That he is entitled thereto because "the law of April 11, 1913, attempted to repeal Sec. 2, of Chap. 132, R. S., which gives the Supreme Court jurisdiction . . . . must relate back to the time of the shooting, namely, March 20, 1913;" that therefore the amendment in question was not in force on that day, and that as to his client, such amendment was entirely inoperative in

any event until after the expiration of ninety days from the date of its approval. (4) While supporting his exceptions as stated in the foregoing, counsel concludes his brief with this statement:

"We do not undertake to argue upon the unconstitutionality of the law on this question.

Our contention is not whether the law is ex post facto, but we claim that the attempt of the State to control the situation as it was March 20, 1913, was futile and under the ninety days provision of no force or effect. In other words, we say it was not an ex post facto law of which we complain, but 'no law' which could take effect until long after the shooting took place on that fateful day of March 20th near the reservation at Togus, Maine.

And concerning the fifth section of page 12 of the printed case wherein it is set forth that the respondent declined to plead in the Superior Court, while a ruling of the Superior Court may be open to exceptions, we think comment unnecessary and depend more fully upon the attempt of the prosecution to keep the case away from a Justice of the Supreme Judicial Court in the manner hereinbefore stated."

As to the first objection raised by the respondent's counsel, it is sufficient to say that when the Superior Court for Kennebec County was established in 1878, it had full jurisdiction in criminal cases. At the same session, the Act creating that court was amended as follows:

"Sec. 19. When any indictment is found for any of the offenses described in sections one and two of chapter 117 of the revised statutes, sections two, three, four, five, six, eight, nine, ten, eleven, twelve, thirteen, fifteen, twenty-five and twenty-seven of chapter 118 of the revised statutes, sections one, two and three of chapter 119 of the revised statutes, the clerk of said superior court shall certify and transmit the indictment to the supreme judicial court for said county, at the next term, when it shall be entered. The supreme judicial court shall have cognizance and jurisdiction thereof, and proceedings shall be had thereon in the same manner as if the indictment had been found in that court."

Full jurisdiction was restored in 1881, and so continued until 1891, when the provision relating to the trial of murder cases was again changed, providing that a Justice of the Supreme Judicial Court be designated to preside at such trials. In 1899, the provision requiring indictments to be certified to this court was restored, and remained

in force until 1913, when the section providing for certifying and transmitting indictments to this court was repealed, and Sec. 90, Chap. 79, R. S., was amended by Chap. 220, Sec. 2, and as amended reads as follows:

"Laws of 1913, Chap. 220, Sec. 2. The original and appellate jurisdiction in all criminal matters in said counties of Cumberland and Kennebec, and all powers incident thereto, originally exercised by the supreme judicial court, but heretofore conferred upon and exercised by said superior courts, are continued."

The following section was added, and the principal contention in this case arises thereunder:

"Sec. 4. Any indictment for murder returned by the grand jury in said superior court at the April term thereof in the year nineteen hundred and thirteen, shall be in order for trial at the next September term of said court, which shall have jurisdiction of all matters pertaining thereto."

It is urged in the motion that this provision "in its attempt to reach the case at bar is retroactive legislation and ex post facto in its nature." If the point raised related to the crime charged, or to the constitutional rights of the respondent thereunder, our conclusion would not be reached so easily, but the provision in question, directed as it plainly is to procedure, and relating entirely to the remedy, and having for its obvious purpose the conduct and disposition of a pending case, is constitutional, and wholly within the legislative power and control, and is not as to this case an ex post facto law, or retroactive in its nature or tendency. Cooley's Const. Lim., 6th ed., page 326; Bishop's Crim. Law, vol. 1, Secs. 279, 7, 280, 2, 3; *Com.* v. *Phelps*, 210 Mass., 78; *Calder* v. *Bull*, 3 Dallas (U. S.), 386, 390; *Thompson* v. *Missouri*, 171 U. S., 386.

The motions were made a part of the exceptions, and the brief made by other counsel, follows substantially the remaining points made in the motions. Both urge the right to a change of venue, and say that the right was denied. It does not appear that any reason existed why change of venue should be had, that a fair trial could not be had, or was not in fact had.

The right to a change of venue is not a common law right. It is created and regulated by statute, and is also a matter of procedure authorized by the legislature under its sole and plenary power to determine what course shall be pursued in the administration of

justice, as well as in all other matters concerning the public good. *Hopt* v. *Utah*, 110 U. S., 574; *Gibson* v. *Miss.*, 162 U. S., 589; *Thompson* v. *Utah*, 170 U. S., 351.

The right to have a jury selected from another county or district is not one of the rights within the words and intent of the constitution prohibiting the passage of ex post facto laws, under Art. 1, Secs. 9 and 10. Chase, J., in the leading case, *Calder* v. *Bull*, 3 Dall., 386, 390, stated the laws included thereunder as follows: "1st, every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) every law that aggravates a crime, or makes it greater than it was when committed. 3rd, Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive" . . . . "but I do not consider any law ex post facto, within the prohibition that mollifies the rigor of the criminal law; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction."

Cooley's Const. Lim., 7th ed., 373-4.

It is well settled that a mere change in the constitution of the trial court which leaves unchanged all the substantial protections which the law in force at the time of the commission of the alleged offense threw about the accused, is not ex post facto. *Duncan* v. *Missouri*, 152 U. S., 377. Nor is a change in the place of trial. *Gut* v. *Minnesota*, 9 Wall., 35, quoted and affirmed in *Cook* v. *United States*, 138 U. S., 157.

Cooley's Const. Lim., 7th ed., 375, note.

The remaining objection is to the jurisdiction of the court, on the ground that the Act of April 11, 1913, did not become a law until ninety days after its passage, to wit, July 11, 1913, and that the crime having been committed on March 20, 1913, the statute which that law was intended to amend in part and repeal in part, was itself then in force, and urges that the respondent should have been tried thereunder, the Justice presiding to be a Justice of this court. We do not so hold. We think the reasons already given are sufficient to justify the ruling of the presiding Justice in this as well as in the other claims of the respondent's counsel, and we may add that the

practice is uniform, and it is well settled that "So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Cooley's Const. Lim., 7th ed., 381, and cases cited; *Com.* v. *Phillips*, 11 Pick., 32.

The fact that the crime was committed before the passage of the Act in question, and that ninety days must elapse before such act has the force of law, does not avail the respondent. He had violated the law. There is no pretense that the law so violated had been changed. The only change effected was in the manner in which he should be tried for that offense against the law. That change was made by the law making power whose will is paramount, and whose right to shape the policy of the State is not to be questioned by the court, nor is the administration thereof to be dictated by the offender. He has no vested right in the matter of procedure—Cooley's Const. Lim., 7th ed., page 381; Cyc. vol. 8, 1031. The rules and orders provided for the conduct of courts, officials, and community generally, are to be observed by all alike as the law, unless they interfere with some substantial right guaranteed by the fundamental law.

A careful examination of the questions involved convinces the court that the respondent was not deprived of the full protection to which he was entitled under existing law.

The entry must therefore be,

Exceptions overruled.

EMILY E. FELKER

vs.

BANGOR RAILWAY AND ELECTRIC COMPANY.

Penobscot. Opinion October 14, 1914.

Collision. Damages. Expenses in Caring for Wife. Loss of Ability to do Domestic Labor. Medical Attendance. Negligence.

1. A married woman who is living with her husband is not entitled, in an action to recover for personal injuries, to recover for loss of ability to do domestic labor in their home.
2. A married woman, who is living with her husband, is not entitled, in an action to recover for personal injuries, to recover for the expenses for medical and surgical treatment, unless she has herself paid, or has expressly undertaken to be personally responsible, for them.
3. A married woman, living with her husband or not, is entitled, in an action to recover for personal injuries, to recover for the loss of her health and strength, and for all of her suffering, mental and physical.
4. When it appears that the jury have discharged their duty with fidelity and have reached a reasonable approximation of the damages, the court will not interfere, even though the verdict seems to them somewhat large.

On motion by defendant for new trial. Motion overruled.

This is an action on the case to recover damages for personal injuries sustained in a collision between the carriage in which the plaintiff was riding and the electric car of the defendant. The defendant plead the general issue. The jury returned a verdict for the plaintiff of $1200. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

D. I. Gould, for plaintiff.

E. C. Ryder, for defendant.

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

SAVAGE, C. J. Case to recover for injuries sustained in a collision between the carriage in which the plaintiff was riding and the electric car of the defendant company. The plaintiff obtained a verdict for twelve hundred dollars. The case comes up on the defendant's motion for a new trial on the usual grounds. But counsel have argued only the question of damages, and to that question we shall confine ourselves.

The plaintiff is a married woman, and at the time of the accident was about 71 years of age, and in ordinarily good health for a woman of her age. The carriage in which she was riding was overturned and she was thrown violently upon the ground, between the railroad tracks. The evidence would warrant a jury in finding that she sustained a severe nervous shock, that two of her ribs were broken, and that she was considerably bruised about her back and other parts of her body, that in consequence of her injuries she suffered great pain for several weeks on account of the irritation caused by the pricking ends of the fractured ribs, that she suffered also in other ways; that it was necessary in order to ease her pain to turn her in bed and give her a rubbing half a dozen times a night, that she was unable to sleep well nights, that as a result of the shock a serious nervous condition was developed, from which she had not fully recovered at the time of the trial, fourteen months after the injury. Her attending physician, in testifying, spoke of this condition as "this horrible state of the nervous system," and the jury might find that, although the fractured ribs united well in a few weeks, she suffered even up to the trial from pain and lameness in her right side, and was unable to do any work of any consequence.

It appears that while confined to her bed in consequence of her injuries, the plaintiff had an attack, but not a severe one, of hypostatic pneumonia, which is a phase of pneumonia incident to old age. It is not claimed that the pneumonia was caused by her physical injuries. Whether she was more susceptible to it by reason of her condition, does not clearly appear.

Being a married woman and living with her husband, the plaintiff is not entitled to recover for loss of ability to do domestic labor in their home, nor for the expenses in caring for her, surgically and

otherwise. Under the marital relation, the labor in the house belonged to her husband. Her inability to perform that labor is his loss. And on the other hand, as the law imposes on him the duty of caring for her in sickness as well as in health, the burden of the expenses for medical and surgical treatment and for nursing falls upon him and not upon her, unless she has expressly undertaken to be personally responsible for them.

But the plaintiff may recover for the undoubted shock of the accident, and for all the sufferings, mental and physical, which it caused. The loss of health and strength was her personal loss, irrespective of its effect upon her ability to labor. For the endurance of the nervous condition caused by her injuries she is entitled to compensation. Such suffering may be both mental and physical.

There is no standard by which the damages for such injuries as are shown in this case can be measured. In the end the question must be left to the sound sense and good judgment of the jury, to award such damages as seem to them to be fairly compensatory. And when it appears that the jury have discharged their duty with fidelity, and have reached a reasonable approximation of the damages, the court will not interfere, even though the verdict should seem to them somewhat large. When the verdict is within the bounds of reason, the court will not institute a paring process to make it conform more exactly to their own views. Such is this case.

Motion overruled.

L. C. ANDREWS

vs.

THE DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Androscoggin. Opinion October 14, 1914.

Agency. Conditions. Fire Insurance. Increase of Risk. Loss. Negligence. Policy. Proof of Loss. Reasonable Time. Waiver.

The letter in the case, which was obviously a reply to a communication from the plaintiff, his great age, the facts admitted, touching the offer on the plaintiff's part to submit his claim to arbitrators, the silence of the defendant and its neglect to answer communications from the plaintiff, and the further fact that notice, when furnished, was for the benefit of defendant, and that substantially all the facts connected with the fire were known to the defendant before the date of the letter to the Company, June 18, 1913, furnished ample ground for a finding that a statement in writing was rendered "within a reasonable time," as required by the Statute and the terms of the policy.

On motion by the defendant. Motion overruled.

The policy in this case, upon which this action was brought, was dated February 11, 1911; the fire occurred May 2, 1913, and proof of loss was mailed August 5, 1913. The plea was the general issue, with brief statement. The jury returned a verdict for the plaintiff of $1234.24. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Skelton, for defendant.

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

HANSON, J. This is an action on a fire insurance policy, dated February 11, 1911. The fire occurred May 2, 1913, and proof of loss was filed August 5, 1913. The jury returned a verdict for the

plaintiff in the sum of $1234.24. The case is before the court on a general motion for a new trial. The material facts in the case are substantially these:

The fire was caused by smoking a large ham and a shoulder in a shed about twenty feet square. The ham and shoulder were suspended by a tarred string from an iron rod running across the bottom of a wooden barrel, which was inverted over a similar barrel, the latter standing on the wooden floor. A kettle containing the fire and combustible material stood on bricks in the bottom of the lower barrel.

The premises were owned by the plaintiff, who had occupied them for thirty-five years, and continued to live in the house until driven out by the fire. For about two years his daughter and her husband, a Mr. Jackson, had lived there, without any lease or special arrangement, but doing the work about the place and owning some of the personal property. The plaintiff retained full control of the premises, but on account of his advanced age and feeble condition was obliged to secure the assistance of Mr. Jackson and his wife in the management of his farm and care of himself in his sickness. The ham and shoulder were the property of Mr. Jackson, and he was smoking them for use in the plaintiff's home. The plaintiff was confined to his bed at the time of the fire, and was carried from his house by neighbors. He lost his deed and other papers, and much of his personal property, in the fire. The plaintiff introduced a certified copy of the deed of the premises from Charles D. Fox to Leonard C. Andrews, dated Nov. 8th, 1874, and the following letter:

"DIRIGO MUTUAL FIRE INSURANCE CO.
Gorham, Maine
June 18, 1913.

L. C. Andrews,
Monmouth, Me.

My dear Sir:—

I am very sorry to be obliged to notify you that we cannot see how the Company can legally pay you for your loss which was caused by smoking hams in your carriage house without permission.

Very truly yours,

T. F. MILLETT, Sec'y.

TFM-B."

The proof of loss was offered and admitted, and the following admission was made:—

"It is admitted that August 5, 1913, the firm of McGillicuddy & Morey sent proof of loss of L. C. Andrews to the Dirigo Mutual Fire Insurance Co. at Gorham, Maine; and on the 15th day of August, 1913, we submitted for Mr. Andrews to the same Company a list of three appraisers, from which they were requested to make their selection in the fire loss of L. C. Andrews against the Dirigo Mutual Fire Insurance Co., stating the names, and that no answer was ever made by the Company to either the proof of loss nor did they ever suggest any names from which we could select, or make a selection of ours.

The defendant pleaded the general issue, with the following brief statement:

"1. That at the time the fire occurred, to wit, on February 21, 1911, the property insured was not then the property of the plaintiff in suit.

2. That the fire which resulted in the loss of the property, the value of which is in suit in this case, was caused through the gross negligence and want of care of the plaintiff acting through his servants and agents in the care and custody thereof and in the matter in which the fire occurred, and was set directly by the plaintiff or by his servants and agents."

At the conclusion of the plaintiff's testimony, the attorney for the defendant stated to the court that he would not undertake to offer any further testimony, that the facts were brought out practically as they existed, and that he desired "to address the jury on the evidence as it stands."

The defendant contends that the fire was caused by the gross negligence of the plaintiff, and that he has violated two conditions of the policy, namely, that provision that "the policy shall be void if . . . without such consent (that of the Company), the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured be so altered as to cause an increase of such risks." And the provision that, "in case of loss or damage . . . a statement in writing . . . shall be within a reasonable time rendered to the company setting forth the value of the property insured," etc., and says "that the only fair inference to be drawn from the evidence is that whatever

was done was the act of the plaintiff done through his agents or employees. Jackson and his wife were doing the active work, but there is no claim of any lease, or independent contract of any sort. The plaintiff remained there; they were simply one family, and, as Mrs. Jackson said, he still had full control of it. The transactions about the place were as much his as though he had been personally present every minute and had done them with his own hand," and that fire was due to gross negligence. That smoking a ham in a shed, without constant watching, was negligence, that the place and means selected, instead of locating the barrel outside the buildings, was inexcusable. In effect defendant claims that the plaintiff was grossly careless, and therefore cannot recover.

We are not able to agree with the defendant's claim that the plaintiff violated two of the conditions of his policy as set out in the brief of counsel, viz.: 1, that the situation or circumstances affecting the risk were so altered, by or with the knowledge, advice, agency, or consent of the insured as to cause an increase of the risk, and, 2, that "a statement in writing" was not rendered to the defendant within a reasonable time, as required by the terms of the policy.

As to the first contention the record does not disclose that it was submitted to the jury, but it does show conclusively that the plaintiff had no knowledge of the situation or circumstances causing the fire, that he had given no instructions in relation to smoking hams, or any other work on that day, or previously, that he did not own the ham in question, or know of its existence. He was 79 years old, and had been ill for months, and in no condition to voluntarily assume control, or in any manner to direct another in the conduct of his farm, or other work. He was helpless and dependent, and the evidence is conclusive that the situation and circumstances affecting the risk were not so altered as to cause an increase of the risk, by or with his knowledge, advice, agency, or consent. Nor does the evidence justify an inference that whatever was done was the act of the plaintiff performed through Mr. Jackson and his wife, as agents, thus violating a condition of the policy.

The defendant relies particularly upon its claim that a proof of loss was not furnished "within a reasonable time." From the briefs of counsel on either side it appears that this question was submitted to the jury by the presiding Justice, and the jury passed upon it, but the defendant says that "in the absence of proof of an express waiver,

it was not a matter of positive instructions by the court to be reviewed on exceptions, but was a question for the jury on which it erred," and "that the only possible way in which the plaintiff can prevail is by reading into the law words which are not there, in order to avoid giving force to the words which are there." Counsel agree that it was a proper question to be submitted to the jury, and in the absence of exceptions, and the charge of the presiding Justice, we must assume that the question was submitted under proper instructions. The words under consideration are the same in the statute and policy, to wit, "within a reasonable time." It is firmly settled in this State that what constitutes reasonable time, on undisputed facts, is not for the jury, but is a question of law. *Hill* v. *Hobart,* 16 Maine, 164; *Greene* v. *Dingley,* 24 Maine, 131; *Libby* v. *Haley,* 91 Maine, 331; *Watson* v. *Fales,* 97 Maine, 366.

Other questions were involved, and the case was necessarily submitted to the jury. It is manifest that there was evidence from which the jury could properly find that there was a waiver of the right of the defendant to require a proof of loss, or that such proof of loss was furnished within a reasonable time. The brief statement does not set up the absence of a proof of loss, or negative a waiver. *Robinson* v. *Ins. Co.,* 90 Maine, 385.

The letter in the case, which was obviously a reply to a communication from the plaintiff on the subject of the loss, the continued illness of the plaintiff, his great age, the facts admitted touching the offer on the plaintiff's part to submit his claim to arbitrators, the silence of the defendant and its neglect to answer communications from the plaintiff, and the further fact that the notice when furnished was for the benefit of the defendant, and that substantially all the facts connected with the fire were known to the defendant before the date of the letter of the Company on June 18, 1913, furnished ample ground for a finding that a statement in writing was rendered within a reasonable time, as required by the statute and the terms of the policy.

It is the opinion of the court that the verdict should stand.

The entry must be,

Motion overruled.

EDWARD W. DUPLISSY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion October 17, 1914.

Burden of Proof. Damages. Fire Communicated by Locomotive. Negligence. Reasonable Inference.

In an action on the case to recover damages for the loss of buildings and contents alleged to have been destroyed by fire communicated by a locomotive of the defendant;

Held:

1. That in this class of cases liability is a question of reasonable inference from all the facts and circumstances, and the evidence should be of such a character that a reasoning mind shall see the connection between cause and effect.
2. That the proximity of the premises, the direction of the wind, the dryness of the night, the time of the passage of the train, the discovery of the fire within a short time thereafter, the location of the fire when first discovered and the absence of all other reasonably probable sources justified the jury in drawing the inference that the locomotive of the defendant caused this fire.
3. That on the uncontradicted evidence offered by the plaintiff on the question of values, the damages are not so manifestly excessive as to warrant the interference of the court.
4. That the testimony of a neighbor as to finding a large quantity of cinders on her piazza the next morning after the fire was properly admitted, as the capacity of the locomotive to throw sparks was in issue. The objections raised by the defendant go to the weight of the evidence, rather than to its admissibility.
5. That the instruction requested by the defendant was properly refused, because it asked the Court to prescribe in detail the character of the evidence required in this class of cases, and to pass upon matters clearly within the province of the jury. The charge fully protected the rights of the defendant in all respects.

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

This is an action on the case by the plaintiff to recover damages for property destroyed by fire, alleged to have been caused by fire communicated from a locomotive engine belonging to the defendant. Plea, general issue. The defendant excepted to the admission of testimony and to the refusal of the presiding Justice to give a certain requested instruction to the jury, both of which are particularly considered in the opinion, and its exceptions were allowed. The jury returned a verdict for the plaintiff of $5341.67.

The case is stated in the opinion.

James D. Rice, and Wm. R. Pattangall, for plaintiff.

Fellows & Fellows, for defendant.

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

CORNISH, J. Action on the case to recover damages for the loss of a hotel in Kingman, with outbuildings, stable and contents, including furniture, supplies and personal effects, alleged to have been destroyed by fire communicated by a locomotive of the defendant.

Liability. The evidence justifying the finding of liability is ample. It is for the most part undisputed. The plaintiff's premises adjoined the railroad location, being situated northerly thereof, with the shed nearest the right of way and the long ell and main part extending to Marginal Street. A freight train of the defendant with twelve empty cars left Mattawamkeag at 1.50 on the morning of September 29, 1913, going east, passing Kingman about 2.15 A. M. and arriving at Danforth at 3.15 A. M. The train did not stop at Kingman Station. There was an up-grade from the station for nearly one-half a mile, and the hotel was situated about midway this distance. The train was fifty minutes late. The night was unusually dry, there being practically no dew on the grass as several witnesses stated. The wind was light, but from a southerly or southwesterly direction, blowing from the track toward the buildings.

One witness testified that he was up at 2 o'clock and looked toward the hotel and no fire was visible then. Between that time and the time when the fire was discovered, 2.30 or 2.45 A. M., this freight

train passed by. The fire originated on the part of the premises toward the railroad and spread to the rest of the buildings. A large number of witnesses testified that when they first saw the fire it was on the southerly side of the shed and creeping up on to the roof. The posts of an old pig pen which had formerly stood between the shed and the track were burned, showing that the grass between the location and the buildings was on fire.

All other sources except the engine are practically eliminated. There had been two fires in the hotel, one a coal fire in the office, and the other a wood fire in the kitchen for the six o'clock supper. The latter had gone out, and the former could not have caused the fire in question because the people were in and about the office, as well as the other rooms in the ell and main part, at the same time that the fire was burning in the shed.

The defendant attempted to suggest two other sources, but failed utterly. The fireman on the locomotive testified that while going through the town at the rate of twenty or twenty-two miles an hour he saw through a crack in the stable a light that looked like a lantern, but he saw no fire of any kind. This story has many inherent improbabilities, but the theory failed because in the first place the stable did not take fire until after the shed and from the shed or ell, and the second place it was found locked when the plaintiff and his boarder went to it and removed the animals and contents. The other suggested source is within the hotel, and, to prove this, three employees of the defendant who were living in a caboose at the station testified that when they reached the fire it seemed to be on the roof of the ell near the main part, and they saw no fire elsewhere. But this testimony, negative at the best, was overwhelmed by that of the neighbors, who clearly prove that the fire spread from the shed to the ell and thence to the main part.

The only other evidence introduced by the defendant was that the engine was equipped with a spark arrester in good condition and, in the opinion of the witnesses, sparks could not have been emitted that would have set the fire. But, as showing the distance to which the sparks or cinders could fly, one neighbor testified to finding a large quantity of cinders on her piazza the same morning, her premises being in close proximity to the burned buildings and adjoining the railroad location.

Without discussing the evidence in detail further it is sufficient to say that, the proximity of the premises, the direction of the wind, the dryness of the night, the time of the passage of the train, the discovery of the fire within a short time thereafter, the location of the fire when first discovered and the absence of all other reasonably probable sources justified the jury in drawing the inference that the locomotive of the defendant caused the fire. As was said in *Jones* v. *Railroad Co.*, 106 Maine, 442; "it is a question of reasonable inference from all the facts and circumstances and the evidence should be of such a character that a reasoning mind shall see the connection between cause and effect." That test is fully met by the evidence in this case.

Damages. The plaintiff's evidence showed the fair value of the buildings to be $3,000 or $3,500. The schedule of personal property amounted to $3,000, making an outside limit of $6,500. The verdict was $5,341.67. This might be divided into buildings $3,500 and personal property $1,841.67, and the evidence would justify the finding. The furniture was for the most part nearly new, having been purchased within a year. The defendant offered no evidence whatever on values, either of buildings or contents, and it would seem that on the uncontradicted evidence offered by the plaintiff the damages are not so manifestly excessive as to warrant the interference of the court.

Exceptions. 1. The testimony of Mrs. Leach, a neighbor, who lived five houses west of the hotel, as to finding a large quantity of cinders on her piazza the morning after the fire, was properly admitted. The capacity of the engine to throw sparks was in issue, and upon that point her evidence was pertinent. The objections raised by the defendant go to the weight of the evidence rather than to its admissibility.

2. The instruction requested by the defendant was properly refused as it asked the court to prescribe in detail the character of the evidence required in this class of cases and to pass upon matters that are clearly within the province of the jury. The court, in the charge, properly instructed the jury upon the burden of proof resting on the plaintiff and fully protected the defendant's rights in all respects.

Motion and exceptions overruled.

BIRD A. AUSTIN *vs.* HATTIE F. BAKER.

Androscoggin. Opinion October 19, 1914.

Duty. Exceptions. Invitees. Licensee. Negligence. Nonsuit.

1. When exceptions are taken to an order of nonsuit, or to the direction of a verdict, all the evidence necessarily becomes a part of the case, and all of it must be taken to the Law Court; and if not taken, the exceptions may be dismissed.
2. It is the duty of the owner of a building, having it in charge, to be careful in keeping it safe for all persons who come there by his invitation, express or implied; but he owes no such duty to those who come there for their own convenience.
3. Toward a mere licensee, the owner of a building owes no duty, except that he shall not wantonly injure him.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case to recover for personal injuries to plaintiff sustained, as he alleged, by reason of the negligence of the defendant. Plea is the general issue. At the conclusion of the plaintiff's evidence, the presiding Justice directed a nonsuit, and to this the plaintiff excepted.

The case is stated in the opinion.

L. B. Waldron, and McGillicuddy & Morey, for plaintiff.

Manson & Coolidge, and Newell & Skelton, for defendant.

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

SAVAGE, C. J. This case comes before this court on exceptions by the plaintiff to an order of nonsuit. The case as made up contains a part only of the evidence, such part as the plaintiff has seen fit to have printed. This being so, we might very properly dismiss the exceptions. When exceptions are taken to an order of nonsuit, or to the direction of a verdict, all of the evidence necessarily becomes a part of the case. Such a ruling is based upon the entire evidence.

And it cannot be determined that the ruling was erroneous without an examination of all the evidence. It may be that the errors complained of are cured by the evidence omitted. It was so held in *Bank* v. *Nickerson*, 108 Maine, 341. Though the defendant has made the point, she has not absolutely insisted upon it. And we have thought best to examine the case on its merits.

So much of the evidence as is reported shows that the defendant is the owner of a two story building in Hartland. All of the upper story was occupied by one Burton and used by him as a barber shop. He was a tenant at will, under the defendant. The approach to the barber shop was by a flight of stairs on the outside of the building, at the top of which was a platform leading to the outside door of the shop. Around the platform was a railing. One rail was decayed and defective at the post. The plaintiff went up the stairs to the barber shop. He carried with him a bottle of whiskey, from which he drank in a back room connected with the barber shop, and he gave the barber a drink. He then started to return. He halted upon the platform to talk with another man. He says he did not lean against the rail, but that his hand was upon the defective rail. At any rate, the rotten end of the rail gave way, and the plaintiff was precipitated to the ground or landing below, and was injured.

This suit is brought to recover for this injury. The plaintiff did not go to the barber shop to be barbered, or to do any business with the barber. He went purely for his own convenience and to gratify his own whim or inclination. That being the case, he was a mere licensee, and the defendant as landlord owed him no duty, except the negative one of not wantonly to injure him. He was not invited.

The distinction between licensees and invitees is stated in *Stanwood* v. *Clancy*, 106 Maine, 72. In that case the court said that "while it is the duty of the owner of a building, having it in charge, to be careful in keeping it safe for all those who come there by his invitation, express or implied, he owes no such duty to those who come there for their own convenience. Toward a licensee the owner owes no duty, except that he shall not wantonly injure him. *Dixon* v. *Swift*, 98 Maine, 207; *Russell* v. *M. C. R. R., Co.*, 100 Maine, 408; *Parker* v. *Portland Publishing Co.*, 69 Maine, 173. It is well settled that when the owner of a building fits it up for business uses, he impliedly invites all persons to come there whose coming is naturally incident to the business carried on there. And if he leases the

building or parts of it to tenants, he impliedly invites all persons to come there in connection with the business carried on by the tenants. At the same time, if the building is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. To those invited he owes the duty of exercising care . . . . but to those merely licensed he owes no such duty. *Plummer* v. *Dill*, 156 Mass., 426."

It will be noticed that the duty of a landlord to exercise care to have the leased premises safe even for invitees arises, in the foregoing discussion, only when he has the building in charge. In this case the defendant contends that the case does not show that she was in charge, or had any control of the premises, or was under any legal obligation to make repairs. She says that in fact the case falls into the ordinary class where in the absence of express, valid agreement, the landlord is not bound to make repairs, but the tenant takes them as he finds them, and a visitor has no greater rights than the tenant. *McKenzie* v. *Cheetham*, 83 Maine, 543; *Whitmore* v. *Orono Pulp & Paper Co.*, 91 Maine, 297; *Bennett* v. *Sullivan*, 100 Maine, 118; *Hill* v. *Foss*, 108 Maine, 467.

But it is unnecessary to consider this last contention. Assuming that the defendant was in charge of the premises, and owed a duty to invitees, it is clear that she owed no duty to a mere licensee, as the plaintiff was. The nonsuit was properly ordered.

Exceptions overruled.

IGNACY BAK

vs.

LEWISTON BLEACHERY & DYE WORKS.

Androscoggin. Opinion October 19, 1914.

Assumption of Risk. Cautioned. Instructed. Knew and Appreciated the Danger. Safe Place.

1. A master is not an insurer of the safety of his servant. He is only bound to use reasonable care to have the place where the servant works in a reasonably safe condition.
2. A servant assumes the risk of all obvious dangers, and all dangers incidental to the business which are known and appreciated by him, and as well, of all dangers that he ought, by the exercise of reasonable care, to have known and appreciated.
3. A servant is not entitled to instructions and cautions about dangers, that he already knows and appreciates.

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

This is an action on the case to recover damages for personal injuries sustained by the plaintiff while working in the defendant's bleachery, because of the alleged negligence of the defendant. The defendant plead the general issue. The jury returned a verdict for the plaintiff of $1964.33, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Dana S. Williams, for plaintiff.

McGillicuddy & Morey, for defendant.

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

SAVAGE, C. J. Case for personal injuries. The verdict was for the plaintiff, and the case comes before the court on the defendant's motion for a new trial.

The plaintiff was employed by the defendant in its bleachery. At the time of the accident he was about seventeen years old, and had lived in this country about four months. To understand the nature of his duties and the way in which he received his injury, it is necessary to describe briefly the machine near which he worked, and in which he was injured. It was called a starching machine. The parts which it is necessary to mention now are first two large iron rolls which were geared together and run upon each other, one being over the other. Then in front of these rolls was a wooden roll. It was not geared to the other rolls and did not touch them. It run free. The space between the wooden roll and the upper iron roll was 4 9-16 inches. Between the wooden roll and the lower iron roll the space is less. The top of the wooden roll is four feet one and one-half inches from the floor, and is somewhat higher than the nip of the iron rolls.

When the machine is in operation long webs of wet cloth, sometimes starched, and sometimes not, are run between the iron rolls for the purpose of squeezing out the water. The free wooden roll serves to guide the cloth and keep it in position to pass through the nip of the iron rolls. After the cloth passes between the iron rolls it is brought back overhead by other rolls or contrivances and falls into a box on the floor in front of the machine. The space between the box and the nearest roll is about three feet.

The plaintiff's duty was to tend the cloth as it fell into the box, so that it would lie compactly in rough plaits or folds, and not come to the floor. And in performing that duty he stood between the box and the machine. When goods were being starched, it was also his duty to take starch from a starch tub at the end of the machine and carry it in a pail or dipper to the starch box, which was a component part of the machine, and situated under the rolls. In doing this starch commonly dripped upon the floor between the box and the machine so that the floor became more or less slippery. The plaintiff had no other duty with respect to the machine or the rolls.

The plaintiff's version of the accident is that the floor around the box was slippery, and that in going around the end of the box in connection with his work he slipped, and in falling got his left hand in some way between the iron rolls and it was injured. He says he cannot tell just how it was done. His complaints in his writ are that the rolls were not guarded, and that he was not instructed or cautioned as to dangers.

There were no guards in front of the rolls on the machine, except that the wooden roll itself served as a guard to the nip of the two iron rolls. To get the hand into the nip of the iron rolls it would be necessary to put it over and back of, or under and back of, the wooden roll. And the mechanical construction is such that it is practically certain that the plaintiff put his hand over and back of the wooden roll. The top of the roll, as already stated, was 4 feet $1\frac{1}{2}$ inches from the floor. The plaintiff's armpit was four feet from the floor. It follows that his hand must have been lifted somewhat above a level from his shoulder.

Whether the plaintiff was cautioned or not is in dispute. The condition of the floor is also in dispute. The plaintiff says it was wet and slippery from the starch. The defendant admits that it had been wet and starchy an hour or more before, but claims that the floor had been swept clean of water and starch before the accident. And the weight of the evidence clearly supports that contention. There is no question, however, that the floor was damp.

While there are some improbabilities in the plaintiff's story, we think it may be conceded that it is possibly true. But giving to the evidence and to the situation an effect most favorable to the plaintiff, we think that he is not entitled to recover, and that the verdict in his favor is indisputably wrong.

In the first place, we think it cannot properly be said that the defendant owed to the plaintiff the duty of guarding the nip of the iron rolls more than it was guarded. The plaintiff was not working at the machine. He had no occasion to come into proximity with the rolls. The nip was nearly as high as his shoulder. There was a wooden roll in front of it. His work was at the box, nearly three feet from the rolls. And we do not overlook the claimed fact that the floor was slippery, a condition known to the plaintiff. The master is not an insurer of the safety of his servant. He is only bound to use reasonable care to have the place where the servant works in a reasonably safe condition.

But if we were to assume that the place in this case was unsafe and dangerous, the plaintiff stands in no better position. It is so well settled that it needs no citation of authorities to sustain the doctrine, that the servant assumes the risk of all obvious dangers, and all dangers incidental to the business which are known to and appreciated by him, and as well, of all dangers that he ought to have known and

appreciated. It is equally well settled that the servant is not entitled to instructions and cautions about dangers which he already knows and appreciates.

The plaintiff's own testimony shows that he knew the consequences of getting his hand between the rolls. He knew where they were. He knew or ought to have known which way they were turning. He knew the condition of the floor. He knew the danger of slipping. He says he was "afraid" of it, and was "careful" by reason of it. Although he was young, it is clear that he knew and understood the dangers. We cannot do otherwise than to hold that the plaintiff assumed the risks of which he now complains.

The verdict is so clearly without warrant that we feel compelled to set it aside.

Motion for a new trial sustained.

RICHARD M. ALLEN *vs.* INHABITANTS OF LUBEC.

Washington. Opinion October 22, 1914.

Liability of Son. Notice. Pauper. Revised Statutes, Chap. 27, Sec. 45. Supplies.

In an action to recover for pauper supplies furnished under the provisions of Sec. 45 of Chap. 27, Revised Statutes;

Held: In order for the plaintiff to recover for supplies furnished to his father, he must prove that his father was destitute and in need of immediate relief; that he, himself, was not financially able to take care of his father and mother; and that the notice given was such as the Statute requires.

On motion for new trial by defendant. Motion overruled.

This action is to recover for supplies furnished by the plaintiff to L. J. Allen and his wife, who, it is claimed, were destitute and stood in need of immediate relief, and is based on the provisions of Chap. 27,

Sec. 45, of the Revised Statutes. Plea, general issue. The jury returned a verdict for the plaintiff of $168.61. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

L. D. Lamond, for plaintiff.

J. H. Gray, for defendants.

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

SPEAR, J. In this action plaintiff seeks to recover of defendant town, under the provisions of R. S., Chap. 27, Sec. 45, the sum of $213.42, for supplies alleged to have been furnished L. J. Allen and his wife, who, it is alleged, stood in need of immediate relief, and chargeable to defendants. The account of plaintiff covers a period extending from August 22, 1912, to June 28, 1913. The jury found for the plaintiff for $168.61, and the case is before the court upon the usual motion for a new trial. The facts are as follows: In June, 1912 and prior thereto, Loring J. Allen and wife were paupers in the town of Lubec. Mr. Allen being sick was sent by the overseers of the poor of Lubec, June 17, 1912, to the Maine General Hospital at Portland for treatment. He returned August 22, 1912, and went directly to his son's house, the plaintiff, to live where his wife, Amanda Allen, had been stopping while he was away. At the hospital he was treated for piles and rupture, and for no other trouble, and from information gained from the Hospital Superintendent, it was claimed Mr. Allen came home a well man and able to do light work; hence the overseers of the poor say they gave the matter no further attention supposing him to be able to support himself and in no further need of pauper supplies.

The plaintiff claims on the contrary that Loring J. Allen was not able to support himself and wife and was in need of relief and that he, the plaintiff, a son, was not able to support him, of which, he says he notified the overseers of the poor of Lubec on the 5th of September, 1912.

The defendant contends: 1st. That Loring J. Allen when he came from the Maine General Hospital on the 22nd day of August, 1912, was able to support himself and was not in need of pauper supplies. 2nd. That if he was not able to support himself and stood in need of pauper supplies, then his son, the plaintiff, was liable

for his support. 3rd. That no notice or request was made to the overseers of the poor by the plaintiff such as is contemplated by R. S., Chap. 27, Sec. 45.

The presiding Justice presented these issues so clearly to the jury that we quote his charge covering these points: "To re-state it: in order for this plaintiff to recover in this action he must prove by a fair preponderance of the evidence, first, that his father was destitute and in need of immediate relief at the time these supplies were furnished right straight down through. If he fails in that you stop right there. If he succeeds in that you move to the next point,—that he himself was not financially able to take care of his father and mother. If you find he was financially able that would stop the case. If you find he was not, then you move on, and the next point is the question of notice. If you find the notice given was such as the defendants claim here, that is the end of the case; plaintiff cannot recover. On the other hand, if you find such a notice was given as the statute requires and as the plaintiff testifies to, so they had full notice of what he expected, and the condition, and everything, then he would be entitled to recover for his necessary expenses, such as you find them to be, connected with the relief of his father."

The first two questions presented to the jury involved pure questions of fact. The jury found against the defendants upon each question. A careful reading of the evidence does not reveal any such error on the part of the jury as requires the interference of the court. The third contention may be said to have presented a mixed question of law and fact. The notice given by the plaintiff as the jury found may be stated substantially as follows: "I notified them (the overseers) about the 5th of September, Mr. Reynolds, I believe. I stated the condition of my father, and told him I was unable to support him, and my father knew I was. He told me that he would see Mr. Baker, another overseer, and see what could be done; I waited another week and I had no reply, and I sent and see Mr. Baker, and see what could be done; I waited another week and I had no reply, and I went and see Mr. Baker and I see Mr. Reynolds. I told Mr. Baker if he didn't find some means of removing and supporting him I would have to see if I could get my pay, I never heard anything more and I did. Now I am unable to." This conversation was corroborated by his wife.

As a matter of law we think this notice contained all the elements of information required by the statute to be given to the officers of the defendant town. Then arises the question whether these elements were so clearly and expressly stated as to enable the officers to understand them. This, of course, was a question of fact for the jury under all the evidence in the case. It appears as a conceded fact that L. J. Allen had prior to this notice been a pauper upon the town of Lubec for some eight or ten years. It, therefore, seemed incredible that the Selectmen of the town with full knowledge of this fact could have failed to fully understand the full purport and meaning of the above notice given them by the plaintiff. While it was not logical nor comprehensive, it yet must have been sufficient to convey to the town officers, to two of whom it was communicated, at different times, that they were requested to remove L. J. Allen and take care of him or the plaintiff would expect them to pay him for his support after the date of the notice. At any rate the jury found that the notice was sufficient to convey this information, and we are unable to discover any good reason for disturbing their verdict upon this question.

Motion overruled.

GEORGE M. COLBATH

vs.

EVERETT B. CLARK SEED COMPANY.

Aroostook. Opinion October 22, 1914.

Agent. Contract. Delivery. Original and Collateral Promise. Promise. Promise to Pay Debt of Another. Statute of Frauds. Telephone Message.

Upon an issue as to whether a promise is original or collateral;

Held:

1. Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damages to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.
2. When a benefit, legal or pecuniary, to the promisor, is the inducement for a promise for indemnity, such promise is not within the statute of frauds as being a special promise to answer for the debt or the fault of another, but is an original promise binding upon the promisor.

On motion for new trial by defendant. Motion overruled.

This is an action of assumpsit on an account annexed to the writ to recover of the defendant the sum of $1093.20 for potatoes sold and delivered in April, 1912. The defendant plead the general issue. The jury returned a verdict for plaintiff of $1022.54, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

James Archibald, and W. T. Spear, for plaintiff.

Powers & Guild, for defendant.

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

PHILBROOK, J. The plaintiff having obtained a verdict in his favor, the defendant brings this case before us on a general motion to have the verdict set aside as being against the law and the evidence.

Briefly stated the contention between the parties is whether the defendant made an original promise to pay for potatoes shipped by the plaintiff to the defendant, and received by the defendant, or whether the defendant merely made an oral promise to answer for the debt of another which could not be enforced under the provisions of R. S., Chap. 113, Sec. 1, par. II.

It appears that the defendant had a contract with one Klippel whereby the latter was to furnish a large quantity of potatoes to the defendant. The defendant claimed that it had advanced money on the contract, or, as the defendant claimed, it had paid in advance for nearly all the potatoes which Klippel might purchase and deliver to the defendant. It was not claimed by either party that Klippel was the agent of the defendant.

In the early part of April, 1912, the plaintiff telephoned Fred M. Clark, secretary and treasurer of defendant company, who was then at Fort Fairfield, and this telephone message was the only method employed in making the contract on which plaintiff now relies. The testimony given by the plaintiff on direct as to the conversation over the telephone is as follows; "I told Mr. Clark that I had been informed that Klippel was no good financially, and I could not ship any potatoes on his order, and I could not ship them unless he agreed to pay for them. He told me he could not pay for them because he had already paid Mr. Klippel. I says you have not paid for my potatoes and I am not going to ship them unless you will pay for them. He says I have got to have the potatoes and I will pay for them if Klippel don't. I says I have been informed that Klippel is no good and I will not ship them unless you agree to pay for them, and he says all right, I will pay for the potatoes if Klippel don't, let the potatoes go forward. I hung up the receiver and shipped the potatoes and sent him the bill of lading." On cross examination the plaintiff stated the substance of the telephone interview in terms somewhat more favorable to his contention and said that he charged the potatoes to the defendant and sold them on the credit of the defendant but the following questions and answers appear in the cross examination of the plaintiff;

"Q. Didn't you ship these potatoes because you understood Mr. Clark to agree to pay if Klippel didn't?

A. That is just what I did; yes, sir.

Q. And that was his agreement?

A. Yes, sir."

The plaintiff also gave these answers in his cross examination.

"But you say Mr. Clark did tell you that if Klippel didn't pay he would?

A. Yes, sir.

Q. And you accepted that agreement?

A. Yes, sir."

In a letter from the plaintiff to the defendant dated May 4, 1912, he tells the defendant "I had my man on the phone on same line so I have witness to conversation we had over the phone." This important witness was not produced at the trial nor was his absence accounted for, and although plaintiff testified that he charged the potatoes to the defendant his books showing such charge were not produced nor their absence accounted for.

Mr. Clark's testimony as to the telephone interview varied materially from that of the plaintiff. He states as follows:

"Someone on the 'phone in Mr. Klippel's office said, my name is Colbath, and I have just sold a car of potatoes to Mr. Klippel, and I want the shipping instructions. And I turned to Mr. Klippel, and he says, yes, that is the car that is to go to Milford. And I says, the shipping instructions Mr. Klippel says is to the Everett D. Clark Seed Co., Milford, Connecticut; and he took it down,—that is, he took the time to take it down, apparently. And he then said, now, Mr. Clark, who is going to pay for these potatoes? And I said, our dealings are entirely with Mr. Klippel, we have paid for these potatoes, and we are dealing only with Mr. Klippel. And I said, further, Mr. Klippel is good for a car of potatoes, isn't he; and Mr. Colbath replied, yes, I guess he is all right, and so are you good for a car of potatoes, aren't you; and I replied, yes, I guess we are all right. Colbath says, that is all I want to know; and I requested that the bill of lading be gotten to me so I could get it on the morning train the day following. He also said he was going that afternoon away, and he would arrange to have it left with the station agent; and as I came through, I got the bill of lading at the Fairmont Station as I remember it."

The defendant also introduced two letters written by the plaintiff less than a month after the telephone conversation transpired which are as follows:

Easton, Me., 4-30, 1912.

Everett B. Clark Seed Co.,
or Mr. Clark.

Dear Sirs:—

I have not received pay from Mr. Klippel for that car seed ship you which you guaranteed payment. I have not been home since I went south the day I sold the car potatoes. Wish you would look after it, I need the money. I am at Bristol, Ct., 74 S. Elm St.

Yours truly,

G. M. COLBATH.

Easton, Me., May 4, 1912.

The Everett B. Clark Seed Co.,
Milford, Ct.

Dear Sirs:—Yours at hand, I am surprised at the stand you take in regard to car potatoes, you surely have not forgot the conversation we had over the phone when you were at Fort Fairfield.

Mr. Klippel called me wanted car seed I made him price he said would see his man and let me know. I called up C. E. Spencer and asked him if Klippel was all right he said he would not sell him without the cash, but you was going to have the potatoes what ever you said was all right. I did not have time to arrange to get pay of Mr. Klipple before the potatoes went forward because he wanted them to go that night and I was going on 4 P. M. train that night so I called you and told you could not let potatoes go with being paid for for. You said you had already advanced the money for the potatoes but if Mr. Klipple did not pay for them you would so I let the potatoes go and billed them straight to you and left the bill of laden and invoice with the station agent at Easton for you. Now Mr. Klippel may pay for these potatoes all right when I get home but if he don't I shall expect you to, just as you agreed to over the phone. I had my man on the phone on same line so I have witness to conversation we had over the phone. Will be home last of next week.

Yours truly,

G. M. COLBATH.

We have endeavored to fairly state the substance of the evidence relating to the contract adduced by each party to this suit. Upon this evidence the defendant says that it has not made any promise which can be enforced against it; that such promise as it did make was not original, but collateral and within the statute of frauds. The plaintiff says otherwise.

The case presents an interesting field for research. At the outset we must observe that the potatoes were not delivered to Klippel but were delivered to the defendant at Milford, Connecticut, in accordance with shipping instructions given the plaintiff by defendant's agent, and presumably the defendant received the benefit of such delivery. The benefit thus accruing, as to its legal effect upon the promise, has furnished much discussion in many cases and the differences in opinion between such learned jurists as Chief Justice Shaw of Massachusetts and Chancellor Kent of New York is interesting and marked. For an exhaustive and able discussion of this question see *Hurst Hardware Company* v. *Goodman*, 68 W. Va., 62; 69 S. E., 898; Ann. Cas. 1912 B, 218. It is also noteworthy that not only has the New York court now substantially adopted the views of the Massachusetts court but the latter have been adopted by the Federal Court. *Emerson* v. *Slater*, 22 How., 28; *Davis* v. *Patrick*, 141 U. S., 479. The rule as it appears in *Emerson* v. *Slater* is "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damages to the other contracting party, his promise is not within the Statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

"When a benefit, legal or pecuniary, to the promisor, is the inducement for a promise of indemnity, such promise is not within the statute of frauds as being a special promise to answer for the debt or default of another, but is an original promise binding upon the promisor." *McCormack* v. *Boylan*, 83 Conn., 686; 78 Atl., 335; Ann. Cases 1912, A, 882.

If there were no element of benefit to the defendant in this case we should be of opinion that the plaintiff had only proved a promise

which was within the statute of frauds, but that element of benefit being so plainly apparent, under the authorities cited we must hold otherwise.

Motion overruled.

LINWOOD CAFFINNI *vs.* GEORGE E. HERMANN.

Cumberland. Opinion October 22, 1914.

Arrest. Assault and Battery. Exceptions. Intoxicating Liquors. Motion. Search and Seizure. Warrant.

1. The law is well settled in this State that even an officer may not arrest without a warrant for a misdemeanor, on information or suspicion, unless it was actually committed in his presence.
2. Intoxicating liquor may be seized without warrant under the provisions of R. S., Chap. 29, Sec. 48, but this section does not empower the officer to search without a warrant.
3. Evidence to prove trouble, which enforcement officers had previously suffered on account of illegal transportation of intoxicating liquor in hand bags and suit cases, is not admissible to show justification of an assault by an officer upon one whom he suspects may be thus illegally transporting such liquors; nor, to justify such assault, may evidence be introduced to show that the officer had made previous seizures of such liquors while being thus transported.
4. When correct instructions are given as to the rules governing actual and exemplary damages, the finding of a jury upon this question will not be disturbed unless manifestly wrong.

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

This is an action of trespass for an assault and battery. The defendant was a deputy sheriff, and in attempting to take a suit case from the plaintiff and in taking him into custody, committed the assault complained of. The defendant plead the general issue and filed a brief statement of special matters of defense, alleging that he

was a duly qualified deputy sheriff in and for Cumberland County and was in the performance of his official duties as deputy sheriff, and acts committed by him as alleged were justified by this fact. The defendant excepted to refusal of the presiding Justice to give certain requested instructions, which are specifically considered in the opinion. The jury returned a verdict for the plaintiff of $200, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Charles G. Keene, Jacob H. Berman, Bernard A. Bove, for plaintiff.

Hinckley & Hinckley, for defendant.

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

PHILBROOK, J. Action to recover damages for assault and battery, in which the plaintiff recovered a verdict of $200.00. The defendant presents exceptions and the customary motion to have the verdict set aside and new trial ordered.

The plaintiff is an Italian who had been in this country four or five years, employed as a laborer, and had acquired only a limited knowledge of our language. On the 16th of August, 1913, he took an electric car at Old Orchard about 8.45 in the evening and came to Portland, bringing in his hand a dress suit case containing his wearing apparel. He arrived in Portland about quarter past ten and, according to his testimony, soon after leaving the car he was accosted by the defendant, who, although a deputy sheriff, was not in uniform, and who seized the plaintiff's suit case, attempting to take it from him. The plaintiff testified that he thought it was an attempt to steal his suit case and refused to give it up. After some struggle he says the defendant struck him on the hand four or five times with an instrument which proved to be a black-jack. He says that he was then seized by the defendant and another person and that they started with him for the police station. Thereupon, an officer in uniform appeared and told the plaintiff that the persons who had seized him wanted to see what he had in his suit case and then, the plaintiff says, he dropped his suit case and when the defendant could not open it the plaintiff opened it and allowed it to be searched, nothing contraband being found. The plaintiff was then permitted to go his way and carry the suit case with him.

The defendant says that he was a deputy sheriff especially charged with the duty of enforcing the law prohibiting the illegal manufacture, transportation and sale of intoxicating liquor. He says that the officers had been having trouble with offenders who brought liquors to Portland in suit cases and hand bags and, on the evening in question, was with his superior officer, the sheriff of the county, on Federal Street when the plaintiff left the car. He says that either he or the sheriff remarked "that fellow looks as if he had quite a heavy case," and that presently the sheriff said to the defendant "go get him." He says he stepped up to the plaintiff and asked permission to look at the suit case which was refused. He further says that the plaintiff struck at him with an umbrella and that he then said "Don't do that, because I am an officer; all I want to see is what you have got in that dress-suit case," at the same time throwing back his coat and displaying his official badge. Neither the defendant nor the sheriff had any warrant authorizing the arrest of the plaintiff or any precept authorizing any search of the person of the plaintiff. Although the defendant seeks to justify his conduct on the ground that he was an officer making a legal arrest and using no more force than was necessary, the law is well settled that even an officer may not arrest for a misdemeanor without a warrant on information or suspicion, unless the misdemeanor was actually committed in his presence, *Palmer* v. *Maine Central Railroad Co.*, 92 Maine, 399. Under the circumstances of this case the arrest was not justifiable even if excessive force had not been used, and it seems plain that such force was used. The presiding Judge was correct in ordering a verdict for the plaintiff.

Testimony was offered by defendant and excluded, relative to trouble which the enforcement officers had been having with those who violated the law by illegally transporting liquor in suit cases and hand bags, but as there was no attempt to connect such acts with this plaintiff there was no error in the ruling. The same was true relative to offered evidence that the officers had made previous seizures of liquor illegally transported in the way just referred to.

The defendant presented three requests for instructions, all of which the presiding Judge refused to give except as they were given in the charge. They were as follows:

"One: If you believe from all the evidence that the circumstances were such as would have caused an ordinarily prudent officer in the exercise of his official duties to believe that the plaintiff had in his

dress suit case intoxicating liquor for unlawful purposes, then the officer would be justified in making a search of the dress suit-case and using whatever force would be reasonably necessary to accomplish this purpose."

"Two: If you are satisfied that was not a malice on the part of the defendant, who, if he committed the acts, believing he was doing his duty, then the plaintiff could not recover punitive damages, but could recover only the actual damages to himself."

"Three: If the plaintiff for the purpose of misleading the defendant, deliberately created circumstances to arouse the suspicion of the defendant, who was an officer of the law, having in mind at the time and intending thereby to get the officer into trouble, and the officer by these acts was misled and became suspicious that a crime or offense was being committed or had been committed by the plaintiff, and under these circumstances, committed the acts alleged, then the plaintiff could not recover, because he himself would be to blame."

As to the first request it is only necessary to call attention to the fact that the statute authorizes an officer to "seize" intoxicating liquors illegally kept, without a warrant, but not to "search" without such precept.

As to the second, the entire point was covered in the charge, and as to the third it is only necessary to say that it does not contain a correct statement of law.

Finally, as to damages. Correct instructions were given both as to actual and exemplary damages and from the evidence and the instructions we think the verdict of the jury was not so manifestly wrong as to require us to interfere.

Motion and exceptions overruled.

JENNIE L. POLLAND

vs.

GRAND TRUNK RAILWAY COMPANY OF CANADA.

Cumberland. Opinion October 27, 1914.

Accident. Defect. Due Care. Negligence. Platform. Ordinary Care.

1. In such a case as the one at bar, care in the highest degree was not required of the defendant, nor was the same degree of care required as that owed to a passenger in a moving train.
2. The defendant was not required to maintain absolutely safe conditions, but its only duty was to exercise ordinary care and to maintain its platform in such reasonably safe and suitable condition that passengers, who were themselves in the exercise of ordinary care, could safely alight from the train.

On report. Judgment for defendant.

Action on the case to recover damages for personal injuries to the plaintiff, sustained by her while alighting from one of the defendant's passenger cars at the Grand Trunk Terminal in Portland, Maine, April 6, 1912. Plea, general issue. The case, at the close of the testimony introduced by plaintiff at January term, 1914, of Supreme Judicial Court, was reported to the Law Court upon this stipulation;—"If the Law Court is of the opinion upon such evidence that the case should have gone to the jury, then the case is to stand for trial; otherwise, it is to direct judgment for the defendant."

The case is stated in the opinion.

Charles J. Nichols, and William A. Connellan, for plaintiff.

Clarence A. Hight, and Harry P. Sweetsir, for defendant.

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

PHILBROOK, J. Action on the case to recover for damages suffered by plaintiff on account of the alleged negligence of the defendant.

The cause comes to this court on report for decision upon so much of the evidence as is legally admissible. If this court is of the opinion that upon such evidence the case should have gone to the jury then the case is to stand for trial, otherwise judgment is to be directed for the defendant.

On April 6th, 1912, at about five o'clock in the afternoon the plaintiff became a passenger for hire on defendant's train, boarding the same at South Paris, and riding to Portland where she arrived about seven o'clock in the evening. On her arrival, while in the act of leaving the train after it had come to a full stop at Portland, which is the terminal of the trip, she fell between the lower step of the car and the edge of the platform and suffered a fracture of one leg.

The negligence complained of by the plaintiff is variously stated in the different counts of her writ but may be epitomized thus, that the platform was insufficiently illuminated at the point where she alighted from the car, and that the construction of the platform, relative to its distance from the lower step of the car, was improper and unsafe. It appears that measurements were taken by an engineer, and also by the jury which viewed the locus of the accident, and the report is as follows; the measurements of the engineer show that a vertical line from the outer edge of the platform, intersecting a horizontal line from the outer edge of the lower car step would show the vertical line to be thirteen and five-eighths inches long and the horizontal line seven and one-half inches; that the vertical measurement of the jury was the same as that of the engineer but the horizontal measurement of the jury was ten and three-quarters inches. In other words the distance from the outer edge of the lower car step to the outer edge of the platform was the hypothenuse of a right triangle whose perpendicular is thirteen and five-eighths inches and whose base is either seven and one-half inches or ten and three-quarters inches. It seems to be conceded that from the outer edge of the platform to the ground was a distance of twelve and one-half inches. These conditions constitute the alleged defects in the construction of the platform relative to its distance from the lower step of the car.

As to the sufficiency of light we must confine ourselves to the testimony of the plaintiff. Mrs. Hall was not present when the accident happened and the other witnesses only testified as to experimental conditions and as it was not shown that their experiments were con-

ducted under circumstances sufficiently similar to those which existed at the time of the accident, we do not consider their testimony admissible.

The plaintiff says that it was dark and she couldn't see much but says she saw the platform, the outline of the platform, and the conductor, but did not see the outline of the platform "perfectly plain." She also testified that she didn't look down to see the edge of the platform.

Considerable testimony was introduced to show different methods of platform construction on other railroads, but no standard of construction applicable to various conditions was shown.

In such a case as the one at bar care in the highest degree was not required of the defendant, nor was the same degree of care required as that owed to a passenger in a moving train. The defendant was not required to maintain absolutely safe conditions but its only duty was to exercise ordinary care and to maintain its platform in such a reasonably safe and suitable condition that passengers who were themselves in the exercise of ordinary care could safely alight from the train. *Maxfield* v. *M. C. R. R. Co.*, 100 Maine, 79.

Without further statement or analysis of the testimony it does not seem to us that the defendant was shown to be guilty of actionable negligence and there is also grave doubt whether the plaintiff was in the exercise of due and reasonable care, for if she had been it would seem most likely that she could have safely alighted.

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

Judgment for the defendant.

DAVID DRISCOLL *vs.* WILLIAM E. GATCOMB.

Washington. Opinion October 29, 1914.

Evidence received by Jurors out of Court. Influence. Replevin. Revised Statutes, Chap. 84, Sec. 53. Tendency to Influence Mind of Jury.

1. An action of replevin, in which verdict was rendered for plaintiff, reported to this court under R. S., Chap. 84, Sec. 53, on motion of defendant for new trial for alleged improper action of a juror in taking, without leave of court, a view of the article replevied and instituting comparisons between it and other articles.
2. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but cannot be permitted to testify how far that influence operated upon his mind.
3. The question of fact is not whether the mind of the juror was influenced but whether his act might have influenced his mind, was of such a nature as to have any tendency to influence it.
4. It is not a violent presumption that evidence received by jurors or remarks made to them, out of court, or views without order of Court, more or less, affect jurors.
5. In this case, nothing appears to rebut this presumption and we are unable to conclude that there is no possibility that the juror was unaffected by his examination and comparison.

On motion by defendant reported to Law Court in accordance with Revised Statutes, Chap. 84, Sec. 53. Motion sustained. New trial granted.

This is an action of replevin of a calf. The maternity of the calf was an element in determining the question of title. The defendant plead the general issue and filed a brief statement, alleging that the property and the right of possession in said calf described in said writ then was, and ever since has been and now is in him, and not in the plaintiff.

The case is stated in the opinion.

R. J. McGarrigle, for plaintiff.

Ashley St. Clair, for defendant.

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

BIRD, J. In this action of replevin of a calf, a verdict was rendered for the plaintiff and the case is now here upon a motion for new trial reported in accordance with the provisions of R. S., Chap. 84, Sec. 53. It appears from the printed record that the maternity of the calf was an important element in determining the question of title at the trial. The Justice presiding had excluded evidence instituting a comparison between the calf and the cow alleged by plaintiff to be its dam. Subsequently and before verdict rendered, one of the jurors engaged in the trial of the cause went to the house of plaintiff and, denying to the plaintiff that he was connected with the Court in any way, was permitted to examine the calf and the cow so alleged to be its dam. The defendant did not learn of the action of the juror until after the rendition of verdict when he promptly filed his motion for new trial. It is not apparent that the juror in question mentioned his visit to the house of plaintiff to his fellows.

Subject to objection of defendant, the juror was permitted, with grave doubt on the part of the Court, to state that his examination and comparison of calf and alleged dam did not influence his decision in any manner. The objection was well taken. As said in *Harrington* v. *Worcester &c. Railway*, 157 Mass., 579, 581, "a juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." And in the same case it is remarked that the question of fact in such a case as the present is not whether the mind of the juror was influenced, but whether his act might have influenced his mind, or was of such a nature as to have any tendency to influence it. See also *Newell* v. *Ayer*, 32 Maine, 334; *Clark* v. *Lebanon*, 63 Maine, 393, 395; *Trafton* v. *Pitts*, 73 Maine, 408; *Heffron* v. *Gallupe*, 55 Maine, 563, 566; *State* v. *Hascall*, 6 N. H., 352, 361, 363.

The question therefore is whether or not the action of the juror might have influenced his mind or was of such a nature as to have any tendency to influence it. It is not a violent presumption that evidence received by jurors or remarks made to them, out of Court, or views without order of Court, more or less, affect jurors: *Cilley* v. *Bulett*, 19 N. H., 312, 324; *Bradbury* v. *Cony*, 62 Maine, 223, 227.

Nothing appears in the evidence reported to rebut this presumption. We are unable to conclude that there is no possibility (*State* v. *Hascall*, 6 N. H., 352, 363) that the juror was unaffected by his examination and comparison. See *Heffron* v. *Gallupe*, 55 Maine, 563, 568; *Belcher* v. *Estes*, 99 Maine, 314, 316.

Motion sustained.
New trial granted.

BERT E. DODGE, In Equity

vs.

CHARLES F. DODGE, et als.

Lincoln. Opinion November 5, 1914.

Beneficiaries. Bequest. Forfeiture. Release. Remainder. Trust. Trustees. Waiver. Will.

1. It is settled law that, if the trust fail, as it would by the death of a beneficiary, the devise being to the trustees for a specific purpose only, they hold the property for the testator's heirs at law, as a resulting trust, and are answerable to them for it.
2. The law favors vested estates and does not favor intestacy as to any part of the estate of a testator.
3. Construing Item 29 of the will in the light of the evident intention of the testator, as gathered from the whole will; *held*, that the testator did not intend that the residuary estate should vest in the beneficiaries, but clearly did intend that when the purposes of the trust were accomplished, the remainder, if any, should vest in his heirs at law.
4. The effect of the waiver is that the beneficiaries voluntarily place themselves in the position of general heirs with all the other heirs at law of the testator, and the fund becomes at once the property of all the heirs at law of the testator.
5. The same rule applies when the property devised is more than is needed to support the trust, and when the trust is not sufficiently defined to enable the court to carry it out.

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

This is a bill in equity praying for a termination of the trust under the will of Isaac Dodge, late of Newcastle, deceased, and the distribution of the remainder of his estate. The defendants filed answers to said bill. The cause was reported to the Law Court, to be decided upon the facts stated in the bill.

The case is stated in the opinion.

A. S. Littlefield, for plaintiff.

William T. Hall, for defendants.

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

HANSON, J. Bill in equity to terminate a trust under the will of Isaac Dodge, late of Newcastle, Lincoln County, with request for instruction to the trustees as to the distribution of the remainder, reported to this Court for determination.

The will was dated January 28, 1895. The testator died Oct. 24, 1896, leaving a widow, three sisters, a brother, and many nephews and nieces. He had no children. The estate was large and many bequests were made. The executors settled various accounts, and made distribution under the will, and in March, 1900, turned over the balance of the estate to the trustees.

The questions raised require consideration of the residuary clause in the will, which reads as follows: "Item 29. All of the rest, residue and remainder of my estate, both real, personal and mixed, including all rights of reversion and remainder, I give, devise and bequeath to Thomas C. Kennedy, Arabella Dodge, both of Newcastle, Maine, and William A. McKenney of Boston, Mass.; but in trust nevertheless for the use and purpose hereinafter named, viz: If the necessity arises that either of my brother or sisters, nephews and nieces who may survive me, may require a larger amount of money than I have by this will given and bequeathed to them, in order to insure in sickness or old age their proper care, victualing, clothing, nursing and medical attendance, it is my will that my said trustees, Thomas C. Kennedy, Arabella Dodge and William A. McKenney at once fully provide for their necessities from this amount so allowed

and held in trust by them" and also the following agreement and waiver signed by all the beneficiaries under the trust:—

"WHEREAS the Supreme Judicial Court for the State of Maine have construed the will of Isaac Dodge, late of Damariscotta, in the County of Lincoln in said State; and said Court has intimated in its opinion, that the trust therein created might be terminated and said estate divided, if all the beneficiaries under said trust should release or waive their rights and claim under it:

NOW THEREFORE, we the undersigned, being of full age and competent to act, and being all the beneficiaries under the trust covering the residuary estate created by said will, do hereby, each in consideration of the agreement of the other so to do, herein contained, release and waive all our claims and rights under said trust and release and discharge said Trustees from all responsibility and liability with reference thereto, if and when said trust shall be terminated under the direction and by order of Court; and do request that said trust be ended and terminated, and the property remaining in said trust divided in accordance with said will and according to law.

And we do appoint William T. Hall our true and lawful attorney in fact in the premises, to do for us, our heirs and assigns, all such things as may be necessary to accomplish the termination of said trust and the disposition of the residuary estate; and to represent us in all proceedings therefor, with full power and authority to waive, if he may see fit, service of any process issued therein and appear in Court as our attorney, thereby binding us to all proceedings which may be taken therein.

Signed this day of January, A. D. 1914."

The will in this case was before this Court in a bill filed by the trustees of the residuary estate praying for a construction thereof, and it was then held (111 Maine, 246) "that the trust will continue until all its expressed purposes have been accomplished, unless all the beneficiaries shall sooner release their rights to claim under it." The conclusion therein reached is in harmony with an uninterrupted line of cases holding that upon the performance of all the conditions of the trust, or when all the beneficiaries shall release their rights thereunder, such trust may be terminated. *Paine* v. *Forsaith*, 86 Maine, 357, citing Perry on Trusts, Sec. 920; *Smith* v. *Harrington*, 4 Allen, 566; *Bowdwich* v. *Andrews*, 8 Allen, 339; *In re Harrar's estate*, Sup. Court,

Penna., 91 Atl., 502; *Morse* v. *Morrell*, 82 Maine, 80; *Tilton* v. *Davidson*, 98 Maine, 55; *Gardner on Wills*, 542, Note.

The right to terminate the trust being undoubted, and the beneficiaries having voluntarily sought such termination, there remains but one question for solution,—to whom shall the remainder be distributed?

All surviving beneficiaries are made parties defendant, together with the legal representatives of beneficiaries deceased since the death of the testator, as well as all surviving relatives who are not mentioned in the will who may claim as heirs at law of Isaac Dodge in case intestacy is declared as to any portion of his estate.

The determination of the question depends, (1) upon the character of the interest created by Item 29, (2) the effect, if any, of the waiver filed in the case upon the interest of the beneficiaries.

1. It is evident from the reading of the whole will that the testator was not hostile to his relatives who are not mentioned in the will. His testamentary disposition toward those to whom bequests were made was based upon special solicitude for their welfare during their lives, thus exhibiting a special interest in each individual so named. His reason for thus discriminating between his relatives may have been due to his knowledge of the existing necessities, and his judgment of what the future necessities of each might be, and his belief that the relatives not named would not need any part of his estate. However that may be, it is very clear that while his main purpose in establishing the trust was to insure the beneficiaries against want in sickness and old age, he was not averse to the idea of intestacy of a portion of his estate, if for any reason his purposes were frustrated, or his wishes were not carried out. He was not only presumed to know the law in relation to such provision in a will, but the will discloses that he did know that if for any reason the trust should fail in its operation, if in the judgment of the trustees no part of the residuum was needed by the individuals named in the trust, or if any part hereof remained at the death of the last beneficiary, that such amount, whatever it might be, would vest in his heirs at law. His familiarity with the law, and his disposition to allow part of his estate to vest in his heirs at law, is plainly seen in the language used in item 26 directing the disposal of $5,000 intended for the Second Congregational Church of Newcastle, where provision is made "that if the church suffers or allows this gift to be diverted, or used for any

other purpose than herein willed and directed, then it is my will that the above gift and bequest revert to my heirs for their use and benefit forever."

In construing item 26, when the subject was first before the court, as in 111 Maine, 246, supra, the question was raised "whether if at *any future time* there shall be a forfeiture of said bequest, the same will become a part of the residuary estate, or go directly to the heirs." We answered, "that the testator gave the fund to the church. It is not and cannot be a part of the residuary estate. The trustees have nothing whatever to do with the administration of the fund. That is a matter which concerns only the church and the testator's heirs." While the law favors vested estates, and does not favor intestacy as to any part of the estate of a testator, there is no room for the application of either principle in the case at bar, for we must construe the item in question in the light of the first and most potent rule of construction,—the evident intention of the testator as gathered from the whole will. Applying that rule, our construction of item 29 is that the testator did not intend that the residuary estate should vest in the beneficiaries, but clearly did intend that when the purposes of the trust were accomplished, the remainder, if any, should vest in his heirs at law. There is no limitation over, and nothing in the will to indicate any other purpose on his part, and the inferences and presumptions arising from reading the will make any other conclusion impossible.

We are therefore led to conclude that, when the trust is terminated as provided herein, the residue in the hands of the trustees will vest immediately in the heirs at law of Isaac Dodge.

2. The effect of the waiver is just what is stated therein,—a release of all claims and rights under the trust, and a release and discharge of the trustees from all responsibility and liability with reference thereto. The beneficiaries voluntarily place themselves in the position of general heirs with all the other heirs at law of the testator, and the fund for a time subject to their individual rights becomes at once the property of all the heirs at law of the testator. The law so directs, and there can be no doubt that the testator so intended.

It is settled law that if the trust fail, as it would in this case by the death of the beneficiaries, the devise being to the trustees for a specific purpose only, they hold the property for the testator's heirs at law, as a resulting trust, and are answerable to them for it. The same

rule applies when the property devised is more than is needed to support the trust, and where the trust is not sufficiently defined to enable the court to carry it out.

Gardner on Wills, page 543, and cases cited, among which are *Eastabrooks* v. *Tillinghast*, 5 Gray, 17, 21; *Sears* v. *Hardy*, 120 Mass., 524, 542; *Nichols* v. *Allen*, 130 Mass., 211, 221; *Olliffe* v. *Wells*, 130 Mass., 221, 223; *St. Pauls Church* v. *Atty. Gen.*, 164 Mass., 188, 197.

Where a devise of an estate is rejected by the devisee, and there is no other disposition of the estate in the will, it will descend to the heirs at law. *Bugbee* v. *Sargent*, 23 Maine, 269. The same doctrine was followed by this Court in *Wentworth* v. *Fernald*, 92 Maine, 282, where it was held that when there is merely a gift for maintenance and support, the beneficiary is only entitled to adequate maintenance, and any surplus goes to the testator's estate. Gardner on Wills, 490, citing 42 Atl., 550, and *McKnight's Ex'rs* v. *Walsh*, 24 N. J., Eq., 498. See *Fogler* v. *Titcomb*, 92 Maine, 184; *Small* v. *Thompson*, 92 Maine, 539.

All parties interested having joined in the petition to terminate the trust under consideration, and as no other persons will be injured thereby, decree will be entered terminating the same. Upon entry of such decree, distribution of the residue of the estate of Isaac Dodge will be made by the trustees as follows: One-seventh to the surviving sister, Susan McKenney; the remaining six-sevenths to the descendants of the deceased brothers and sisters of Isaac Dodge, by right of representation.

Reasonable counsel fees and costs will be allowed by the Justice settling the final decree, to be paid by the trustees and charged in their account.

Bill sustained.
Decree in accordance with this opinion.

ALBERT W. SMITH, Adm'r

vs.

BOOTH BROTHERS & HURRICANE ISLE GRANITE COMPANY.

Knox. Opinion November 12, 1914.

Assignment of Mortgage. Boundaries. Deeds. Delivery. Exceptions. Mortgage. Possession. Prescription of Delivery of Deed. Record. Title.

1. A new trial will not be granted on the ground of newly discovered evidence, when it could have been discovered before the trial by the exercise of due diligence.
2. The newly discovered evidence in this case does not have such probative force as to warrant the granting of a new trial.
3. A deed by a mortgagee, containing also an assignment of the mortgage debt, conveys the mortgagee's title.
4. A deed by a mortgagee out of possession, not accompanied by a transfer or assignment of the mortgage debt, conveys no title.
5. A mortgagee by taking possession under his mortgage acquires a seisin in fact, and an interest in the land itself, which he can convey, if he continues in possession.
6. A seisin once acquired is presumed to continue until it is shown that there has been an ouster or disseizin, or an abandonment.
7. Mere non-user is not enough to warrant a finding of abandonment.
8. The owner of land may retain the legal possession of land though he does not remain upon it, and such possession may be regarded as actual, as distinguished from constructive.
9. When a mortgagee has taken possession, his title, so acquired is presumed to continue until the contrary is shown.
10. An owner having granted all the granite in his farm, his subsequent deed of a tract of land by metes and bounds which included the farm, and perhaps more, is not admissible to show the limits of the farm. But if the later deed conveyed more than the original farm, the grantee became the owner of all the granite outside of the farm, and a trespasser who is sued for one-fifth only of the granite is not prejudiced by the admission of the deed, which is a muniment of the plaintiff's title.

11. Exceptions to the admission of irrevelant, but harmless, testimony will not be sustained.

12. The payment of taxes assessed on land is not evidence of possession. It is evidence of a claim. But where the fact of possession is indisputable upon the other evidence, the admission of a tax assessment and payment offered to show possession is harmless.

13. The granting of a motion to strike out testimony is usually discretionary. The discretion was not unreasonably exercised in this case.

14. How long and how far cross-examination of a witness for the purpose of impeaching him shall be continued lies within the discretion of the presiding Justice.

15. That it is found to be the ordinary thing that land overruns the measures given in old deeds and old surveys may be shown to explain apparent discrepancies between old surveys and measurements and what are claimed to be monuments marking true lines and corners; but not to lengthen certain and definite measurements in old deeds.

16. Exceptions to refusals to instruct except as given in the charge cannot be sustained unless the charge is made a part of the bill of exceptions. In such case, it must be presumed that the instructions given were adequate and correct.

17. Unless a charge is made a part of a bill of exceptions, the court cannot examine or consider it, although it may be printed as a part of the record.

18. Under a motion for a new trial, it is always to be presumed that the charge was appropriate and correct; and the practice, sometimes followed, of printing the charge has no warrant.

On motion for new trial and exceptions by the defendant. Exceptions and motions overruled.

This is assumpsit to recover the sum of $2800 for one-fifth of stumpage for granite claimed to have been taken by defendant from the quarry and pasture adjoining the quarry owned by defendant at Long Cove in St. George, Maine. The defendant pleaded the general issue. The jury rendered a verdict for the plaintiff of $2511.60 and the defendant filed a general motion for a new trial and a motion for a new trial on the ground of newly discovered evidence. The defendant had numerous exceptions, which are fully considered in the opinion.

The case is stated in the opinion.

A. S. Littlefield, for plaintiff.

C. E. Littlefield, C. W. Littlefield, and Frank H. Ingraham, for defendant.

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

SAVAGE, C. J. Assumpsit by the administrator of James M. Smith to recover one-fifth of the stumpage for granite alleged to have been taken by the defendant from the quarry and pasture adjoining the quarry owned by the defendant at Long Cove in St. George, Maine. The trial resulted in a verdict for the plaintiff, and the case is brought here by the defendant on a general motion for a new trial, a motion for a new trial on the ground of newly discovered evidence, and on numerous exceptions.

The principal issues involved are these. The plaintiff in the first place claims that James M. Smith, his intestate, in whose lifetime the granite was taken by the defendant, had a title by deed to an undivided fifth part of the granite in the premises in question. This is denied by the defendant on two grounds, first, that James M. Smith never had any title, and secondly, if he ever had title, he had conveyed it to his wife, Annie S. Smith, before the defendant's acts complained of. The plaintiff replies that even if James M. Smith had no valid title by deed, yet he had such a possessory right as would entitle him, or his administrator, to maintain this action against one having no title or right of possession. He says further that the deed of James M. Smith to Annie S. Smith was never delivered to her, and therefore that no title passed. There is also a dispute as to the location of the northern boundary line of the tract on which the quarrying rights are claimed to have belonged to James M. Smith. These are the issues.

We will first consider the contention that long before any granite was taken by it, the plaintiff's intestate conveyed to Annie S. Smith, his wife, whatever interest he had in the granite which is now the subject matter of dispute. For if the motion should be sustained on that ground, it will not be necessary to consider the case further. If the plaintiff's intestate had conveyed all his title before the time the granite was taken, the action cannot be maintained.

That a deed to that effect was executed and acknowledged by James M. Smith is not denied. It was dated February 4, 1882. As the defendant set up this deed to defeat the plaintiff's title, it was incumbent on it to show that it became effective by delivery. It is denied that it was ever delivered to the grantee or to any one for her use. Mrs. Smith, the grantee, testified that it was never delivered, and

that she never knew of its existence. The jury, by direction, made a special finding which was to the effect that the deed was never delivered. As will be shown more particularly hereafter, Alvin H. Fogg and Laurettus E. Fogg were tenants in common, each of one-fifth, with James M. Smith, of the unquarried granite. It appears that on February 3 and 4, 1882, the Foggs separately conveyed their interests to Annie S. Smith, and she executed mortgages to them respectively of the same interests. February 4, 1882, as stated, her husband executed a deed to her of his one-fifth interest, but did not take back any mortgage. All these deeds to Mrs. Smith were recorded, and were found by the defendant's attorneys on the files of the Registry of Deeds, a short time prior to the trial in this case, which was 31 years after the deeds were executed, and several years after Mr. Smith's death.

It is not shown that the grantee assented to the delivery of the deed for record, or that she knew of its existence. She denies it. It is not shown, unless by inference, who delivered it to the registry. It is not shown that there was any change in the use and occupation of the property named in the deed. The defendant relies upon a presumption of delivery arising from the fact that it is recorded. Its counsel in their brief, quoting from the note to *Munro* v. *Bowles*, 54 L. R. A., 884, say that "the general rule undoubtedly is that a presumption of delivery arises from the fact that a deed has been recorded."

We do not need to discuss now the accuracy of this statement. Assuming, but not deciding, it to be correct in the broadest sense, and that the record of a deed is presumptive evidence of its delivery, it is only a presumption, and the presumption is rebuttable. There is rebutting evidence in this case, and it is of such a character as to warrant the finding that the deed was never delivered. Accordingly the general motion for a new trial cannot be sustained on this ground.

But the defendant has filed a motion for a new trial on the ground of newly discovered evidence of the delivery of the deed. The newly discovered evidence is that of the attorney who drafted the deed, but who did not take the acknowledgment of it. His testimony is as follows: "It is my recollection that James M. Smith was in somewhat of a hurry when he instructed me to make out the deed from him to Annie S. Smith, and did not wait in the office to have the deed written; that he afterwards called for the deed or that it was mailed

to him by me to St. George where he then lived. While I am not able to state that I now have a specific and independent recollection of instructing Mr. Smith as to the fact that in order that the deed to Annie S. Smith might be effective and valid it must be delivered, and what was necessary for him to do in order to accomplish a delivery, I feel morally certain that I told him that to make the deed valid and effective it must be delivered to the grantee . . . . or to someone for her with her knowledge and assent, as it was and now is my unvarying and universal practice to give to parties for whom I draw deeds specific and careful instructions as to what it was necessary for them to do in order to accomplish a delivery to the grantee."

This latter motion cannot prevail for two reasons. First, the testimony could have been discovered by the exercise of due diligence before the trial. The defendant's attorneys discovered the deed before the trial in the Registry of Deeds. They knew the scrivener and knew where he was. They should have anticipated that the question of delivery would arise in the case of a deed found under such circumstances. *Blake* v. *Madigan*, 65 Maine, 522; *Maynell* v. *Sullivan*, 67 Maine, 314. A new trial will not be granted on the ground of newly discovered evidence, when it could have been discovered before the trial by the exercise of due diligence. *Howard* v. *Grover*, 28 Maine, 97; *Blake* v. *Madigan*, 65 Maine, 522; *Kimball* v. *Hilton*, 92 Maine, 214; *Berry* v. *Ross*, 94 Maine, 270. Moreover, when the point of non-delivery was made, the defendant, if surprised, might have asked for a continuance on that ground. It asked for none. Secondly, the newly discovered evidence, if admissible, does not have such probative force as to warrant the granting of the motion. *Parsons* v. *L. B. & B. St. Ry.*, 96 Maine, 503.

We will next examine the exceptions, thirty-one in number. The evidence is made a part of the bill of exceptions, and the exceptions must be considered in the light of the evidence. Hence we make now a brief review of such of the facts shown as bear upon the exceptions. And first as to the title of the plaintiff's intestate to the granite by deed. The case shows that on July 1, 1823, John Ruggles conveyed to Joshua Smalley a strip of land several hundred rods long extending in a general northwesterly-southeasterly direction, and described as forty-four rods wide. The title to this land afterwards came to Archelaus Smalley, and the tract constituted what was known as the Archelaus Smalley farm. The location of the northerly side line of

this tract is one of the questions in dispute in this case. The exact location of the southerly side line is also in dispute; but it is sufficient now to say that the tract was bounded on the south by land which now belongs to L. W. Seavey.

In 1836, Archelaus Smalley conveyed to Sherman Converse "all the granite on and in the farm on which I now live in St. George," reserving the wood, soil and buildings. This was the farm already referred to. Afterwards in the same year, 1836, Converse mortgaged to John S. Abbott, "all my right, title and interest in and to all of the granite" on and in the same farm, to secure the payment of notes amounting to $15,000. March 16, 1862, Abbott gave a quitclaim deed of the same interest in the granite to Alvin H. Fogg. This deed contained an assignment of the mortgage debt, and therefore conveyed the grantor's interest as mortgagee, *Lunt* v. *Lunt*, 71 Maine, 377. On March 10, 1873, Alvin H. Fogg gave a quitclaim of four undivided fifths of all his right, title and interest in the granite on and in the Archelaus Smalley farm to James M. Smith, Lauretus Fogg, Joseph Hume and William Boiss, one-fifth part to each, in common and undivided. No assignment was made of any part of the mortgage debt, or of the grantor's interest therein.

The plaintiff was permitted to introduce, subject to objection and exception, a quitclaim deed, dated June 4, 1867, from Archelaus Smalley to John M. Fuller of all that part of the Smalley farm which contained the granite now in question, but the granite was excepted from the conveyance. In this deed the strip conveyed, being the southeasterly end of the original Smalley farm, was described as being about forty-seven rods wide at the shore end and about forty-six and one-half rods wide at the other end; and bounded on the north by other land of the grantor, Archelaus Smalley; also, a quitclaim deed, dated June 1, 1888, of the same premises, with the same description, from Alfred W. Fuller to John A. Fuller. These Fullers were the heirs of John M. Fuller; also, a warranty deed, dated September 16, 1889, of the same premises, from John A. Fuller to James M. Smith. This deed did not except the granite, but did reserve the wood. But it is admitted that Smith knew that the granite on the Smalley farm had been previously conveyed. He was a grantee of one-fifth of it. The description in this deed is similar to the two previous ones, except that it describes the northerly side line as beginning "at land of Booth Brothers & Hurricane Granite Co., and

thence E. S. E. by said Booth Brothers & Hurricane Granite Co. southerly line." Therefore the land claimed to belong to Smith is bounded on the north by the defendant's land, wherever the line may be. The defendant did not introduce its title deed.

The undisputed testimony shows that after the quitclaim deed of the granite, with assignment of the mortgage indebtedness, from John A. Abbott, mortgagees, to Alvin H. Fogg, Fogg in 1863 or 1864, or both, entered upon the premises and carried on some sort of a granite quarrying operation. He then went to Clark's Island, and it does not appear that any further quarrying was done until 1873. It is shown, subject to objection and exceptions, that on the same day, March 10, 1873, that Alvin H. Fogg gave a quitclaim deed of four undivided fifths of the granite to James M. Smith and three others, that the grantor and grantees formed a co-partnership, and it is not disputed that the co-partnership entered upon the premises and conducted quarrying operations thereon, for a year or two.

The disputed line is the northerly line of the Archelaus Smalley farm. In the original ancient deed, the width of the farm, northerly and southerly, was given as 44 rods. The granite conveyed to Converse and mortgaged by him to Abbott was all within that farm. If the northerly line of the farm as claimed by the defendant is the true one, and if the southerly or Seavey line is where the defendant claims, the farm in the region of the dispute was 42 rods and 7 feet wide. If the northerly and southerly lines are where the plaintiff claims, the farm was about 46½ rods wide. On the face of the earth the northerly line claimed by the plaintiff is about six rods northerly of that claimed by the defendant. And from this six rods strip, much of the granite sued for was taken. The foregoing statement of facts is practically undisputed.

It is now well settled in this State that a deed by a mortgagee out of possession, unaccompanied by a transfer or assignment of the mortgage indebtedness conveys no title. *Lunt* v. *Lunt*, 71 Maine, 377; *Wyman* v. *Porter*, 108 Maine, 110; *Farnsworth* v. *Kimball*, 112 Maine, 238.

Under this doctrine the defendant claims that as matter of fact Alvin H. Fogg was not in possession of the mortgaged granite at the time he gave a quitclaim deed to Smith and the others, and that as there was no transfer of the mortgage debt, no title passed to Smith. Nine instructions were requested of the court upon this subject, all of

which were refused, except as they had been given in the charge. The requested instructions appear to have been based upon a contention, expressed in several ways, that Fogg's deed to Smith did not convey any title unless Fogg was in actual possession of the granite when the deed was made, that the possession must have been continuous, and that Fogg had previously abandoned the quarry.

The exceptions to the refusals to instruct cannot be sustained. The refusals were made "except as given in the charge." The charge is not made a part of the bill of exceptions. The rule is universal that in such case it must be presumed that the instructions actually given were adequate and correct. *Marshall* v. *Oakes*, 51 Maine, 308; *Hearn* v. *Shaw*, 72 Maine, 187. Without incorporating the charge in its bill of exceptions the defendant is necessarily unable to show that it was aggrieved by the refusal to instruct. *Fletcher* v. *Clarke*, 29 Maine, 485. To sustain exceptions it must be shown that the ruling complained of was both erroneous and prejudicial. *Smith* v. *Smith*, 993 Maine, 253, and many other cases.

It is true that the charge of the presiding Justice was printed in the record of this case, but it was printed without warrant. It is not properly a part of the record, even under the motion. Under a motion it is always to be presumed that the charge was appropriate and correct; and the practice, sometimes followed, of printing the charge has no warrant. The charge may be made a part of the bill of exceptions, but unless it is so made, the court has no right to examine or consider it. It has no authority to travel outside of the bill of exceptions itself. *Hunter* v. *Heath*, 76 Maine, 219; *Jones* v. *Jones*, 101 Maine, 447.

The subject matter of the above mentioned requested instructions, however, is open for consideration in connection with the exception to the admission of the quitclaim deed from Fogg to Smith and others. The defendant's contention to state it again, is that the deed of Fogg without proof of his being in actual possession at the time, conveyed no title, and that in fact Fogg was not shown to be in possession, but that the evidence showed that he had abandoned the property. It is true that the deed was only one step in the proof of the plaintiff's title, and that the court in his discretion might admit the deed first and receive the proof of possession afterwards. Still we think we should discuss the exception in a broad way, for on the admissibility of this deed before or after the proof of possession depends the title of the plaintiff's intestate to the granite on the Smalley farm.

Fogg having taken a deed from the mortgagee with an assignment of the debt stood in the steps of the mortgagee. He had a mortgagee's right. He was in effect a mortgagee. He owned the debt, and held the mortgage title as security. Being a mortgagee, he could not, if out of possession, transfer the mortgage title by deed unless he assigned the debt. It has been said that technically the fee in the mortgaged real estate is in the mortgagee. But even so, the mortgagee cannot convey the mortgage title unless he is in possession, or assigns the debt. Until foreclosure, or taking possession, the mortgage remains in the light of a chose in action, so far as the right to convey is concerned. The mortgage is but an incident attached to the debt, and cannot be detached from its principal. *Lunt* v. *Lunt*, supra; *Wyman* v. *Porter*, supra; *Jackson* v. *Willard*, 4 Johns., 41. It seems then that the rule which holds that a mortgagee in possession may convey the mortgage interest without assigning the debt is necessarily based upon the proposition that the mortgagee by taking possession acquires more than a mere mortgage right of security. He acquires a seisin in fact; he acquires a certain interest in the land itself,—a defeasible interest, indeed, but one which he can convey. It seems to be well settled that one merely in possession of lands may convey them by deed, the possession giving him for the purpose of conveyance a sufficient seisin. 3 Washburn Real Property, 132. Such a conveyance is good against all except those who have a better title. The application of the rule as to mortgagees is not limited to possession taken for purpose of foreclosure. We find no authority to that effect. It applies to possession taken under the mortgage for any lawful purpose.

Now in this case the proof is clear and undisputed that Fogg did take possession under his mortgage title in 1863. He was not merely in possession, but in possession with an interest. Undoubtedly, to enable him to convey an interest in 1873, without assigning the debt, the possession must have been continued. He did not work the quarry from 1864 to 1873. He worked elsewhere. In 1873, he came back, gave a deed of an undivided interest in the granite, and formed a partnership of which he was a member to work the quarry further. And the possession and work of the partnership was the possession and work of each member. Upon the undisputed facts, did the possession acquired by Fogg in 1863 continue until 1873? We think it should be so held. A seisin once acquired is presumed to continue

until it is shown that there has been an ouster or disseizin, or an abandonment. *Brown* v. *King*, 5 Metcalf, 173; *Currier* v. *Gale*, 9 All., 525; 3 Washburn Real Property, 130. No ouster or disseizin has been shown. Nor do we think that the mere fact that Fogg ceased working the quarry in 1864, and went to work elsewhere, is sufficient to warrant a finding that he had abandoned it. See *Adams* v. *Hodgkins*, 109 Maine, 361. His was not a mere possessory title which would cease when he ceased actually to occupy. It is not sought here to show a title by adverse possession, where the possession must not only have been continuous, but have been continuously manifested by acts of occupation. There is a distinction between non-use or non-occupancy, and non-possession. The owner of land may be in the legal possession of it, while not upon it. The owner of a lot of wild land, for illustration, retains the legal possession of the land, though he may not go upon it, nor operate upon it, for scores of years. Having taken possession of this granite, it was not necessary that Fogg should physically remain upon it, in order to continue his legal possession. He might perhaps abandon it, but we think he did not. Being of some value, the presumption is against it. His legal possession was an actual, as distinguished from a constructive possession. And as there is a presumption of the continuance of a title until the contrary is proved, *Porter* v. *Bullard*, 26 Maine, 448, so we think there is a presumption of the continuance of a condition upon which a title rests, namely, possession, or seisin, *Adams* v. *Hodgkins*, supra. The possession was such as would enable a mortgagee to convey a title.

We conclude then that Fogg in 1873 did have such possession of the granite as would enable him to convey his interest in it; and, therefore that the quitclaim deed from him to Smith and others was admissible, and that it showed a title in Smith and his co-grantees.

The defendant excepted to the admission of the warranty deed from John A. Fuller to James M. Smith dated September 16, 1889, and to the previous mesne conveyances by quitclaim deeds from Archelaus Smalley down to Fuller. These have been described already. These deeds cover all of the southeasterly end of the Smalley farm which is involved in this suit. The defendant contends that they include more, namely the six rod disputed strip, or practically that strip between the northerly line of the farm as claimed by the defendant and that line as claimed by the plaintiff. These deeds,

it will be remembered, described the tract conveyed as being 47 rods wide at one end and 46½ rods at the other, somewhat wider than the farm as described in the original 1823 deed. The defendant's point, as we understand it, is that it was not competent for the plaintiff to show the boundaries of the farm, the granite in which was conveyed by an after conveyance by the grantor of the farm itself, and it contends that the admission of the deeds was prejudicial, because it was liable to lead the jury to think that the northerly boundary of the land conveyed to Smith was identical with the northerly line of the Smalley farm out of which the granite had been sold.

We may assume that these deeds were not admissible to show the northerly boundary of the Smalley farm, yet we think they were admissible to show the limits of land owned by James M. Smith. If the deed included no land outside of the Smalley farm, it was harmless, for the undisputed evidence elsewhere shows that Smith had a title, as already stated, to an undivided part of the granite on that farm. If the deed included land and granite outside the Smalley farm, and the defendant took the granite from the land, the plaintiff may recover for it in this suit. The defendant introduced evidence to show, and in argument contends, that Archelaus Smalley, at the time of his deed to John M. Fuller, owned land next northerly of the original Smalley farm. The southerly line of that land was not designated by monuments in the deed, nor is it shown by evidence in this case, but as stated, the land in the Fuller deeds was described as about 47 rods wide at one end and about 46½ rods at the other. Though the distance named on the deed is not exact, yet, in the absence of monuments, it is not without significance. It may be that by fair construction, the deed conveyed some land northerly of the Smalley farm. But if it did, the result will be that Smith had not only an interest, as we have seen, in one undivided fifth of the granite on the Smalley farm, but also a warranty deed of the land without reservation of the granite northerly to the limits of his deed. Having that warranty deed, he had sufficient title and possession to enable him to maintain an action against a trespasser for all the granite in the land described in his deed, north of the Smalley farm, if any there was. In this suit his administrator seeks to recover only one-fifth. Accordingly the defendant was not prejudiced by the introduction of the deeds.

An exception was taken to the admission of testimony that James M. Smith at one time cultivated a piece of land within the limits of his deed for a garden. In view of the state of the title to the granite already found by us, this testimony was harmless.

An exception was taken to the admission of tax assessments for land and quarry, "land and quarry bounded on the north by Booth Brothers," made to James M. Smith, and the payment of the taxes assessed. The counsel for plaintiff in argument states that this testimony was offered as tending to show that Smith was in possession of the land and quarry. For this purpose the evidence was not admissible. The assessment of taxes, as bearing upon the title to property, is res inter alios, the act of third parties. The payment of taxes may be admissible as tending to show that the party paying claimed the property, as in cases of alleged adverse possession; or if the party is in occupation, as tending to show the character of the occupation. But it is not evidence of possession. *Carter* v. *Clark*, 92 Maine, 225. When the payment of taxes is admissible it is proper to show by the books what the property was which was assessed.

But in this case, the other evidence leaves no ground for controversy that Smith owned the land covered by his warranty deed, "bounded on the north by Booth Brothers," that he owned all the granite between the Smalley farm and Booth Brothers, if any, that he owned an interest in the granite or quarry on the farm, and that his administrator can maintain an action against a trespasser for the granite taken. The evidence objected to was therefore harmless.

The date of the writ was March 4, 1912. The quarry was operated from that time until September, 1913. A witness for the plaintiff testified to a computation of all the granite taken out of the quarry south of the line claimed by the plaintiff as far as "the bluff," which was the limit of excavation in September, 1913. This computation on the face of it included some granite taken after the date of the writ. After cross-examination in which the particular time when the witness made his measurements was developed, the defendant's counsel moved that the computation be stricken out. The motion was denied and an exception was taken.

We think the ruling was discretionary. The granting of a motion to stike out is usually discretionary. *Bridghams Applts.*, 82 Maine, 323. The question put to the witness in the first place indicated clearly the full limits of the granite computed by him, and was

answered without objection. The situation was this. The defendant, after it was sued in this action and after it was thus advised of the plaintiff's contention, continued to operate the quarry on the disputed area. The operation itself destroyed existing land marks, and made it impossible for the plaintiff afterwards to make an accurate computation. The necessary data for deduction were peculiarly within the knowledge of the defendant. To let the answer stand, does not appear, under the circumstances, to have been an undue exercise of discretion.

The surveyor appointed by the Court was called by the plaintiff as a witness. In a lengthy cross-examination, the defendant's counsel sought to discredit his testimony by showing bias and partiality. The defendant then introduced a witness who accompanied the court surveyor when he made his survey. The witness testified that he had asked the court surveyor to locate certain lots on the plan, and that he refused to do so. He was then asked if he gave as a reason that he had spent all the time that he was going to on the plan. The answer was excluded. The court surveyor had been inquired of about this conversation on cross-examination. This evidence was collateral. Its purpose was solely to impeach. How far and how long it should be continued lay within the discretion of the presiding Justice. *State* v. *Benner*, 64 Maine, 267; *Grant* v. *Libby*, 71 Maine, 427; *Mayhew* v. *Sullivan Mining Co.*, 76 Maine, 100.

An experienced land surveyor called by the defendant as a witness was allowed to testify on cross-examination that it is "found to be the ordinary thing that land overruns the measures given in the old deeds and old surveys." To the admission of this evidence, an exception was taken. That evidence of this character is not admissible for the purpose of lengthening an otherwise certain and definite measurement in an old deed is settled in *Heaton* v. *Hodges*, 14 Maine, 66, and cases cited therein. In that case the monument was lost. There was a definite measurement in the old deed. It was held that that measurement could not be enlarged by proof that old measurements in deeds and old surveys were ordinarily shorter than the real lines. *Prop'rs of Kennebec Purchase* v. *Tiffany*, 1 Maine, 219. But we think such evidence is admissible to explain apparent discrepancies between old surveys and measurements and what are claimed to be the monu-

ments marking true lines and corners. And this is especially true in cross-examination. Such is the frequent practice. And we have found no authority to the contrary.

We have examined all the other exceptions taken, but find nothing which requires discussion. No reversible error appearing, the exceptions must all be overruled.

We have already considered so much of the motion for a new trial as relates to delivery or non-delivery of the deed from the plaintiff's intestate to his wife. As to all other questions of fact arising under the motion, it is necessary only to say that there was sufficient evidence to warrant the verdict of the jury.

Motions and exceptions overruled.

FRANK P. J. CARLETON, et als.

vs.

GEORGE H. CLEVELAND.

Knox. Opinion November 14, 1914.

Adverse Possession. Damages. Riparian Proprietor.

1. As the owners of upland upon the seashore and adjacent flats may sell the upland without the flats, or the flats without the upland, or divide the flats into such parcels as convenience may suggest, so the owner of upland extending to the thread of the river may sever and convey the upland or the land under the river, or any part of the latter, as well as the former.
2. The owner of land covered by water has a right to erect and maintain buildings or other structures upon piles driven into the bed of the stream, provided he does not dam the river back upon the upper owners, or interfere with the flow of the stream to those below.
3. The title to the land on which buildings are so erected and maintained may be acquired by prescription, and so may the right to diminish the flow or change the character of the water relative to the lower proprietors.

4. When land is conveyed by metes and bounds, the description of the line nearest the thread of the river being "thence northeasterly thirty-eight feet, more or less," which line is submerged, and there is neither mention of the river nor apt language conveying more than the lot described, the grantee is limited to the lot described, by metes and bounds. He is not a riparian proprietor.

Reported upon agreed statement of facts. Judgment for plaintiff for damages assessed at the sum of three dollars.

This is an action on the case to recover damages for diminishing the contents of and retarding the flow of water from plaintiff's mill pond upon Megunticook River. Plea is the general issue. The case was reported by agreement to the Law Court upon the writ, pleadings, agreed statement of facts, plan and photograph; the Law Court to render such final judgment therein as the law and the facts require.

The case is stated in the opinion.

M. T. Crawford, A. S. Littlefield, for plaintiffs.

Reuel Robinson, for defendant.

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

BIRD, J. This is an action on the case brought for the recovery of damages for diminishing the contents of and retarding the flow of water from plaintiffs' mill pond or storage basin upon the Megunticook River. The case is reported upon an agreed statement of facts, plan and photograph. The properties of plaintiffs and defendant are separated by a bridge (forming a part of a street) the abutments of which, with apparently solid fill, are much nearer together than the margins of the river. It is agreed that plaintiffs have the right to flow the lands above the bridge to increase the supply of water for the operation of their mill below. The defendant's premises consist of a wooden building twenty feet wide extending westerly or up stream from the bridge thirty-eight feet, more or less, and an addition, at its westerly end, twenty feet square supported, the former by fifteen, the latter by six, piles. The piles average eight inches in diameter, are placed in or upon the bed of the river and are braced by about the same number of one and a half inch planks of six inches width. The northerly line of the buildings and the thread of the stream are coincident.

The defendant claims title to the lot whereon the main store and the addition now stand by deed to him of one Edwin C. Fletcher dated January 6, 1900. It is claimed that Edwin C. Fletcher obtained title to the lot occupied by the main store by deed to him of Aura A. Fletcher whose grantor was one Flye. The latter's deed, dated June 27, 1862, described the northerly line of the lot conveyed as "thence northeasterly . . . . . 38 feet, more or less, to said road line" and it is agreed that this line "bordered immediately upon and was washed by the water of Megunticook river." The building upon this lot was totally destroyed by fire Nov. 10, 1892, and nine days later Aura A. Fletcher conveyed the lot to Edwin C. Fletcher by deed containing substantially the same description as that of Flye to her. Subsequently to the fire Edwin C. Fletcher erected upon lot conveyed a frame building, substantially covering it, which was occupied as a store in the winter of 1892-3. In the spring of 1893 to make room for a brick block, now apparently standing, Fletcher moved his frame building northerly upon the lot lying between the thread of the stream and the northerly line of the lot described by metes and bounds in the deeds of Flye and Aura A. Fletcher, which he claimed to own as a riparian proprietor. But neither the agreed statement of facts quoted, nor the plan nor photograph indicate that the northerly line of the lot "thence northeasterly . . . . . 38 feet, more or less, to said road line," were coincident with the bank or margin of the river. The river is not mentioned in the description and there are no words, apt, or otherwise, conveying more than the lot described. Assuming that someone in the chain of title owned the upland to the thread of the stream, he and his successors in title could sell it in such parcels as he or they saw fit. The owner of upland upon the seashore and adjacent flats may sell the upland without the flats or the flats without the upland or divide the flats into such parcels as convenience suggests: *Storer* v. *Freeman*, 6 Mass., 435, 439; *Deering* v. *Long Wharf*, 25 Maine, 51, 64; *Abbott* v. *Treat*, 78 Maine, 121, 124; *Proctor* v. *Railroad Co.*, 96 Maine, 458, 467. So, we conceive, may the owner of upland extending to the thread of the river sever and convey the upland or the land under the river or any part of the latter as well as of the former: See *Warren* v. *Blake*, 54 Maine, 276, 281. We conclude that defendant under his deeds obtained no title to the lot whereon the main store now stands. He did not thus become a "riparian proprietor:" *Pratt* v. *Sampson*, 2 Allen, 275.

The defendant, however, has occupied this lot under claim of title in the manner already stated for more than twenty years prior to this action commenced. The right of the owner of land covered by water to erect and maintain buildings or other structures upon piles driven into the bed of the stream, is clear provided he does not dam the water back upon upper owners, or interfere with the flow of the stream to those below and that the structure be so erected that it will not be washed away. The title to the land on which buildings are so erected and maintained, may be acquired by prescription: *Boston Mill Corp.* v. *Bulfinch*, 6 Mass., 229, 234; and so the right to diminish the flow or change the character of the water relative to lower proprietors: *Lockwood Co.* v. *Lawrence*, 77 Maine, 297, 319; *Ware* v. *Allen*, 140 Mass., 513, 515. The owner of the bed is entitled to a reasonable use of his land, as the riparian proprietor is entitled to a reasonable use of water, and we are unable to perceive that the maintenance of the piles and braces by defendant is unreasonable on his part, that is, as materially diminishing the quantity of water or its flow: *Knight* v. *Barr*, 130 Mich., 673, 675; *Seeley* v. *Brush*, 35 Conn., 419, 424. Nor do we consider that the length of time plaintiff has stored water over that part of the land occupied by plaintiff now under consideration affects the right to such reasonable use by one having title to a portion of the bed: *Adams* v. *Hodgkins*, 109 Maine, 361, 366. See also *Davis* v. *Brigham*, 29 Maine, 391, 400.

The title to the lot in the rear of that occupied by the main store appears to have been conveyed to Edwin C. Fletcher. His conveyance to defendant of the main store has already been referred to. At the time (1900) of this conveyance the addition had not been built. The following is the description employed: "The wooden frame building now on the west side of Maine St., Camden, Me., adjoining the drug store of E. E. Boynton and formerly occupied by Frank Hoffses as a candy and variety store together with the land on which it sits." The defendant claims that under this deed, the title to the lot in the rear of the main store vested in him. The description is not uncertain. The deed conveys no more than the law would imply if the words "together with the land on which it sits" were omitted. *Derby* v. *Jones*, 27 Maine, 357, 360; *Rogers* v. *Snow*, 100 Mass., 118, 124. What is carried by the deed is in either case the same. The rear lot during the ownership of Edwin C. Fletcher was neither enclosed nor used in connection with the main store nor

necessary to the enjoyment of the latter. See *Blake* v. *Clark*, 6 Maine, 436, 437; *Derby* v. *Jones*, 27 Maine, 357, 359-360; *Cunningham* v. *Webb*, 69 Maine, 92; *Hatch* v. *Brier*, 71 Maine, 542; See also *Furbush* v. *Lombard*, 13 Cush., 109, 114; *Oliver* v. *Dickerson*, 100 Mass., 114, 117. We must conclude that the rear lot, or that on which the addition stands, did not pass under this deed to defendant.

The erection upon the rear lot of the piles, with their braces, by defendant in the fall of 1911 was not the act of an owner of the bed of the river but was that of a trespasser, who is not entitled, as against plaintiff, to occupy the mill pond or retard the flow of water therefrom.

The defendant is liable therefore for damages to plaintiff, see *Ware* v. *Allen*, 140 Mass., 513, 515, but in view of the character of the pond and in the absence of any evidence showing a peculiar or special damage, they can scarcely be other than nominal.

We have considered alone the rights of the parties to this suit relative to the occupation of the mill pond and the retardation of the flow of its waters. Whether the river is navigable or floatable and, if so, what are the rights of the public or of one suffering special damage from the invasion of such rights is not passed upon. See *Pearson* v. *Rolfe*, 76 Maine, 380.

Judgment may be entered for the plaintiff for damages assessed at the sum of three dollars.

MARSHALL G. COLE, Libt.

vs.

LILLIAN COLE.

Kennebec. Opinion November 14, 1914.

Divorce. Frivolous Exceptions. Jurisdiction. Revised Statutes, Chap. 79, Secs. 56, 85. Superior Courts.

1. The Justices of the Superior Courts have no jurisdiction under R. S., Chap. 79, Sec. 55, to certify to the Chief Justice of the Supreme Judicial Court exceptions adjudged to be frivolous and intended for delay, except in criminal cases. Under R. S., Chap. 79, Sec. 84, exceptions may be so certified only in cases within the exclusive jurisdiction of the Superior Courts.
2. The Superior Court of the county of Kennebec does not have exclusive jurisdiction of libels for divorce.
3. The Law Court has no jurisdiction, except in cases brought before it in the manner provided by statute.
4. The Law Court has no jurisdiction to consider and determine exceptions in a divorce case which were adjudged frivolous and intended for delay, and which have been certified by the Justice of the Superior Court for Kennebec county to the Chief Justice of the Supreme Judicial Court, to be argued in writing.

On exceptions by libelee. The certificate discharged and exceptions stand to be certified to the clerk of next term of Law Court, under the provisions of Revised Statutes, Chap. 79, Sec. 44.

Libel for divorce pending in Superior Court for the County of Kennebec. At the hearing, the exceptions by libelee were adjudged frivolous and intended for delay and were ordered to be transmitted to the Chief Justice of the Supreme Judicial Court to be argued on both sides in writing, within thirty days thereafter.

The case is stated in the opinion.

Andrews & Nelson, for plaintiff.

Connellan & Connellan, for defendant.

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

SAVAGE, C. J. This cause is a libel for divorce pending in the Superior Court for the County of Kennebec. In the course of the proceedings exceptions were taken by the libelee, which were adjudged to be frivolous and intended for delay, and which were ordered to be transmitted at once to the Chief Justice of the Supreme Judicial Court, to be argued in writing on both sides within thirty days thereafter. The regularity of this proceeding is challenged.

The taking and allowance of exceptions and their certification to the Law Court, or to the Chief Justice thereof, are wholly matters of statutory regulation. But for the statute there would be no right of exception, and no Law Court. The Law Court has jurisdiction only as conferred by statute. *Stenographer cases*, 100 Maine, 271. The Law Court has no jurisdiction, except in cases brought before it in the manner provided by statute.

It is not clear under what provision of statute the Justice of the Superior Court assumed to act in certifying the exceptions to the Chief Justice of this Court and ordering them to be argued in writing within a specified time. Some of the language used in the certificate seems to indicate that the Justice had in mind Sec. 55 of Chap. 79 of the Revised Statutes which provides for the certification to the Chief Justice of exceptions adjudged to be frivolous and intended for delay. But Sec. 55 relates, in civil cases, only to the procedure in the Supreme Judicial Court. The distinction is marked in the statute, for it is declared that the section is to apply "to exceptions filed in any criminal proceedings in either of the superior courts." The implication is that it does not apply in other cases. This is not a criminal proceeding.

The procedure relating to exceptions in the Superior Courts differs from that in the Supreme Judicial Court in several particulars. One noticeable difference is that in the Superior Courts, notwithstanding the filing of exceptions, in all cases, the case proceeds to trial as if no exceptions had been taken, until the case is in such condition that the overruling of the exceptions will finally dispose of it, R. S., Chap. 79, Sec. 85; while in the Supreme Judicial Court that procedure is ordered only when exceptions are taken to the overruling of a dilatory plea. R. S., Chap. 79, Sec. 56. Again, while it is provided in Sec. 84 of

Chap. 79 of the Revised Statutes that exceptions in the Superior Courts may be alleged, and certified to the clerk of the Law Court to be entered upon its docket, as in the Supreme Judicial Court, R. S., Chap. 79, Sec. 44, it is also provided in the same Sec. 84, that "all exceptions arising in cases within the exclusive jurisdiction of either of said superior courts may be certified at once by the justice thereof to the chief justice of the supreme judicial court, and shall, when so certified, be argued in writing on both sides within thirty days thereafter, . . . and exceptions so certified shall be considered and determined by the justices of the supreme judicial court as soon as may be." But this latter provision does not apply in this case. It applies only when a Superior Court has "exclusive jurisdiction." The Superior Court for Kennebec county does not have exclusive jurisdiction of libels for divorce.

We have found no provision of statute which authorizes a Justice of any Court to certify to the Chief Justice of the Supreme Judicial Court exceptions adjudged to be frivolous and intended for delay, except in Sec. 55, of Chap. 79, and that section applies in the Superior Courts only to criminal cases.

And it is proper to add that the irregularity in this case is not merely one of form. It is one of substance. Except in cases which are certified to the Chief Justice in accordance with some provision of statute, the excepting party has a right to be heard orally in argument before the Justices sitting together, and under such circumstances that the Justices may conveniently advise together upon the merits of the argument. This right is an important one, and a party ought not to be denied its exercise, except in cases where the statute authorizes the denial.

We think we have no jurisdiction to consider and determine these exceptions as they are now presented to us. The certificate must be discharged, and the exceptions stand to be certified to the clerk of the next term of the Law Court, under the provisions of Revised Statutes, Chap. 79, Sec. 44.

So ordered.

FRANCIS C. PEAKS, Applt.

vs.

COUNTY COMMISSIONERS.

Piscataquis. Opinion November 18, 1914.

Appeal. Constitution, Art. I, Sec. 21. Damages. Highway. Land Taken. Report. Revised Statutes, Chap. 23, Sec. 53. Surface Water. Water.

1. Where part of a tract of land is taken for public purposes, by the right of eminent domain, the measure of damages is the injury to the market value of the entire tract by the taking. It is the difference between the value of the whole tract immediately before the taking, and the value immediately afterwards.
2. In the assessment of damages for the taking of a part of a tract of land for a highway, it is proper to consider the probability or likelihood that the proper construction of the road will make it necessary to turn the surface water accumulated in the ditches onto the remainder of the tract, in streams or collected bodies, so far as that probability or likelihood may depreciate the market value of the whole tract, but no further. Such damages are not too remote for ascertainment and allowance.
3. Revised Statutes, Chap. 20, Sec. 26, which provides that selectmen may construct ditches or drains to carry water away from a highway, affords no remedy to the owner of land which is taken for a highway, for damages by depreciation in value of the tract on account of the probability that surface water collected in the road ditches will be turned onto the land below in streams.

On exceptions by appellant. Exceptions sustained.

This is an appeal from an award of damages by the County Commissioners in proceedings for the alteration of a highway, on land of appellant. Upon the appeal, a committee was appointed under the provisions of Revised Statutes, Chap. 23, Sec. 53. The appellant objected to the acceptance of the committee's report. His objections were overruled and he took exceptions to said ruling.

The case is stated in the opinion.

J. B. & F. C. Peaks, C. W. Hayes, for appellant.

J. H. Hudson, for respondent.

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

SAVAGE, C. J. This is an appeal from an award of damages by County Commissioners in proceedings for the alteration of a highway upon the appellant's land. Upon the appeal a committee was appointed under the provisions of Revised Statutes, Chap. 23, Sec. 53. At the hearing before the committee, the appellant offered evidence, as the bill of exceptions shows, that "the proposed highway is located for a considerable distance along a steep hillside; that there is a very great water shed between the way and the height of land; that by the nature of the situation, vast quantities of water, occasioned by the melting snows of winter, and during the rainy seasons, must flow down the hillside and be collected in large bodies in the ditches on the upper side of the way; that the only manner by which this water so collected can be disposed of is by allowing it to run off through culverts under the way, and upon the land of the appellant on the down hill side of the way; that in this manner the water collected from a large area will be emptied upon the land of the appellant, not in a well distributed manner, as it flows down the hillside above, but in streams of great volume and velocity; that such streams would do great damage to his land by undermining and uprooting trees, and by making deep ravines; that it would be a physical impossibility for him to prevent by barriers the water from flowing thus upon his land." The committee refused to consider this evidence as showing an element of damage, and in their report, stated specifically that they did not include in their award damages "for water which shall run upon the land of the appellant from the highway after it is built and opened for travel." On the coming in of the committee's report, the appellant objected to its acceptance on the ground that the committee had erred in law in refusing to consider the foregoing element of damages. His objections were overruled and the report accepted. To these rulings of the Court he took the exceptions which are now before us.

The conclusion of the committee must of course be considered in the light of the evidence offered. The single question is whether in awarding land damages for land taken for a highway across the side of a hill the fact that the surface water which will naturally drain into the ditch on the upper side of the way, and which must be discharged

through culverts onto the land below in streams or collected bodies, may be considered as an element of damage to the land owner below.

The Constitution, Art. I, Sec. 21, provides that "private property shall not be taken for public uses without just compensation." Where only a part of a tract is taken in the exercise of the power of eminent domain, the general rule is that the just compensation which the Constitution guarantees to the owner includes not only the value of the part taken, but also the damages accruing to the residue from the improvement. *Mason* v. *Railroad*, 31 Maine, 215; *Morrison* v. *Bangor & Bucksport R. R. Co.*, 67 Maine, 353; 15 Cyc., 687. The measure of damage is the depreciation of the fair market value of the entire tract by the taking. It is the difference between the value of the whole tract immediately before the taking, and the value immediately afterward.

We cannot resist the conclusion that the existence of such conditions as are described in the evidence offered before the committee, but disregarded by them, does affect the market value of the land, and hence that the evidence was relevant and material. It was so held in effect in *Morrison* v. *Railroad*, supra. In that case, which was an action at common law, the plaintiff sought to recover for an injury to his premises caused by the road-bed of the defendant preventing the accumulations of surface water from passing where they were accustomed to flow. The Court said:—"Undoubtedly the plaintiff was injured by the taking of his land beyond the value of the mere land taken; the injury to the land left, by the use that was to be made of the land that was taken was included in the damages awarded to him; or should have been. They were recoverable in that form." In *Walker* v. *Railroad*, 103 Mass., 10, the Court said:—"The cuts and embankments and necessary gutters of the railroad tracks will unavoidably modify the flow of the surface water, and sometimes cause damage by keeping it back or projecting it in large quantities upon the lands adjoining the road. Injuries to lands from such causes would seem clearly to fall within the class of effects which have been held to afford ground for the assessment of damages under the statute."

This discussion is not concerned with surface water flowing as it was accustomed to do before the taking, nor with water flowing in brooks and natural channels. It is concerned only with surface water prevented by the road from flowing away naturally, and thus artifici

ally collected and turned upon the land below in streams. If such a condition depreciates the value of the land below, the owner is entitled constitutionally to compensation therefor. And we think he must seek his compensation for this injury, as well as for all other injuries, in connection with the assessment of damages in the condemnation proceedings, or not at all. He has no other remedy.

It is common knowledge that in building and maintaining roads it is sometimes necessary to provide for the turning of the water which accumulates in the ditches on to the adjacent land. Towns are required to build roads when located by the County Commissioners. All their necessary acts of construction are therefore lawful, and they are not responsible for the consequences. No action at law lies against a town, or other corporation or person, for acts required or authorized by law, whether necessary or not. *Bangor* v. *Lansil*, 51 Maine, 521; *Greeley* v. *Railroad*, 53 Maine, 200; *Morrison* v. *Railroad*, supra; *Gardner* v. *Camden*, 86 Maine, 377. Damages which may result from lawful and proper acts in constructing a road are not recoverable in an action at law. But the likelihood of such damages being caused thereby may be considered in the assessment under the statute, so far as it affects the value of the land.

It is, however, urged that the appellant should not in this proceeding have damages of the character now claimed, because of a supposed remedy afforded by Revised Statutes, Chap. 21, Sec. 26, which provides that the municipal officers of a town may at the expense of the town construct ditches and drains to carry water away from a highway, when they deem it necessary for the public convenience or for the proper care of the highway; that land damages for the taking of lands shall be assessed and paid, and that the owner or occupant may have an action against the town for damages sustained on account of failure to keep the ditches and drains in repair. But we think it is sufficient to say of this statute that it affords the land owner no remedy for the depreciation of the value of his land by reason of the existence of such conditions as the bill of exceptions says the evidence showed in this case. And in any event, this statute is permissible, not compulsory. It authorizes, but does not require, the municipal officers to build ditches and drains. And they are authorized to do so only when they deem it necessary for public convenience, or for the proper care of the road.

The appellees contend also that damages of this character do not fall within the rule stated, because they are too remote to be regarded as damages,—that the damage may never occur. It may be true that prospective particular injuries cannot be foretold. But the appellant does not seek, and cannot be allowed for, such injuries. He seeks rather to have allowed to him the amount of the depreciation in value of his land on account of the probability and likelihood of injury from the flowage of water as described. Under such weather conditions as we have in this State, it seems certain, upon the evidence offered in the case, that water in streams will be turned onto the appellant's land. How much water will thus flow, and what the consequences will be, are a matter of judgment guided by observation and experience. Their effect upon the value of the land cannot be said to be too remote for ascertainment and allowance.

We have examined the other contentions of the appellees but, in view of the discussion already had, we find no merit in them. Nor is it necessary now to state them in detail. We answer them by holding as we do, that in the assessment of damages for the taking of a part of a tract of land for a highway, it is proper to consider the probability or likelihood that the proper construction of the road will make it necessary to turn the surface water accumulated in the ditches onto the remainder of the tract, in streams or collected bodies, so far as that probability or likelihood may depreciate the market value of the land, but no further.

The evidence offered had a tendency to show such a depreciation and should have been considered by the committee. It being shown on the face of their report that they erred in a matter of law, the report should not have been accepted.

Exceptions sustained.

HIRAM S. GOSS

vs.

ARTHUR D. KILBY et al. & TRUSTEE.

Cumberland. Opinion November 18, 1914.

Assumpsit. Consideration. Delivery. Exceptions. Nonsuit. Ratification. Sale.

The plaintiff sold hay to the defendant, and made one M. his agent to deliver the hay, but not to receive payment, which limitation was known to the defendant. M. delivered the hay and received the pay for it from the defendant. Part of the money received he placed to the plaintiff's credit in a bank, and the plaintiff has received it. The rest of it M. kept. Until suit was brought three months after the plaintiff discovered what had been done, he gave no notice to the defendant of any want of authority in M. The defendant claims ratification.

Held:

1. The general rule that the principal cannot affirm the agent's doing in part, and repudiate in part does not apply, since the plaintiff was legally entitled in any event to what he received.
2. The rule that where a principal has full knowledge of the acts of his agent he must dissent and give notice of his dissent within a reasonable time applies only, in this State, where the principal receives a direct benefit therefrom.
3. A presumption of ratification arising from silence is a presumption of fact, and is ordinarily rebuttable. The question of ratification in this case should be submitted to a jury.

On exceptions by plaintiff. Exceptions sustained.

An action of assumpsit to recover a balance due for hay sold and delivered. The plea was the general issue. At the conclusion of the plaintiff's evidence, the presiding Justice directed a nonsuit, to which direction the plaintiff excepted.

The case is stated in the opinion.

Bertram S. Peacock, for plaintiff.

Robert E. Randall, for defendant.

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

SAVAGE, C. J. Assumpsit to recover for balance of price of hay sold and delivered. The case comes before this Court on exceptions to an order of nonsuit. It is admitted that the hay was sold and delivered to the defendant. The defense is payment to the plaintiff's agent.

The evidence, considered most favorably for the plaintiff, shows that after the hay was bargained the plaintiff went out of the State for several weeks. Before going he told one Millett, who, with his wife, was living in the plaintiff's house on the premises where the hay was stored, that it was understood between him and Mr. Kilby, the defendant, that if he, Kilby, came for the hay while the plaintiff was away, he was to leave the money due with a Mr. Holmes; and he added,—"If Mr. Kilby comes for the hay before it is paid for, don't you let him have it." Kilby's teamsters did come for the hay while the plaintiff was away. Mrs. Millett prevented them from loading it, because not paid for. Thereupon the teamsters procured from Mr. Kilby two checks drawn by him, one for $100 payable to the plaintiff's order, and the other for $60 payable to the order of one Stetson, who assisted in removing the hay. These were delivered to Mr. Millett, who then permitted the hay to be removed. The $100 check was left by Millett at the bank on which it was drawn, and was credited by the bank to the plaintiff's account. The plaintiff has had the benefit of that check, and gives credit for it in this suit. It being ascertained that the $60 check was more than enough to pay the balance due for the hay, which was $51.55, Millett got it cashed at the bank, paid back to the teamsters the difference between the amount due and the amount of the check, and kept the rest himself. And he has kept it ever since. The plaintiff returned to his house about the first of December, 1913. He then learned that the hay had been taken, and heard from the Milletts the story of the checks. He boarded with the Milletts for several weeks. The board went on the account of an old indebtedness from Millett to him. It does not appear that he demanded payment of the $51.55 from Millett, though it does appear that he told Millett that Kilby still owed him $50 for the hay. There is nothing in the case to show that the plaintiff, from the time he discovered the true situation until he brought this

action, ever gave the defendant any notice of any want of authority in Millett, or ever in any manner disavowed or repudiated Millett's acts, except as shown by the above statement. This action was commenced March 4, 1913.

From the history of the case as above stated we think a jury would have been warranted in finding, if not required to find, that Millett was the plaintiff's agent to deliver the hay, but that he was not authorized to receive the pay for the hay. Nor was Millett clothed by the plaintiff with apparent authority, so that the defendant was justified in paying him. Therefore the payment to Millett was unauthorized.

To meet this conclusion the defendant replies that the unauthorized payment has been ratified. There seems to be only two grounds upon which a claim of ratification can be argued. One is that the plaintiff has accepted the benefit of the one hundred dollar check, which was a part of the unauthorized payment. It is the general rule that the principal cannot affirm in part and repudiate in part. He cannot keep what is good and disavow what is bad. He must accept all or none. But this rule is not applicable in a case like this, where the principal is legally entitled in any event to what he received. *Crooker* v. *Appleton*, 25 Maine, 13; *White* v. *Saunders*, 32 Maine, 188; 31 Cyc., 1268. In this case the plaintiff was entitled to the one hundred dollars received in any event. The money received was due him from the defendant, and it would have been useless for him to return it only to recover judgment for it afterwards. *Crooker* v. *Appleton*, supra.

But the defendant strenuously urges that the unauthorized payment of the $60 was ratified, for the reason that the plaintiff did not disavow and repudiate it within a reasonable time after he discovered the truth. The rule relied upon is variously stated. In 1 Chitty on Contracts, 291, it is said that "a principal is bound to disavow the unauthorized act of his agent the first moment the fact comes to his knowledge." It was said by the Court in *Johnson* v. *Wingate*, 29 Maine, 404, that "if a principal does not within a reasonable time after actual notice . . . disapprove of the conduct of his agent, a presumption of assent and ratification will arise." It has many times been held that long acquiescence, or even silence on the part of the principal will afford a presumption of satisfaction of an unauthorized act. And under some circumstances, the presumption may be deemed to be conclusive. Story on Agency, page 299. But ratifica-

tion is a fact. A presumption of ratification is a presumption of fact. It is ordinarily rebuttable, except under conditions when an equitable estoppel arises, as when one who has been silent when he ought to have spoken must remain silent when he wishes to speak.

But the rule of presumption of ratification from failure to repudiate within a reasonable time was more fully and precisely stated in *School Dist.* v. *Aetna Ins. Co.*, 62 Maine, 330. In that case the Court said, "The rule that where a principal has full knowledge of the acts of his agents he must dissent, and give notice of his dissent within a reasonable time, is stringent in its application only where the agent and those dealing with him are acting in good faith, and the principal receives a direct benefit therefrom." See also, *Brigham* v. *Peters*, 113 Mass., 139.

In this case the plaintiff received no benefit from the receipt by Millett of the $60 check. And if the failure for three months to notify the defendant of his disavowal affords any presumption that the plaintiff ratified Millett's act, no equitable considerations appear, which should make the presumption conclusive. Nor is the inference of ratification so one sided for the defendant as to make it proper to take that question from the jury.

Exceptions sustained.

PHILENA T. KEHAIL

vs.

HENRY I. TARBOX & TRUSTEE.

Sagadahoc. Opinion November 18, 1914.

Motion to Dismiss. Public Laws of 1913, Chap. 95, Sec. 3. Return Term. Writ.

By a statute which became effective on July 11, 1913, the term of the Supreme Judicial Court theretofore held in Sagadahoc County on the third Tuesday in August was abolished, and a term beginning on the second Tuesday of October was substituted in its stead:—

Held: That a writ sued out June 5, 1913, and made returnable at a term to be held on the second Tuesday of October, 1913, is abatable on motion seasonably filed.

On exceptions by defendant. Exceptions sustained.

This was an action of assumpsit. The writ was dated June 5, 1913, and was made returnable on the second Tuesday of October, A. D. 1913, of the Supreme Judicial Court for said County. At said October term, the defendant filed a motion to dismiss said action because the same should have been made returnable on the third Tuesday of August, 1913. The Justice presiding overruled, pro forma, the motion, and the defendant excepted thereto.

The case is stated in the opinion.

George E. Hughes, for plaintiff.

James B. Perkins, for defendant.

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

SAVAGE, C. J. Exceptions to the overruling, pro forma, of a motion to dismiss, seasonably filed. The writ was sued out June 5, 1913 and was made returnable at a term of the Supreme Judicial Court "next to be held at Bath, within and for the county of Sagadahoc, on the second Tuesday of October, 1913." The ground of the motion to dismiss is that at the date of the writ no October term

existed in Sagadahoc County, and that the writ should have been made returnable on the third Tuesday of August, which was the term next to be held in that county after the date of the writ.

At the date of the writ, the statute then in force provided for a term of the Supreme Judicial Court in Sagadahoc to be held on the third Tuesday of August. A statute had been enacted by the legislature which in effect abolished that term, and provided for a term in its stead to be held on the second Tuesday of October. Public Laws of 1913, Chap. 95, Sec. 3. But the Act of 1913 did not become effective until ninety days after the adjournment of the legislature, or on July 11, 1913. Such is the constitutional provision. Constitution, part 3 of Art. IV, Sec. 17.

The Act of 1913, effective prior to the third Tuesday of August of that year, provided among other things that all writs and processes which had been made before the act took effect, and which were returnable to the respective terms of Court as they were to be holden under the law prior to the changes made by the Act, should on the day upon which they are so made returnable, be filed in the office of the clerk of Court and entered upon the docket, and then be continued automatically to the next term of Court.

It is clear that the situation which existed in this case was provided for by the statute. As the law stood at the date of the writ there was an August term. It was the next term. Had the writ been made returnable to that term, it could have been entered and continued as the Act of 1913 provided. Instead it was made returnable to an October term, 1913. At the date of the writ there was no such term. Non constat that there ever would be any October term, 1913. The people had the power, by use of the referendum, to prevent the Act of 1913 from ever taking effect. A certain fraction of the electors, by filing petitions, had the power to delay its taking effect until after the next election. Const. of Maine, part 3 of Art. IV, Sec. 17. The fact that the referendum was not resorted to does not change the legal situation.

It is settled law that a writ returnable on a day out of term is voidable. So when it is made returnable after an intervening term. And such a writ is abatable on motion seasonably filed. *McAlpine* v. *Smith*, 68 Maine, 423; *Bell* v. *Ames*, 13 Pick., 90; *Wood* v. *Hill*, 5 N. H., 229.

Exceptions sustained.

SAMUEL J. COONEY *vs.* PORTLAND TERMINAL COMPANY.

Cumberland. Opinion November 18, 1914.

Assumption of Risk. Exceptions. Instructions. Master. Negligence. Notice. Servant.

1. The duty of inspection by an employer of the appliances used by his employee does not extend to the small and common tools in every day use, of the fitness of which the employee using them may reasonably be supposed to be a competent judge.
2. Want of reasonable care on the part of the employer cannot be predicated on the fact that he failed to warn a servant mechanic ordinarily intelligent and experienced that bits of steel were liable to fly from the mushroomed head of a cold chisel when struck with a hammer.
3. Assumption of risk is voluntary. But when nothing appears to the contrary, an employee is deemed to have agreed to take upon himself the risk of injury from dangers visible and appreciated. He may terminate the agreement by giving notice to the employer that he will no longer bear the risk. The evidence does not take this case out of the ordinary rule.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant. Plea, general issue. At the conclusion of the plaintiff's evidence, the presiding Justice ordered a nonsuit, and the plaintiff excepted to said order.

The case is stated in the opinion.

Dennis A. Meaher, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SAVAGE, C. J. Case to recover for personal injuries alleged to have been caused by the negligence of the defendant. A nonsuit was ordered, and the case comes up on plaintiff's exceptions to that order.

The plaintiff was employed by the defendant as a carpenter in its car repair shops, and had been so employed four or five years. In the course of the work in the carpenter's department it became necessary occasionally to cut off rivets with cold chisels. This work was customarily done by the carpenters as a part of their work. The plaintiff had on several occasions done this kind of work, either holding a chisel, or striking with a hammer, sometimes one, sometimes the other.

Just prior to the accident the plaintiff was at work with a fellow workman attaching a safety appliance to a car. It became necessary to cut off some rivets, so as to remove the grab iron which was fastened by them to the car. The plaintiff without special instructions, looked around for a cold chisel but could find none. Then he went to the foreman and asked for one. The foreman directed him to wait until another workman who was using a chisel had finished with it. He did so. He then took the chisel, and he and the man that worked with him proceeded to cut off a rivet with it. They alternated, first one holding the chisel and the other striking with the hammer, and then reversing. While the plaintiff was striking a piece of steel was broken from the head of the chisel and flew into his eye. The chisel itself was exhibited at the argument in this Court. Its head appeared somewhat battered or "mushroomed."

A committee, of which the plaintiff was one, had sometime previously complained to the defendant's superintendent of the poor condition of the tools, including the chisels, but the case does not show that any particular defects were pointed out. For several years before his employment by the defendant as a carpenter, the plaintiff had been a car inspector and car repairer. His testimony shows him to be a mechanic of at least ordinary intelligence.

In its general aspects, this case seems to fall within the principles of the rules stated in *Golden* v. *Ellis*, 104 Maine, 177, and *L'Houx* v. *Construction Company*, 111 Maine, 101. Both of these cases are somewhat analogous to the one at bar. It is too well settled to require the citation of authorities, that a servant assumes the risk of obvious dangers, those which he knows and appreciates, and those which by reasonable care and attention he ought to know and appreciate. In *Golden* v. *Ellis*, it was reaffirmed that a servant assumes the risks of known defects in machinery, tools, appliances, etc., or of improper appliances furnished for a particular task, or where no proper appliance is furnished, although the defect or danger results from the

negligence of the master; and that if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances in connection with which he is required to labor, and it appears that he fully appreciates the danger, he will be deemed to have assumed the risk. And in the same case, the court quoted with approval the rule that "a servant assumes the risks of injuries from simple and ordinary appliances and methods, the nature of which he understands, or which is easily understood. It is a part of this doctrine that the duty of inspection by an employer, of the appliances used by his employees, does not extend to the small and common tools in every day use, of the fitness of which the employees using them may reasonably be supposed to be competent judges."

In *L'Houx* v. *Construction Company,* the Court said,—"It would seem to be a matter of common knowledge that when steel hammers are struck with great force upon steel chisels or drills held against iron surfaces, chips or particles of steel are liable to break off from the chisel, as well as from the hammer or the iron surface, and fly up and about," and it was held that the plaintiff in that case assumed the risk of such danger.

It would seem that upon the authority of these cases that the defendant did not owe to the plaintiff the duty of inspecting such tools as a cold chisel, the condition of which would ordinarily be as apparent to a servant as it would be to a master; and that the risk of particles flying off from a chisel when struck by a hammer would be so obvious to an ordinarily intelligent and experienced mechanic such as the plaintiff was, that he should be deemed to have assumed it.

But the plaintiff contends that these rules as to negligence of master and assumption of risk by a servant are not applicable in this case. He claims, and has alleged in his writ, that by reason of his inexperience, it was the duty of the defendant to instruct him in regard to the danger of being hurt by flying chips of steel or iron. We think otherwise. We think that want of reasonable care on the part of the master cannot be predicated on the fact that the master failed to warn a servant mechanic of the age, intelligence and experience of this plaintiff that bits of steel were liable to fly from the mushroomed head of a cold chisel when struck with a hammer.

The plaintiff also contends that the general rule of assumption of risk is not applicable in this case for the further reason that notice of the defective condition of the chisel had been given to the master, and

the master had promised to repair it. And he claims that the jury would have been warranted in finding that the plaintiff had on that account effectually thrown off the risk he would otherwise have been deemed to have assumed; in other words, that in this case he did not in fact assume the risk. *Dempsey* v. *Sawyer*, 95 Maine, 295. A sufficient answer to this contention is that it does not appear that the master was notified of any particular defects of this or any other chisel. Nor does it appear that the master made any promise to repair them.

Assumption of risk is voluntary. When nothing appears to the contrary, the servant is understood to agree to take upon himself the risk of injury from dangers visible and appreciated. It is competent for the servant to cancel that agreement and thereby let the risk fall back on the master. He may terminate the implied agreement by giving notice to the master that he will no longer bear the risk. And the master may promise to repair, which may be evidence of an agreement on his part to assume the risk. In every case it is a question for the jury, whether the servant has terminated his agreement to assume the risk. *Dempsey* v. *Sawyer*, supra. So, whether the master has agreed to assume the risk, thereby relieving the servant. But there is nothing here to take the case out of the ordinary implication of assumption of risk on the part of the servant. Nor is there anything which would warrant a jury in finding that the plaintiff had not assumed the risk, or that the defendant had assumed it.

The presiding Justice did not err in ordering a nonsuit.

Exceptions overruled.

LOUIS B. LAUSIER *vs.* FRANK E. HOOPER.

York. Opinion November 18, 1914.

Accommodation Maker. Contribution. Dissolution of Partnership. Evidence. Exceptions. Note. Partnership.

1. When A., one of two makers of a promissory note, at the request of B., the other, procures C., to sign it also, the representations of A. to C. as to whether B. and C. would be joint accommodation makers for A., or whether C. would be an accommodation maker for A. and B., are admissible against B., in his suit against C. for contribution.
2. The relation of the makers of a promissory note, inter sese, is a matter of contract, and the terms of the request to sign made by one to another is material evidence of the nature of the contract into which the latter entered.
3. If testimony is material and admissible on one ground, it is not reversible error to admit it on another and untenable ground.

On motion and exceptions by the plaintiff. Motion and exceptions overruled.

This is an action of assumpsit in which the plaintiff seeks to recover of the defendant money claimed to be due him by reason of himself and defendant being joint accommodation makers of a note for one Welch, which note the plaintiff paid. This action is to compel the defendant to contribute towards the payment. Plea, the general issue. The jury returned a verdict for defendant. The plaintiff excepted to the admission of certain testimony and filed a general motion for a new trial.

The case is stated in the opinion.

Cleaves, Waterhouse & Emery, for plaintiff.

William H. Dwyer, and James O. Bradbury, for defendant.

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

SAVAGE, C. J. The plaintiff and one Welch entered into partnership November 16, 1911. To raise the necessary capital, they

borrowed money of a bank and gave their individual joint note. The partnership as such was not a party to the note. When that note matured it was renewed by another individual joint note. Afterwards, and before the second note matured, the partnership was dissolved. Welch retained the business and the partnership assets. It does not appear that anything was said then about the note. When that note matured, it was renewed by a new note signed by Welch on the face and by the plaintiff and defendant on the back. That note was renewed by another signed in the same way. When this fourth note became due, it was renewed by a fifth, signed only by the plaintiff and Welch. The defendant refused to sign. This last note the plaintiff ultimately paid. The plaintiff claims that he and the defendant were joint accommodation makers for Welch on the third and fourth notes, and, having paid the fourth note by a renewal note, and then having paid that one, he brings this suit for contribution. The defendant claims that he signed the third and fourth notes as accommodation maker for the plaintiff and Welch, and, hence, that he is not liable to contribute.

The verdict was for the defendant, and the case comes up on the plaintiff's exceptions and motion for a new trial.

During the course of these transactions the plaintiff and defendant did not meet. The defendant signed the third and fourth notes at the request of Welch. The defendant testified that he knew at one time that the plaintiff and Welch were in business together, and there is no evidence that he knew of the dissolution of the partnership. He denies that he knew it.

The defendant was permitted to testify as to what Welch said to him at the time he signed the third note, (his first signing), namely, that Welch "wanted me to accommodate him and sign a note for him and Mr. Lausier;" that "he wanted to know if I would do him a favor and sign a note for him and Mr. Lausier." This evidence was objected to on the ground that the conversation was after the dissolution of the partnership, at a time when Welch could not in any way bind the plaintiff. The presiding Justice admitted the evidence as a part of the res gestae, and exceptions were taken to the admission.

The question whether this evidence was admissible as a part of the res gestae has been fully argued, pro and con. But we need not con-

sider it, for we think the evidence was clearly admissible upon another and material ground. And being admissible, the plaintiff was not prejudiced improperly by its admission.

The relation of the makers of a promissory note, inter sese, is a matter of contract, express or implied. They are liable to one another as and how they have agreed. They may all be principals. Some may be principals, and others their sureties, signing with the principals as accommodation makers. If an accommodation maker has to pay, he may recover of the principal. If one of two accommodation makers has to pay, he may compel the other to contribute. The question always is, which was the contract relation among the signers. And the question in this case is what was the contract relation between the plaintiff and defendant.

Under the circumstances, it may very well have been understood between the plaintiff and Welch when the plaintiff signed the third note that he was signing as accommodation maker for Welch. Originally they had been joint principals. But the situation had changed. Welch had the property purchased by the money for which the prior notes had been given. Taking all the property, it is quite likely that Welch was understood to assume the payment of the note, the proceeds of which went into the property. But that is not the question in this case. The question now is, what did the defendant engage to do? and for whom? In this aspect, it seems to us that the terms of the request made to him, and with which he complied, are very material evidence of the nature of the contract, as to his fellow signers, into which he entered.

But there is more than this. There is evidence tending to show (in fact it is uncontradicted) that Welch procured the signature of the defendant to the third note in compliance with the plaintiff's request that he would "get someone else to go on the note." Welch then in procuring the defendant's signature was acting for the plaintiff, as well as for himself, in accordance with the plaintiff's request. He represented the plaintiff. The plaintiff cannot complain if his representative held out to the defendant that he was signing as accommodation for the plaintiff and Welch, and not as signing with the plaintiff as accommodation for Welch. If one party to a note sends out another to procure a third to sign, it would seem that he makes him his agent for that purpose, and that the representations of the agent are admissible against him.

The admission of the testimony complained of was not reversible error in any event, if it was error at all, and the exceptions must be overruled. The evidence clearly warranted the verdict. The certificate must be,

Exceptions and motion overruled.

STEVENS TANK AND TOWER COMPANY

vs.

BERLIN MILLS COMPANY.

Androscoggin. Opinion November 18, 1914.

Assumpsit. Contract. Delivery. Merchantable. Rescission.

In an action of assumpsit to recover the price of a hard pine tank sold and delivered to the defendant.

Held:

1. That the real issue is, whether the goods sold were of the kind, quality and dimensions called for by the contract.
2. That this was a question of fact under proper instructions from the Court on which the jury found in favor of the plaintiff, and the record fails to convince us that the finding is so manifestly wrong that it must be set aside.
3. That the defendant's attempted rescission by writing the plaintiff that the tank was in defendant's yard at Berlin subject to the plaintiff's shipping instructions does not meet the requirements of law.
4. That the seller must be put in substantially the same position that he occupied before the contract; and the notification of a vendor by the vendee, that the latter holds the goods subject to the order of the former is insufficient.
5. That the agreement on the part of the plaintiff to furnish a man to set up the tank was a subsequent and independent contract and not a condition precedent to the maintenance of an action for the price.
6. A witness who was neither the agent nor representative of the plaintiff and who has testified that he did not recollect making a statement regarding workmanship, may be contradicted by showing that he did make such a statement, but the statement itself is properly excluded as he had no power to bind the company.

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

An action of assumpsit to recover the price of a hard pine tank claimed to have been sold and delivered to the defendant. The real question is whether the goods sold were of the kind, quality and dimensions called for by the contract. The jury returned a verdict for the plaintiff.

The case is stated in the opinion.

George C. Wing, for plaintiff.

Sullivan & Daley, and White & Carter, for defendant.

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

CORNISH, J. Assumpsit on an account annexed to recover the price of a hard pine tank sold and delivered to the defendant. The record shows these facts.

On April 14, 1913, the plaintiff, a manufacturer of tanks at Auburn, received a letter from the defendant, asking a quotation of the lowest price and best delivery at Berlin, N. H., where the defendant had a pulp mill, for "one prime long leaf hard pine tank, with two heads 25 feet x 17 feet O. D., 24 feet x 15 feet I. D., staves and bottom 6 inches, top 4 inches, 20 round hoops $1\frac{1}{8}$ inches. The plaintiff, not clearly understanding the description, wrote for further information, in answer to which the defendant replied on April 16, enclosing a sketch of the desired tank with specification of dimensions. The plaintiff under date of April 17, 1913, offered to sell the defendant a tank of the required material and dimensions for "$1100. delivered at Berlin, 2% 10 days, net 30 days," shipment to be made in about ten days after receiving the order. This offer was accepted by the defendant, their letter of April 21, confirming the trade for "$1100 f. o. b. Berlin." It was subsequently arranged by telephone that the plaintiff should send a man to Berlin to set up the tank, charging only for his cash disbursements. A part of the material was shipped from Auburn on May 7th, and the balance May 9th. On May 14th the defendant wrote the plaintiff stating that the tank had arrived and asking that a man be sent by the 20th to erect it. This man,—Mr. Hutchins,—arrived at Berlin on the 20th and began the work, which required two weeks time, the men under him being employees of the defendant. After the work was completed the tank was

tested and found to leak in several places. Mr. Hutchins made some changes and returned to Auburn. After interviews and correspondence between the parties, Hutchins returned to Berlin to make further changes and to remedy the leaks, but, as he says, was forbidden to touch the tank by representatives of the defendant. This testimony is controverted in a measure.

Much of the testimony had reference to the manner in which the tank was erected, but is beside the real issue because the agreement on the part of the plaintiff to furnish a man to set up the tank was a subsequent and independent contract and not a condition precedent to the maintenance of an action for the price. *Lombard Co.* v. *Paper Co.*, 101 Maine, 114.

The real issue is whether the goods sold,—the knock down tank—to borrow an expression from the furniture trade, were of the kind, quality and dimensions, called for by the contract.

The measure of the defendant's rights in this respect was stated to the jury in the charge as follows: "When a party orders of a manufacturer or dealer in a certain class of goods a certain article by description, then the party so ordering, having no opportunity for inspection, is entitled to receive the article ordered, and moreover a saleable and mechantable article under that name or description. . . . . And 'saleable or merchantable' does not only mean that it may or should be sold in the market, but it also means as defined by this Court, 'that it shall be of ordinary quality marketable quality, bringing the average price, at least of medium quality or good class, good lawful merchandise of suitable quality, good and sufficient of its kind, free from any remarkable defects.'" The defendant claimed that this test was not met, as shown by the condition of the tank when completed, while the plaintiff contended that the parts were properly prepared and would have produced a proper tank when completed, had not the defendant, against the plaintiff's protest, inserted a timber ten inches square across the tank a short distance below the top, cutting gains on the inner sides, on which the ends rested. This formed no part of the original plan of construction, but was added under the express orders of the defendant during the erection.

The plaintiff further claimed that the materials were not properly cared for and protected by the defendant after their arrival at Berlin, but were permitted to remain exposed to the weather for several days

in open cars, and that after the erection it offered to remedy the defects even to the extent of taking down the tank and reconstructing it, but that the defendant refused to give it the opportunity.

All these contentions were submitted to the jury, and the record fails to convince us that the finding of the jury is so manifestly wrong that it must be set aside.

If there was a breach of warranty in the quality, the defendant had a right to rescind the contract and return the goods within a reasonable time. The defendant's attempted rescission is expressed in the letter of July 1, in these words: "We have taken it down and it is in our yard at Berlin, subject to your shipping instructions." That does not meet the requirements of the law. The seller must be put in substantially the same position that he occupied before the contract. The buyer must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do, he is relieved of the obligation by a refusal to receive them if tendered. It is not sufficient for a vendee who has taken delivery of the goods to make a proposal to return them or to notify the vendor that he holds them subject to his order. *Tyler* v. *Augusta*, 89 Maine, 180.

A single point is raised by the exceptions, namely, the exclusion of the alleged declarations of Hutchins in regard to the workmanship entering into the tank at the factory. Hutchins was in no sense the agent or representative of the plaintiff. He had no power to bind it by any statements that he might make. He was a workman sent by the company to take charge of erecting the tank, and nothing more. On cross examination he was asked:

Q. "When this tank was being erected did you talk with any of the men about there about the workmanship of the tank?

A. About what?

Q. About the workmanship that went into the tank?

A. I don't remember as I did.

Q. You don't remember whether you did or not?

A. No, sir.

Q. And you wouldn't say whether you did or not?

A. No, sir."

The defendant asked its superintendent, Brawn, whether Mr. Hutchins said anything to him during the erection of the tank as to the workmanship that went into it. Counsel in offering the testimony stated that it was for the purpose of contradicting Mr. Hutchins.

The witness was allowed to state whether or not Hutchins did say anything respecting the workmanship but was not permitted to state what he said. The ruling was correct. The testimony admitted was admissible, so far as it went, to contradict Mr. Hutchins. The statement excluded was inadmissible, because as the presiding Justice remarked, it had not been shown that Hutchins was vested with power to fully represent the plaintiff. The distinction made was manifestly correct.

Motion and exceptions overruled.

EDWARD D. MEGQUIER *vs.* GEORGE A. BACHELDER.

Penobscot. Opinion November 21, 1914.

Adjoining Owner. Division Fence. Fence Viewers. Partition. Prescription. Revised Statutes, Chap. 26, Sec. 5.

1. At common law, an adjoining owner could not be compelled to build any part of a division fence. He was compelled to keep his cattle upon his own land at his peril.
2. An adjoining owner could not build the entire fence and make the other pay for one-half, or any part of it.
3. This condition of the law was not satisfactory and consequently a statute was enacted to relieve it, so that if one owner refused or neglected to build his share of the fence, he could be made to do so, or have it built for him.
4. The procedure by which this could be accomplished was prescribed by statute, and a tribunal, known as "fence viewers" was given jurisdiction over the division of fences of adjoining owners to the extent of compelling the delinquent owner, either to build his part of the fence, or pay his neighbor for building it for him.
5. The jurisdiction of fence viewers depends upon certain preliminary requirements, among which is proof of a division fence in controversy, by an assignment made by fence viewers, by agreement of the parties, or by prescription, based upon the presumption of a division, the evidence of which is lost.

6. To make each party build his share of the fence is the primary purpose of Sec. 5 of Chap. 26 of the Revised Statutes. However, he cannot be so required to build his share until he knows what his share is, and he cannot know this until his part is first determined, either by fence viewers, by agreement of the parties, or by prescription.
7. Every person who may, by law, be required to build a part of a division fence, should first, be given an opportunity to build it himself. That such opportunity cannot be given, until by some division, he is informed of what his part is.

On report. Judgment for defendant.

This action on the case is brought under Sec. 5 of Chap. 26 of the Revised Statutes, to recover one-half of a partition fence between the plaintiff and defendant and the fees of the fence viewers for making the division. Plea, the general issue. At the conclusion of the evidence, the case was, by agreement of the parties, reported to the Law Court for final determination, upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

W. H. Powell, and Geo. H. Morse, for plaintiff.

E. M. Simpson, for defendant.

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

SPEAR, J. This is an action brought under Sec. 5 of Chap. 26 of the Revised Statutes to recover the value of one-half of a partition fence between the plaintiff and defendant and the fees of the fence viewers in making the division. No legal division had been made of the fence between the plaintiff and defendant by any of the methods known to the law. But the plaintiff built the whole fence upon the disputed line, the defendant's as well as his own, and then invoked the authority of Sec. 5 both for a division of the fence and a right of action for building the defendant's half.

It may here be observed that the plaintiff's remedy is purely statutory. An adjoining owner could not be compelled by common law to build any part of a division fence. He had, however, to keep his cattle upon his own land at his peril. Accordingly an adjoining owner could not build the entire fence and make the other pay for one-half, or any part of it. But this condition of neutrality was not satisfactory and the statute was enacted to relieve it, so that, if one owner

refused or neglected to build his share of the fence, he could be made to do so or have it built for him. But the procedure by which this could be done was prescribed wholly by the statute. The scheme of the statute was to give a tribunal, called fence viewers, jurisdiction over the division of fences of adjoining owners, to the extent of compelling the delinquent owner, either to build his part of the fence, or pay his neighbor for building it for him. But this jurisdiction is made to depend upon certain preliminary requirements, among which is proof of a division of the fence in controversy, (1) by an assignment made by the fence viewers, (2) by agreement of the parties, or (3) by prescription, based upon the presumption of a division the evidence of which is lost. This conclusion seems to be fully sustained by an analysis of the sections of the statute providing the procedure necessary to give jurisdiction to the fence viewers.

Section 1. Specifies what constitutes a lawful fence.

Section 2. Specifies when adjoining owners must maintain a fence.

Section 3. Specifies the method of compelling a delinquent to repair or rebuild his legal part of the fence, and is based upon a presupposed division between the parties; that each knows the portion he is required to build.

Section 4. Prescribes complainant's rights, for having built his neighbor's fence as provided in Sec. 3. All these sections are based upon the assumption of an existing division.

Section 5. Is entirely independent of the four preceeding sections, assuming the application of section two, and prescribes the method to be pursued by a complainant when no legal division of the partition fence exists and the parties disagree respecting their rights, namely: (1) An application of one of the parties to the fence viewers. (2) Notice to each party. (3) Assignment of part to be built by each. (4) Limit of time in which to build. (5) Record of the assignment. The last clause of this section then goes on to say: "If such fence has been built and maintained by the parties in unequal proportions" the fence viewers may determine the value of such excess and an action may be maintained to recover it.

Under this provision the plaintiff contends that, before any division by any of the methods above recited, he was authorized, a disagreement having arisen, to go on and build the entire line of division fence between himself and the defendant, and then call on the fence viewers, to make the division, and determine the value of the proportional

part of the fence built by the plaintiff in excess of his share, and make the defendant pay for it. This contention negatives the whole scheme of the statute.

The conception of the fence chapter is based upon the theory that each party to a division fence is required to build his part, not necessarily in length, but in value. "His share thereof" is the bight of section five. To make each party build "his share" is the primary purpose of the section. But he cannot be so required until he knows what his share is; and he cannot know this until his part is first determined, either by the fence viewers, by agreement of the parties, or by prescription. Accordingly, to permit one party to build the entire fence before any division, would be an act without the pale of the statute, and consequently void.

Moreover, the very language of the clause relied upon by the plaintiff presupposes a division before either party is authorized to build the whole fence. "Such fence" refers to the fence immediately alluded to in the prior part of the section. The fence there alluded to is a divided fence, and none other. The phraseology "assigning each his share thereof;" "each shall build or repair his part of the fence;" and "they shall thereafter maintain their part of said fence;" expresses the clear intent that the meaning of the phrase "such fence" is a divided fence. Futhermore, "such fence" cannot mean the entire fence when considered in the light of the language which follows it. It is limited in its meaning by the phrases "built and maintained by the parties;" "unequal proportions;" and "award to the party who built and maintained the larger portion, the value of the excess." But there can be neither "parties," "unequal proportion," nor "the building of a larger portion" when one party builds the whole fence. "Parties" means more than one. "Unequal proportion" and "larger portion" mean at least two parts, one of which is larger than the other. The reason for this clause is based upon the practical experience of adjoining owners of improved lands. It is a matter of common knowledge that disputes over division fences are constantly arising between such owners. They may arise in many ways. Fences are usually divided into equal parts, mathematically. One party may claim that he has built the hardest half; or by mistake, has built more than his part; or upon protest has built a part disclaimed by the other; all of which might give rise to the disagreement contemplated by the clause of the statute, in question.

We are of the opinion that every person who may, by law, be required to build a part of a division fence, should first be given an opportunity to build it himself. And that such opportunity cannot be given until by some division he is informed of what his part is. No such division appears in this case, accordingly the fence viewers had no jurisdiction. The fact that the fence viewers had once been called upon to make a division of the fence between these parties, and made a division which was void in law, is immaterial here. The present proceedings are independent of any previous division.

Judgment for defendant.

GEORGE M. BRIGGS

vs.

LAKE AUBURN CRYSTAL ICE COMPANY.

Androscoggin. Opinion November 21, 1914.

Collision. Due Care. Escape. Exceptions. Negligence.

Action of tort to recover for injuries sustained by reason of a collision when the plaintiff's team was overtaken by the defendant's in a public highway. The defendant's team escaped from the control of its driver while left unhitched on the defendant's premises, and thence ran away through a private way to the public street.

Held:

1. That the liability of the defendant depends, as in other cases of negligence, upon the degree of care exercised by it, and not upon the mere fact that the runaway team escaped from the private land of the defendant.
2. That the ordinance of the City of Auburn in regard to the care and control of teams upon the city streets has no application to the case at bar, as the defendant's team was not being driven upon a public street, but had escaped from its driver before the public street was reached.
3. That even if the ordinance had been violated it was not conclusive proof of the defendant's liability, but only evidence thereof.
4. That the exclusion of certain medical testimony, even if admissible, has been rendered immaterial by the verdict for the defendant.

On exceptions by the plaintiff. Exceptions overruled.

This is an action on the case to recover for injuries to person and property alleged to have been sustained by the plaintiff, by reason of the negligence of defendant company in the management of one of its ice teams, as a result of which said team collided with the team of the plaintiff on the streets of Auburn, causing the injuries complained of. The plea was the general issue. The jury returned a verdict for the defendant, and the plaintiff had exceptions to the refusal of the presiding Justice to give certain requested instructions which are fully considered in the opinion.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Andrews & Nelson, for defendant.

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

CORNISH, J. The declaration in this case counts upon "the duty of the defendant to manage its said teams so that the same should not escape and run away and into persons lawfully upon and using the highways in said city of Auburn, but the said defendant unmindful of its duty in this regard then and there through its said servants and agents so negligently managed a pair of draft horses attached to a heavy ice cart, said negligence consisting in leaving said horses while so harnessed to said wagon standing unhitched and without the near presence of any driver or attendant to control said team and prevent its escape, if said horses should suddenly start to run away, that said defendant well knew said horses were liable so to do if so left, and by the exercise of reasonable care ought to have so known, that said horses did then and there escape and run away from the vicinity of the defendant's ice house situated in said Auburn near Turner Street in and upon said Turner Street," &c., and collided with the plaintiff's team causing the damage and injuries set forth.

The case was tried upon the issues raised by the declaration, negligence on the part of the defendant and due care on the part of the plaintiff. The jury returned a verdict for the defendant and the case is before the Law Court on plaintiff's exceptions, which we will consider in their order.

1. Refusal of the presiding Justice to give the following requested instruction:

"If the team of the defendant escaped from the control of its driver from the private premises of the defendant and thence ran away into and upon the public highways of the city of Auburn said team was not lawfully upon said highways." It is admitted that the defendant had a large ice house situated on private land controlled by it, from which a private way led and connected with the public streets of Auburn; that on the day of this accident the driver of the defendant's team came to this ice house to replenish his load and backed his team against a platform extending across one end of the ice house, hung up his reins on a hook in his cart, and went into the ice house to get the ice. In his absence the horses ran away from the ice house premises, followed the private way out to the public streets, and overtook and collided with the plaintiff on Turner Street.

The first requested instruction is based upon the theory that as this team was upon the defendant's private premises when it started to run away, and escaped therefrom to the public street, it was as a matter of law unlawfully upon the street, and the defendant was absolutely responsible for any injuries it might cause, and the question of due care on its part cannot be considered. No such claim is alleged in the writ, and, even if it were, we cannot originate such a legal doctrine. It would be attended by too many absurdities. It would fix absolute liability upon the owner whose team might escape from his control when in his own door yard, although he may have taken every precaution which an ordinarily prudent person could take, but would leave his liability to be determined according to the rules of due care, if the same team might escape from this neighbor's door yard or in the public street. It would make the milk man an insurer when he loads his team in his own door yard, but liable simply for negligence when his team runs away while on the public street or in any other door yard on his route. We can see no reason requiring such a rule.

In support of this contention, the plaintiff invokes the common law rule that every man is bound to keep his cattle within his own close and to prevent them from escaping. It is undoubtedly the law in this State that while a land owner in the absence of prescription, agreement or assignment under the statute, is not obliged to fence his lands against an adjoining close, he is obliged to keep his own

flocks and herds within his close, and is liable for any trespasses they may commit if they escape. *Rust* v. *Low*, 6 Mass., 90; *Lyons* v. *Merrick*, 105 Mass., 71; *Little* v. *Lothrop*, 5 Maine, 356; *Knox* v. *Tucker*, 48 Maine, 373; *Harlow* v. *Stinson*, 60 Maine, 347. That doctrine however has no application to the case at bar because it applies to domestic animals roaming at will upon the owner's land and not to horses harnessed in a team. Then there was formerly a statute in this State providing a penalty for suffering animals to run "at large without a keeper in the highways," R. S., 1883, Chap. 23, Sec. 2, and actions were sustained where this statute was violated and injuries sustained thereby, as in *Jewett* v. *Gage*, 55 Maine, 538, where a hog in the highway frightened the plaintiff's horse. But that statute was repealed in the revision of 1903, and, were it now in force, it too could have no application to the facts in this case, as a runaway team cannot be considered as animals running at large. The statute was never intended to apply to such a condition. Impounding a runaway team would certainly be an anomaly.

In *Allen* v. *B. & M. Railroad*, 87 Maine, 326, the Court held that the plaintiff whose team had escaped from his premises to a public street, and thence across a public park to a railroad track, where the horse was killed by a locomotive, could not recover because the Railroad Company was not obliged to fence off its railroad from the park to keep off animals not rightfully in the park. The same doctrine is maintained in *Russell* v. *Maine Central R. R. Co.*, 100 Maine, 406. That is the extent of the decision and is unquestioned law; but the further statements as to the obligation of the owner under other conditions are merely dicta and not controlling in a case like that at bar. The rights of the plaintiff here depend upon neither the law applicable to animals escaping from a pasture, nor animals running at large, but upon the common law principles of negligence as applied to the existing facts. The Massachusetts Court says: "The general doctrine of the common law as to injuries done by domestic animals seems to be, that the owner is not liable unless he has been in some fault. He is liable for their trespasses when it was his duty to confine them and he has neglected to do so." *Barnes* v. *Chapin*, 4 Allen, 444.

In the case of runaway teams, the question is as set forth in the plaintiff's declaration, the degree of care and oversight exercised by the owner, and not the title to the precise spot from which the team

started. Thus actionable negligence was held to be test of liability, in *Tenney* v. *Tuttle*, 1 Allen, 185, where defendant's horses, harnessed to a wagon, were left standing on his land near his house, without being tied and with no one in immediate charge, and escaped to the highway and injured a traveller; In *Coller* v. *Knox*, 222 Pa., 362, 23 L. R. A., N. S., 171, where a team was left standing in a private lane, and in *Miller* v. *United Rys. Co.*, 134 S. W., 1045 (Mo.), where the team was left in an open space near a public street. In *Fallow* v. *O'Brien*, 12 R. I., 518, a horse escaped from an inclosure and injured a person on a highway. In the course of the opinion the Court say: "In the American cases cited, it seems to be recognized that it is the negligence of the owner of the animal straying in the highway which renders him liable for the injury inflicted by it, and that if he is guilty of no negligence he is subject to no liability. In the case at bar the defendant had an undoubted right to keep his horse in the inclosure near the highway. He had as much right to have it there inclosed as he had to drive it in the streets harnessed. But if, while driving it harnessed, it had escaped from his control without negligence on his part, and running away had injured the plaintiff, it is perfectly well settled that he would not be liable for the injury. We do not see why he should be any the more liable because the horse, instead of escaping from his control, escaped from an inclosure where he was rightfully kept, unless there was some want of diligence in pursuing and recapturing it."

The same reasoning applies with even greater force to the case at bar. The request was therefore properly refused.

2. The second request for instruction reads: "If while said team of defendant was passing in, through, along or across the public streets of the city of Auburn, the driver thereof was not enabled at all times to guide and restrain the same, by having sufficient reins or walking so near as to have constantly the control of said team, said team was not lawfully upon said public streets."

This request was based upon a city ordinance prescribing the duty of drivers of teams upon the public streets, in substantially the same language, and was properly refused. First, because it was inapplicable to the facts of this case, as this team was not being driven upon a public street, but had escaped from its driver before the public street was reached. The ordinance contemplated an entirely different situation. And second, even if the ordinance had

been violated, such violation was not conclusive proof of defendant's liability, but only evidence thereof. Failure to perform even a statutory duty is merely evidence of negligence, not negligence per se. *Carrigan* v. *Stillwell*, 97 Maine, 247; *Neal* v. *Rendall*, 98 Maine, 69; *Wood* v. *M. C. R. R.*, 101 Maine, 469; *Jones* v. *Co-Op. Assoc'n*, 109 Maine, 448.

The third and fourth requests involve the same points as the first and second already considered, while the fifth and sixth are based upon the city ordinance, which as we have determined, did not apply.

The charge clearly stated the legal rights of the parties on the question of defendant's negligence and of plaintiff's contributory negligence, and was without error.

The remaining exceptions relate to the exclusion of certain medical testimony, but as that affected merely question of damages, the verdict of the jury in favor of the defendant has rendered those questions entirely immaterial. *Young* v. *Chandler*, 104 Maine, 184.

The entry must therefore be,

Exceptions overruled.

LUNA C. SHEPHERD

vs.

MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion November 21, 1914.

Damages. Own. Plaintiff's description. Plan. Revised Statutes, Chap. 52, Sec. 73. Title.

1. Under the declaration and plea, the plaintiff, without offering any evidence of a paper title, proved his title by the use of a plan and oral testimony. The plan was used under the eye of the Court, without objection by counsel, and must be assumed to be substantially correct.
2. No objection or question was made by the defendant as to the truth of plaintiff's claim of ownership, nor as to the accuracy of the plan which was used to indicate and explain the extent and boundary of the burned area, as set forth in the writ. After the plaintiff had testified to his ownership of the land and described it as delineated upon the plan, the defendant waived his right of cross-examination and left the plaintiff's testimony and the plan uncontested and impressed with the presumption of truth, both as to title and description.
3. The word "own" used as a verb has a well defined meaning in law and is defined, "to have a good legal title; to hold as property; to have a legal or rightful title to; to have; to possess."
4. There can be little doubt that the claim of ownership, as made by the plaintiff, his minute description on the plan of his damaged premises; the conceded truth of his testimony upon both ownership and accuracy of the plan, were sufficient, under the circumstances of this case, to afford prima facie evidence of title.
5. It is well settled, that a party who would have the advantage of an oversight, if he wins, must take the disadvantage of the same oversight, if he loses. He must be deemed to have waived the deficiencies, under the circumstances, if there is sufficient in all the testimony to make a prima facie case.

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

This is an action on the case, under Revised Statutes, Chap. 52, Sec. 73, to recover damages for injuries to a maple growth by fire communicated thereto, by a locomotive engine of the defendant

company. Plea, the general issue. The defendant requested the Justice presiding to instruct the jury that "the plaintiff is only entitled to recover for the maple wood under his declaration, the difference in value of the maple before and after the fire.". The instruction was refused and the defendant excepted thereto. The jury returned a verdict for the plaintiff of $210.41. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

T. B. Towle, for plaintiff.

Fellows & Fellows, for defendant.

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

SPEAR, J. This action is brought under R. S., Chap. 52, Sec. 73, to recover damages for the burning of a maple growth on the land of the plaintiff in the town of Dexter.

The plaintiff declared upon his own seizin, and describes his land by metes and bounds. He then further describes it as "being in the town of Dexter and lying along side of and adjoining the railroad track of the Maine Central Railroad Company . . . known as the Dexter branch, and sometimes called the Dexter and Dover branch of said railroad."

The plea was the general issue.

Under this declaration and plea the plaintiff proved his title by the use of a plan, and by oral testimony. He offered no evidence of a paper title. The plan was used under the eye of the Court without objection by counsel and must be assumed to be substantially correct. Otherwise it would and should have been objected to and excluded until properly amended. We start then with the admission that the plan contained a substantially correct location and delineation of the premise as described in the plaintiff's writ. Unfortunately the plan was not made a part of the case and therefore is not before us. But the record shows that it was before the Court and jury at nisi and recognized by counsel upon both sides, as a substantially correct representation of the locus described in the writ. The only proof of title is shown by the following testimony: Q. Now will you describe on the plan the land that is owned by you? He then proceeds to describe the "land owned" by him by the use of the plan.

No objection or question was made by the defendant as to the truth of the plaintiff's claim of ownership, nor as to the accuracy of the plan which was used to indicate and explain the extent and boundary of the burned area, as set forth in his writ. No objection whatever was made that the locus described on the plan did not correspond with that described in the writ. After the plaintiff had testified to his ownership of the land and described it as delineated upon the plan, the defendant waived his right of cross-examination and left the plaintiff's testimony and the plan absolutely unassailed, and accordingly impressed with the presumption of truth both as to title and description. Was this testimony sufficient to prove prima facie title? Now the word "own" as applied to land means all the lands claimed and possessed by the party termed the owner. The word "own" used as a verb has a well defined meaning in law. 29 Cyc., 1548. "Own, To have a good legal title; to hold as property; to have a legal or rightful title to; to have; to possess."

There can be little doubt that the claim of ownership as made by the plaintiff; his minute description on the plan of his damaged premises; the conceded truth of his testimony upon both ownership and accuracy of the plan; the omission to call for any further proof of title or description; were sufficient, under the circumstances of this case, to afford prima facie evidence of title.

But the defendant further objects that the premises described by the plaintiff do not correspond with the premises described in the declaration. Here again the plan plays an important part, when considered in connection with the way in which it was treated by the defendant. By the testimony it will be seen that the plaintiff minutely described his land, as delineated upon the plan, and pointed out the burned area, as appears by the following question: Q. Now on that chalking will you show the jury where the maple grove was that was burned over? He then goes on to describe it. He further said that the track of the railroad went "right through" his property. Cross-examination of the plaintiff was waived, but of another witness defendant's counsel asked this question: Q. Is the plan up there correct, so far as you know, in regard to the location of the small lots? A. I should say it was. When the testimony of the plaintiff, describing the burned area by the plan, had been fully adduced; when all the evidence upon the other issues had been presented; when the plaintiff's case was closed; the defendant, up to this time,

had made no objection to any variation between the proof and the allegations; raised no question as to the accuracy of the plaintiff's description of the area burned over; offered no suggestion of anything wanting to enable the Court and jury to fully understand the case; and introduced no evidence in defense to explain, modify or contradict any contention or fact sought to be established by the plaintiff's evidence; but after verdict against it the defendant for the first time raises objections to proof of title and variation between proof and pleading.

At this juncture arises a question of practice, how far a party can take advantage of inadvertancies if he wins, and avoid the disadvantages, if he looses. Upon this point we think it is well settled, that a party who would have the advantages of an oversight if he wins, must take the disadvantages of the same oversight, if he looses. He must be deemed to have waived the deficiencies, under the circumstances, if there is sufficient in all the testimony to make a prima facie case. *Raymond* v. *Connors*, 62 Maine, 110.

We are of the opinion that the plaintiff made out a prima facie case before the jury, although the plan or chalk, which was important in enabling the jury, Court and counsel to understand the case, is not before us to give us as full information as was furnished at the trial. Sufficient information, however, we readily gather from the record. Accordingly our conclusion is that the plaintiff made out a prima facie case of title and a sufficiently definite description of the burned area to entitle him to recover whatever damages he was able to prove.

It would be of no avail to rehearse the evidence upon the question of damages. The verdict was only $210.41, and if warranted under the rule of law given by the presiding Justice must be allowed to stand.

This brings us to the exception. The allegation was that "the maple growth on said land above described was injured and destroyed by fire," etc. The defendant requested the presiding Justice to instruct the jury as follows: "The plaintiff is only entitled to recover for the maple wood under his declaration. The difference in value of the maple before and after the fire." The Court refused to give this instruction, but did give the following: "That the plaintiff is only entitled to recover for the maple growth under his declaration. I said so. The difference in the value of the maple growth, before and after the fire."

From this exception it appears that the presiding Justice had already instructed the jury as to the measure of damages, precisely as he did after the requested instruction. The instruction given corresponded with the allegations in the declaration that the maple grove, not the maple wood, was damaged. With only this information regarding the charge to the jury upon this point, we cannot say that the instruction was wrong. It is palpably plain that there might be a marked difference between the value of a maple grove and the maple wood comprising the grove. What the presiding Justice said regarding this point does not appear, and as no exceptions were taken, the distinction which he made must be regarded as correct.

Motion and exceptions overruled.

JOHN E. GLIDDEN

vs.

BANGOR RAILWAY & ELECTRIC COMPANY.

Penobscot. Opinion November 21, 1914.

Damages. Highway. Last Chance Doctrine. Negligence.

1. It is unnecessary to determine whether the plaintiff was negligent or not, as it is perfectly apparent that the jury had a right to infer from the testimony that the defendant was negligent after the motorman saw plaintiff's team across the track, or by the exercise of due care, in watching the streets ahead of him, ought to have seen it.
2. Travelers have a right, if a proper use of the highway permits it, to pass over and upon the car tracks; and it is admitted by defendant that, on account of the length of his rig and the obstruction on the westerly side of Centre Street, it was impossible for the plaintiff to turn down Centre Street without driving across the tracks. He was, accordingly, lawfully on the track.

On motion by defendant for new trial. Motion overruled.

This is an action on the case to recover damages for injuries to person and property suffered by plaintiff, by reason of the negligence of the defendant in conducting and driving one of its cars, so that it

collided with the team of the plaintiff, causing the injuries and damages complained of. Plea, general issue. The jury returned a verdict for the plaintiff of $500, and defendant filed a motion for a new trial.

The case is stated in the opinion.

George E. Thompson, and W. M. Warren, for plaintiff.

E. C. Ryder, and Edgar M. Simpson, for defendant.

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

SPEAR, J. It would serve no useful purpose to quote from the evidence in this case. The jury passed upon it and found in favor of the plaintiff. It is unnecessary to determine whether the plaintiff was negligent or not, as it is perfectly apparent that the jury had a right to infer from the testimony, that the defendant was negligent after the motorman saw the plaintiff's team across the track, or by the exercise of due care, in watching the streets ahead of him, ought to have seen it.

The plaintiff's team was squarely across the track without anything to obscure its discovery by the motorman for hundreds of feet. The motorman, however, undertakes to excuse his collision with the team, at such a speed as to go fifty feet after the impact, by claiming that an arc light obscured his view within the zone of its rays. If this was so, then he should have slowed down and had his car under control, until he had passed the area of obscurity and danger. Because travelers have a right, if a proper use of the highway permits it, to pass over and upon the car tracks; and it is admitted by the defendant that: "On account of the length of his rig and the obstruction in the westerly side of Centre street below Willow, it was not possible for him to turn down Centre street without driving across the tracks." But the fact that the plaintiff had a long rig did not inhibit him from using the streets of Bangor. He was, accordingly, lawfully on the track. Whether he remained on the track so long that his delay became an act of negligence, as before stated, it is unnecessary to determine, as the jury were warranted upon the evidence in finding the defendant negligent under the last chance doctrine.

Motion overruled.

DAYTON T. MOORE et als.,

Trustees of the Estate of MOSES W. WEBBER, In Equity,

vs.

STELLA R. MCKENZIE and THE WEBBER HOSPITAL ASSOCIATION.

York. Opinion November 23, 1914.

Bill in Equity. Construction of Will. Life Tenant. Trustees. Will.

A bill in equity for the construction of the will of Moses W. Webber, deceased. The several answers of respondents admit all the allegations of the bill of complaint.

The residuary clause of the will, under which the first question arises, has already been construed by this Court in *Webber Hospital Asso.* v. *McKenzie*, 104 Maine, 320. In accordance with the construction adopted in that case, it appearing from the bill that the trustees, in their sound judgment, declare the maintenance of the hospital built by defendant association is assured and guaranteed as contemplated by testator and provided in his will, it is answered that the trustees may make the proposed payment of twenty-five thousand dollars to said Webber Hospital Association.

The Court answers in the affirmative the second question "Shall the excess of the estate in the hands of the plaintiffs, trustees, over the sum of ninety thousand dollars be paid to the Webber Hospital Association, the same representing income that should have been paid to said association under the terms of said will."

"Shall the note of Stella R. McKenzie be turned over to said association as representing income" is the third question. It is the opinion of the Court that this note should not be turned over to respondent association, either as principal or income, but be retained by the trustees as principal.

The fourth inquiry is "Shall Stella R. McKenzie be paid one hundred dollars annually as a gross and fixed sum; or such sum, not in excess of one hundred dollars, annually as the trustees may deem necessary for the maintenance of the house at Old Orchard, Maine." The item of the will, under which this question arises is:—"I also give from the income of my property one hundred dollars for the maintenance of said house at Old Orchard, Maine, while in the use of said Stella F. Ripley." The house mentioned is that already devised by the will to

said Ripley (now McKenzie) for use during her life. It is the conclusion of the Court that the sum of one hundred dollars be paid annually by the trustees to said McKenzie.

The last question is "5th. Can the trust fund of fifteen thousand dollars for the benefit of Stella R. McKenzie and the trust fund for the benefit of the Webber Hospital Association be invested together and the net income paid to each *pro rata*, or shall there be two distinct funds set apart."

There is no authority of law for the mingling of trust funds proposed by this inquiry. Certainly it could not be considered if the two trusts were to be administered by distinct trustees. That the trustees were or are the same, or that the corpus of each fund is finally to be paid to or held for the same person can make no difference. Each trust must stand alone; otherwise losses legitimately to be borne, with corresponding loss of income, by one, could be imposed in part upon the other.

On report. Decree according to the opinion.

This is a bill in equity, in which the construction of the will of Moses W. Webber is sought. All the allegations of the bill are admitted in the several answers thereto. The following is a copy of the will of Moses W. Webber, omitting the formal parts:

"I, Moses W. Webber of Biddeford, Maine, manufacturer, make this my last will.

I give, devise and bequeath my estate and property, real and personal, as follows—that is to say:

$500. Five hundred dollars as a fund the income from which to be used for the perpetual care of my burial lot in Laurel Hill Cemetery, Saco, Maine.

$750. Seven hundred and fifty dollars for a monument with inscriptions thereon of all buried in the lot of my father's, Aaron Webber, in Biddeford Cemetery, Biddeford, Maine, there shall also be markers for each one buried there.

$250. Two hundred and fifty dollars as a fund the income from which to be used for the perpetual care of said burial lot of my father in Biddeford Cemetery, Biddeford, Maine.

$250. Two hundred and fifty dollars as a fund the income from which to be used for the perpetual care of the burial lot of my wife's father, William Littlefield, in Laurel Hill Cemetery, Saco, Maine.

$5,000. Five thousand dollars to Stella F. Ripley, my wife's cousin, who has faithfully made a home for me since the death of my beloved wife.

$15,000. Fifteen thousand dollars as a fund the income from which to be given said Stella F. Ripley during her lifetime.

$1,000. One thousand dollars as a fund the income from which to be donated to the aid of unfortunate women to enable them to enter the Wardwell home, so called, at Saco, Maine, the fund to be known as the Eliza P. Webber fund.

All of my household goods, books, pictures, &c., &c., wherever situated, to be given said Stella F. Ripley.

I also give Stella F. Ripley, the use of my house at Old Orchard, Maine, during her lifetime.

I also give from the income of my property one hundred dollars per annum for the maintenance of said house at Old Orchard, Maine, while in the use of said Stella F. Ripley.

The balance of my estate and property real and personal and all that shall accrue to said estate, not otherwise mentioned, to constitute a fund which when it shall have amounted to seventy-five thousand dollars the income from which to be used for the maintenance of a Free Hospital in Biddeford, Maine, where the unfortunate may receive good care and skilful treatment.

If a Hospital shall not have been built when the above Hospital fund shall have amounted to seventy-five thousand dollars, twenty-five thousand dollars of the principal may be used for building one providing a sufficient sum is guaranteed for its maintenance.

The above fund to be a memorial to my beloved wife, Eliza P. Webber."

At the hearing in this case, May 29, 1914, it was reported to the Law Court upon the following stipulation; "This cause comes on to be heard on bill and answers; and it appearing to the Justice presiding that questions of law are involved of sufficient importance and doubt to justify the same, by consent of the parties, the cause is reported to the next Law Court for hearing and decision."

The case is stated in the opinion.

N. B. & T. B. Walker, for plaintiffs.

Edwin Stone, and Harris & Dwyer, for defendants.

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

BIRD, J. This is a bill in equity brought for the construction of the will of Moses W. Webber, deceased. The several answers of respondents admit all the allegations of the bill.

The first question propounded is "Whether the plaintiffs, trustees, are now authorized to pay to The Webber Hospital Association the sum of twenty-five thousand dollars provided for in said will, for the reason that on December 31st, A. D. 1906 a hospital had not been built as contemplated by said Moses W. Webber in his said will, but has been built since said hospital fund amounted to the sum of seventy-five thousand dollars, by the Webber Hospital Association, aforesaid, in reliance upon and in expectation of receiving said sum of twenty-five thousand dollars, and as the hospital of said association has for four years been maintained as a free hospital and will continue to be so maintained."

In *Webber Hospital Association* v. *McKenzie*, 104 Maine, 320, wherein the residuary clause of the will, under which this question arises, has already been construed and the mode of administering the trust considered, it is said, see Id. pp. 324 and 329-30, "when the time arrives the association may have already built a hospital. If not, the trustees may use twenty-five thousand dollars of the principal for that purpose, if a sufficient sum is guaranteed by other parties, so that with the income from the remaining $50,000 its maintenance is assured. That decision will call for the sound judgment of the trustees."

The complainants, the trustees, allege in their bill of complaint that the future maintenance of said free hospital (that of respondent association) is assured and guaranteed as contemplated by Moses W. Webber and provided in his will and the allegation is admitted in the answers of all the respondents. Assuming the allegation to embody the sound judgment of the trustees, our answer is that the trustees may now make the proposed payment of twenty-five thousand dollars.

The second question is "Shall the excess of the estate in the hands of the plaintiffs, trustees, over the sum of $90,000 be paid to the Webber Hospital Association, the same representing income that should have been paid to said Association under the terms of said will." And the Court answers in the affirmative.

"Shall the note of Stella R. McKenzie be turned over to said Association as representing income" is the third question. Stella R. McKenzie, as executrix, apparently made payments to herself as legatee and as trustee of the fund of $15,000 in excess of the correct amounts (106 Maine, 387) aggregating at the time of her final account

the sum of $10,635.12, for which she gave her note, payable by maker by the application of the income of the $15,000 trust created for her benefit. It is the opinion of the Court that this note should not be "turned over" to respondent association either as principal or income but be retained by the trustees as principal.

The fourth inquiry is "Shall Stella R. McKenzie be paid one hundred dollars annually as a gross and fixed sum; or such sum, not in excess of one hundred dollars annually as the trustees may deem necessary for the maintenance of the house at Old Orchard, Maine."

The item of the will, under which this question arises, is as follows:—"I also give from the income of my property one hundred dollars per annum for the maintenance of said house at Old Orchard, Maine, while in the use of said Stella F. Ripley." The house mentioned is that already devised by the will to said Ripley (now McKenzie) for use during her lifetime.

Maintenance is defined the act of maintaining, or state of being maintained, support, sustenance, defense, livelihood, etc.: that which maintains or supports; means of sustenance; supply of necessaries and conveniences. Webster's New Int. Dict. The act of maintaining, means of support, assistance. The furnishing by one person to another, for his support, of the means of living, or food, shelter, clothing, etc. Black's Law Dict. From these definitions, the apparent expectation of the testator that the life tenant, Stella R. McKenzie, would make the house her home and the duty imposed upon the life tenant by law to keep the premises in repair, we conclude that it was the intention of the testator that the sum of one hundred dollars should be paid annually to the life tenant for the purpose of keeping up the house as a home. The sum of one hundred dollars is therefore to be paid annually by the trustees to said McKenzie.

The last question is "5th. Can the trust fund of fifteen thousand dollars for the benefit of Stella R. McKenzie and the trust fund for the benefit of The Webber Hospital Association be invested together and the net income paid to each pro rata, or shall there be two distinct funds set apart."

We know of no authority of law for the mingling of trust funds proposed by this inquiry. Not for a moment could it be considered if the two trusts were to be administered by distinct trustees. That the trustees were or are the same or that the corpus of each fund finally is to be paid to the same person, can make no difference.

Each trust must stand alone, otherwise losses legitimately to be borne, with corresponding loss of income by one, could be imposed in part upon the other.

Decree accordingly.

CARL W. THURSTON *vs.* ALONZO A. CARTER.

Knox. Opinion November 23, 1914.

Larceny. Public Laws, 1909, Chap. 222, Sec. 17. Taxation. Trover.

1. Under the common law, the question, whether the animal be wild or tame, is referred to our knowledge of his habits, derived from fact and experience. It is clear, therefore, from the popular meaning of the word domestic and from our knowledge of its habits, and from fact and experience that the cat is a domestic animal.
2. The civil law classifies animals in two divisions, as follows;—Domestic or tame, which class includes cattle, horses, sheep, goats, pigs, poultry, cats, dogs and all other animals which, by habit or training, live in association with man.
3. Domestic animals, like other personal and movable chattles, are the subject of absolute property. The owner can maintain trover for them, and retain his property in them if they stray or are lost.
4. A cat is a domestic animal within the meaning of Public Laws, 1909, Chap. 222, Sec. 17.

On exceptions by the plaintiff. Exceptions overruled.

This is an action of trespass, in which the plaintiff seeks to recover damages for the killing of the fox hound of plaintiff by the defendant. The defendant, claiming to justify under Public Laws of 1909, Chap. 222, Sec. 17, alleged that he shot and killed the plaintiff's dog while it was chasing and worrying a cat belonging to him, and upon the land of the defendant. At the conclusion of the evidence, the Justice presiding directed a verdict for the defendant; To which direction, the plaintiff excepted. The bill of exceptions contained the stipulation, that if a cat is a domestic animal, the ruling below is to stand; otherwise, judgment is to be entered for plaintiff in the sum of fifty dollars.

The case is stated in the opinion.
L. M. Staples, for plaintiff.
Frank B. Miller, for defendant.

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

BIRD, J. This action of trespass is brought for the recovery of damages for the killing of the fox hound of plaintiff by defendant. The latter, in justification, under Pub. Laws 1909, Chap. 222, Sec. 17, claimed that he shot and killed the plaintiff's dog while it was chasing and worrying a cat belonging to and upon the land of the defendant. After the introduction of all the evidence, the Court ordered a verdict for defendant. To this direction, plaintiff filed his bill of exceptions in which it is stipulated that if a cat is a domestic animal, the ruling below is to stand, otherwise judgment is to be entered for plaintiff in the sum of fifty dollars.

That portion of Sec. 17, Chap. 222, Pub. Laws, 1909, which defendant invokes is as follows:—"Any person may lawfully kill a dog which . . . is found worrying, wounding, or killing any domestic animal, when said dog is outside of the enclosure or immediate care of its owner or keeper."

The enactment is entirely free from technical words or phrases. It is therefore to be construed according to the common meaning of the language: R. S., Chap. 1, Sec. 6, I; *State* v. *Harriman,* 75 Maine, page 567. Domestic has been variously defined by lexicographers but with substantial uniformity of meaning. "Inhabitating the house, not wild." Johnson's Dictionary: "Belonging to the house or household; domesticated; tame; Standard Dict: Living in or near the habitations of man; domesticated; tame as distinguished from wild; living by habit or special training in association with man. Webster's New Int. Dict: "Relating to or belonging to the home or household, or to household affairs;" Cent. Dict. "Pertaining, belonging or relating to a house;" Black's Law Dict. See also *Kimball* v. *Water Co.,* 107 Maine, 467, 469. It is a broad term; *Osborn* v. *Lennox,* 2 Allen, 207, 209.

The cat is defined as "A domestic animal that catches mice;" Johnson's Dict. "A well known domesticated carnivorous mammal, kept to kill mice and rats and as a house pet." Standard Dict.

"A carnivorous quadruped (felis domestica) which has long been kept by man in a domestic state, as a pet and for catching rats and mice; . . . (it) is not known in the wild state." Webster's New Int. Dict.

The time of its first domestication is lost in the mists of the dawn of history but it is apparent that the cat was a domestic animal among the early Egyptians by whom it came to be regarded as sacred as evidenced by the device of Cambyses during his invasion of Egypt, B. C., 525 or 527 which could scarcely have been feasible if the animal was then wild. From that day to this it has been a dweller in the homes of men. In no other animal has affection for home been more strongly developed and in none, when absent from home, can the *animus revertendi* be more surely assumed to exist.

"But the common law has . . . adopted the test laid down by Puffendorf, by referring the question, whether the animal be wild or tame, to our knowledge of his habits, derived from fact and experience." II Kent, *349.

It is clear, therefore, from the popular meaning of the word domestic and from our knowledge of its habits gained from fact and experience that the cat is a domestic animal.

In "The Laws of England" it is laid down that "the common law follows the civil law in classifying animals in two divisions as follows—

"(1) Domestic or tame (*domitae* or *mansuetae naturae*). This class includes cattle, horses, sheep, goats, pigs, poultry, cats, dogs and all other animals which by habit or training live in association with man. I Halsbury, 365." And following this definition, the same author declares that "Domestic animals, like other personal and movable chattels, are the subject of absolute property. The owner can maintain trover for them, and retains his property in them if they stray or are lost." Id. See also *Yates* v. *Higgins*, L. R., 1 Q. B. D., 1896, 166; *Harper* v. *Marcks*, L. R., 1894, 2 Q. B. D., 319, 322, 323.

But it is urged that the cat is not the subject of larceny and, therefore, its owner can have but a qualified property therein. Among the ancient Britains it was held to have intrinsic value and the theft of a cat was punishable by fine. When, however, larceny became punishable capitally, the courts, to mitigate the severity of the law, held that certain animals were not the subject of larceny as not fit for food, or as base, or as kept only for pleasure, curiosity, or whim.

They are instanced by Blackstone, as "dogs, bears, cats, apes, parrots, and singing birds, because their value is not intrinsic, but depending only on the caprice of the owner." 2 Com. x393. And Hawkins, speaking of the subjects of larceny, says "Thirdly, they ought not to be things of a base nature, as dogs, cats, foxes, monkeys, ferrets and the like, which, howsoever they may be valued by their owner, shall never be so regarded by the laws, that for their sakes a man shall die." 1 Hawk P. C., 214; 1 Gabb., Cr. L., 569. And so from the time of Sir Mathew Hale to the case of *Sentell* v. *New Orleans &c. Railroad*, the enumeration, with changes to suit the times or individual predilections, has been repeated: 1 Hale, P. C., 512; 166 U. S., 698, 701. *Cessante ratione legis, cessat ipsa lex.*

A cat which is kept as a household pet may be properly considered a thing of value. It ministers to the pleasure of its owner, and serves, as was said by Coke of falcons, *ob vitae solatium. Ford* v. *Glennon*, 74 Conn., 6, 7. See also *Mullaly* v. *New York*, 86 N. Y., 365, 366. "It follows then, that the cat must stay at home."

If it be urged that they are not liable to taxation, it is true that they are not enumerated by name as subjects of taxation in the statutes of the State but the general language of the tax enactments is sufficient to include them, even if the owner had but a qualified property. Poultry is not mentioned by name neither are its various kinds in the statutes respecting taxation. Nor yet the ass albeit its side issue is. But it will scarcely be contended that hens, geese, ducks, or turkeys, or asses are not liable to be taxed.

The change of sentiment respecting animals and the light in which they are regarded at the present day is admirably shown in the provisions of law punishing cruelties inflicted upon them and their sweeping character is indicated in the provision that the word animal as employed in our statutes upon this subject "includes every living brute creature." On the other hand while enactments are numerous giving damages for injuries caused by various animals and providing for their license and regulation, our statutes are silent as to the "harmless necessary cat."

It remains to inquire if there be aught in the context of Pub. Laws, Chap. 222, which militates against the conclusion reached. As already seen the word domestic is a broad term (*Osborn* v. *Lennox*, 2 Allen, 209) and, while its significance must always be determined with reference to the subject matter and the relation in which it appears,

(107 Maine, 471) we find nothing in the act in question which indicates that the term domestic is used in other than its ordinary and popular meaning as we have found it to be defined. See *Osborn* v. *Lennox*, 2 Allen, 207, 209; *Brown* v. *Graham*, 80 Neb., 281, 284.

Exceptions overruled.

GRACE M. CARTER *vs.* ERNEST B. ORNE.

Cumberland. Opinion November 23, 1914.

Agreement. Allegation. Breach. False Representations. Remedy. Variance.

In an action of deceit, upon defendant's exceptions to the refusal of the presiding Judge to order a verdict for the defendant, it is

Held:

1. That there was a fatal variance between the first alleged misrepresentation and the evidence. The allegation was that the defendant stated that one Haggett had sold one hundred copies of the plaintiff's song when demonstrating in Lewiston, while the evidence only showed that the defendant said he had received a letter from Haggett to that effect.
2. That the second alleged false statement, viz: that "the defendant agreed that the second lot of one hundred copies should be sold only in Lewiston, while the said Haggett was demonstrating there, and only for advertising purposes," related not to some material existing fact, but to a promise for the future, and therefore was not properly a representation, but an agreement.
3. That the plaintiff's remedy, if any, is in contract and not in tort.

On exceptions by the defendant. Exceptions sustained.

This is an action on the case, brought in the Superior Court for Cumberland County, for deceit, wherein the plaintiff alleged that the defendant, by false and fraudulent representations, induced the plaintiff to deliver to said defendant certain copies of a song entitled "Regret," on which song plaintiff was the owner of a copyright; and that, by reason of the aforesaid deceit and false representations,

she sustained damages. Plea, the general issue. The jury returned a verdict for the plaintiff of $225. During the trial, the defendant excepted to the admission and exclusion of evidence by the presiding Judge, and filed a motion for a new trial.

The case is stated in the opinion.

Hinckley & Hinckley, for plaintiff.

Harry E. Nixon, and Jacob H. Berman, for defendant.

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

CORNISH, J. It is only necessary to consider the exception to the refusal of the presiding Judge to order a verdict for the defendant.

This is an action of deceit.

After reciting by way of preliminary statement that one Haggett, the alleged agent of the defendant, on November 23rd, 1912, had secured from the plaintiff one hundred copies of a song written by her, for the purpose of demonstrating the same in Lewiston, at an agreed price of four cents each, the declaration sets forth the false representations in these words: "That on or about the 28th day of November, 1912, the said Ernest B. Orne came to the home of the said plaintiff and informed her that Haggett received the one hundred copies for him and sold them all in Lewiston while demonstrating, and he desired to get another one hundred copies for the same purpose and agreed that the second lot of one hundred copies should be sold only in Lewiston while the said Haggett was demonstrating there and only for advertising purposes." And the declaration further alleges that the misrepresentations were made with an intent to defraud the plaintiff, and that the defendant in fact intended to sell and did sell the copies in Portland.

In the first place there is a fatal variance between the first allegation of false representation and the evidence in support of the same. The allegation is that the defendant informed the plaintiff that Haggett had sold the one hundred copies in Lewiston, while demonstrating there, but the only evidence on this point is the plaintiff's own testimony that the defendant said "I had a letter from Mr. Haggett, asking me if I would come to you and get another hundred copies of "Regret" as the first hundred that he got the Monday morning before had gone like hot cakes" &c. This falls fatally short

of the allegation. It does not state that Haggett had sold all the copies, but simply that Orne had received a letter from Haggett to that effect, and there is no evidence to show that he did not receive such a letter. So far as the record discloses, the defendant's statement was absolutely true. For this reason this alleged misrepresentation fails.

The second alleged false statement relates not to some material existing fact, but to a promise for the future. The declaration sets forth that the defendant "agreed that the second lot of one hundred copies should be sold only in Lewiston while the said Haggett was demonstrating there and only for advertising purposes." The breach of this agreement is really the gist of the complaint, so that the plaintiff has misconceived her remedy. It should have been in contract and not in tort. A case strongly in point is *Dawe* v. *Morris*, 149 Mass., 188, where the Court say: "A representation, in order that, if material and false, it may form the ground of an action where one has been induced to act by reason thereof, should be one of some existing fact. A statement promissory in its nature that one will thereafter sell goods at a particular place or time, will pay money, or do any similar thing, or any assurance as to what shall thereafter be done, or as to any further event, is not properly a representation but a contract, for the violation of which a remedy is to be sought by action thereon." The prior allegation as to the actual sale of one hundred copies, if separated from the promise to sell the second lot also in Lewiston, is entirely unimportant and immaterial because if the defendant had actually sold the second lot in Lewiston as he agreed to do, no action could have been maintained by reason of any false representation in regard to the first lot, and no injury could have resulted to the plaintiff thereby. The only injury claimed by the plaintiff is because of the defendant's failure to perform his agreement, and for that injury the remedy sounds in contract and not in tort. *Ross* v. *Reynolds*, 112 Maine, 223.

Exceptions sustained.

MARION E. FIELDS *vs.* LEWIS M. MITCHELL.

Cumberland. Opinion November 23, 1914.

"A married woman of any age." Conveyance of Real Estate. Coverture. Disaffirm Sale. Infancy. Revised Statutes, Chap. 63, Sec. 1.

1. R. S., Chap. 63, Sec. 1, providing that "A married woman, of any age, may own in her own right, real and personal estate acquired by descent, gift or purchase, and may manage, sell, convey and devise the same by will, without the joinder or assent of her husband" &c., applies to a married woman under the age of twenty-one years as well as to one who has attained her majority.
2. That a conveyance of real estate made by a married woman under the age of twenty-one years cannot be disaffirmed by her after arriving at majority, nor the property recovered back.

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

This is a real action to recover certain real estate described in the declaration. The plaintiff, a married woman under the age of twenty-one years, conveyed said premises by warranty deed to Forest W. Fields, which land Forest W. Fields subsequently conveyed to the defendant. At the date of the writ in this action, the plaintiff was twenty-one years of age. The case was reported to the Law Court upon the agreed statement of facts.

The case is stated in the opinion.

Jacob H. Berman, for plaintiff.

Reynolds & Sanborn, for defendant.

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

CORNISH, J. The sole question to be determined in this case is whether a married woman under the age of twenty-one years can sell and convey real estate and after arriving at the age of twenty-one can disaffirm the sale and recover the property back. If she can, then this action can be maintained, otherwise not.

This question is one of statutory construction.

R. S., Chap. 63, Sec. 1, provides as follows:

"A married woman, of any age, may own in her own right real and personal estate acquired by descent, gift or purchase; and may manage, sell, convey and devise the same by will, without the joinder or assent of her husband;" etc. The plaintiff contends that the phrase, "A married woman of any age" should be interpreted to mean "of any lawful age;" that is, one who has attained her majority; while the defendant claims that the words mean precisely what they say, "of any age," whether under twenty-one or over. This is the issue, and a careful examination of the history of this legislation sustains the claim of the defendant.

At common law the plaintiff would have been under two disabilities,—coverture and infancy. In 1844 the Legislature passed an Act removing in part the disability of coverture, viz:

"Sec. 1. Any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase or distribution, in her own name, and as of her own property; provided it shall be made to appear by such married woman, in any issue touching the validity of her title, that the same does not in any way come from the husband after coverture.

Sec. 2. Hereafter when any woman possessed of property real or personal, shall marry, such property shall continue to her, notwithstanding her coverture, and she shall have, hold and possess the same, as her separate property, exempt from any liability for the debts or contracts of the husband." Pub. Laws, 1844, Chap. 117.

This act gave married women the right to hold property in their own name, and a subsequent act passed in 1852, gave them the right to dispose of it, namely:

"Sec. 1. Any married woman who is or may be seized and possessed of property, real or personal, as provided for in the Acts to which this is additional, shall have power to lease, sell, convey and dispose of the same, and to execute all papers necessary thereto in her own name, as if she were unmarried, and no action shall be maintained by the husband of any such married woman for the possession or value of any property held or disposed of by her in manner aforesaid." Pub. Laws, 1852, Chap. 227.

This Act took effect February 23, 1852. It does not in terms say that married women under the age of twenty-one may sell and dispose of their own property, so that while the disability of coverture had been to a great extent removed, that of infancy might still remain in doubt. But the same Legislature on April 26, 1852, passed another Act that removed in clear and unambiguous terms the disability of infancy. Public Laws 1852, Chap. 291, Sec. 3, provides: "Any married woman under the age of twenty-one years shall, and may exercise, all the rights, privileges and powers enumerated in the several acts now in force, securing to married women their rights in property in the same manner and with the same effect as though she were of full age." The Act of February 23, 1852, was in force at the time of the passage of this last Act and therefore came under its provisions.

Since that date in this State all married women have possessed the same rights regarding the sale of their property whether under twenty-one years of age or over. In the revision of 1857, these statutes were condensed, but the meaning was preserved in these words: "A married woman, of any age, may own in her own right, real and personal estate acquired by descent, gift or purchase" &c., R. S., 1857, Chap. 61, Sec. 1. And the same language unmodified and unamended has been retained in the subsequent revisions. R. S., 1871, Chap. 61, Sec. 1; R. S., 1883, Chap. 61, Sec. 1; R. S., 1903, Chap. 63, Sec. 1. A study therefore of the original Act from which the present statute is derived leads to the inevitable conclusion that the sale of real estate by a married infant is not voidable on the ground of infancy.

We have not overlooked the decision in *Cummings* v. *Everett*, 82 Maine, 260, holding that under R. S., Chap. 61, Sec. 4, a married woman under the age of twenty-one years is not liable on her executory contracts. It is to be observed, however, that that decision depends upon the construction of the language of another section than the one in the case at bar, originally Public Laws 1866, Chap. 52. This read: "Any married woman" &c., and the Court held this to mean any married woman of lawful age. But the attention of the Court was not called to Public Laws 1852, Chap. 291, removing the disability of infancy, nor is it mentioned in the opinion. This omission may have occurred because that Act, although most import-

ant and far reaching, is not included in the annotations of Chap. 61, in the revision of 1857. Had the attention of the Court been called to it, the reason for the change from "any married woman" to "a married woman of any age," in Sec. 1, which seems to have been obscure to the Court, would have been clearly revealed, and the result might have been different. In any event, the opinion in that case must be modified so far as is necessary to be consistent with the principle here announced.

Judgment for defendant.

JOHN WATSON *vs.* WALTER T. FRENCH.

Aroostook. Opinion November 23, 1914.

Easement by Necessity. Equity. Injunction. Right of Way. Right to disconnect plaintiff's water pipe.

On bill in equity praying for an injunction enjoining the defendant from interfering with, or preventing the repairing and restitution by said plaintiff of the water connection with the water main of the Houlton Water Company.

Held:

1. That under the facts of this case and under the circumstances and conditions existing when the deed was executed, the plaintiff had an implied grant of the right to have the water pipes remain as at the time of conveyance, or at least in some situation equally adapted to conveying water to the plaintiff's premises; in other words the plaintiff has an easement by necessity.
2. That to create such an easement, strict necessity and not mere convenience is required.
3. That such a strict necessity exists in this case because a water supply to the stable from some source is absolutely necessary, and this is the only available source.
4. That the plaintiff cannot reach the main through other land of his own and has no rights in the private way other than rights of travel.
5. That the plaintiff's necessity is not removed by the suggestion that application should be made to the Water Company for service, and the Company might take the intervening land by right of eminent domain and render the service required.

6. That it is doubtful whether the Company has the legal right under its charter to condemn the land of a private individual in order to construct a service pipe to one taker.
7. That there is no evidence that the Company would attempt to do this even if it had the legal right.
8. That a water company is not compelled to extend its mains at the request of individual takers.
9. That the fact that the defendant does not own the source of supply does not affect the plaintiff's rights. The plaintiff does not claim an easement in the water itself, but in the maintenance of the pipe whereby the water of a public service corporation can continue to flow to his premises.

On report. Bill sustained with costs. Perpetual injunction to issue. Decree accordingly.

This is a bill in equity, praying for an injunction to prevent the defendant, on his own land, from severing the connection of plaintiff with certain water pipes and the flow of water through them of the Houlton Water Company to the stable of the plaintiff. The defendant filed an answer to the bill and the plaintiff filed a replication. The cause was reported under the stipulation following; Questions of law having arisen of sufficient importance or doubt to justify the same, and the parties agreeing thereto, this cause is reported to the Law Court for determination by the Law Court upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

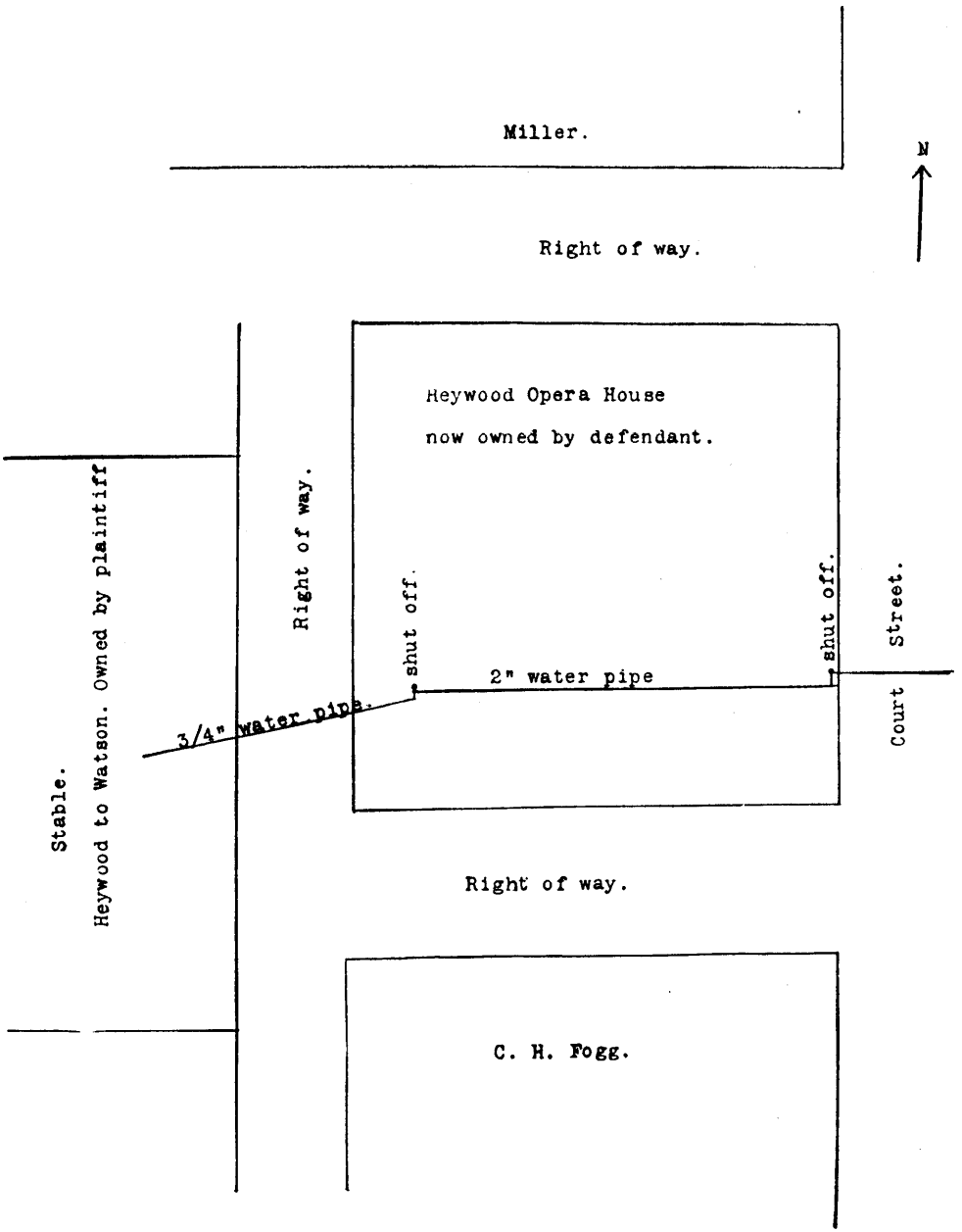
Madigan & Pierce, for complainant.

Hersey & Barnes, for respondent.

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

CORNISH, J. The rights of the parties in this case are to be determined by the construction of a certain deed given by Albion P. Heywood to the plaintiff on June 13, 1893. Prior to that time the premises of both the plaintiff and defendant belonged to Heywood, the common grantor, who on that date conveyed the rear portion with a stable thereon to the plaintiff, and retained the front portion with the opera house thereon adjoining Court Street. The plaintiff was also granted the right in common with Heywood and others "to use said passage way along the north side of said George Cary's lot and also the right to use a passage between the premises herein conveyed and the opera house, some twelve or fifteen feet wide."

The following diagram will explain the situation:



When the Houlton Water Company installed its system in 1887, Heywood made connection on June 6 of that year with the Court Street main, by means of a two inch pipe which enters the opera house cellar under the front wall, and rises up and runs across the cellar on top of the concrete floor to a point near the rear wall, and there is connected with a three-fourths inch pipe that drops down under the cellar, the rear wall and the passage way and comes up into the stable. The larger pipe supplied the opera house and the smaller the stable. This was the situation when the plaintiff occupied the stable as a tenant of Heywood for several years prior to his purchase in 1893; it was the situation when he purchased, and it remained unchanged after his purchase during the lifetime of said Heywood, and after his decease until July, 1912, when the defendant as purchaser from the heir at law of Heywood shut off the supply to the plaintiff's stable.

This bill in equity was brought asking that the defendant be enjoined "from interfering with or preventing the repairing and restitution by said plaintiff of the said water connection wherever necessary and from interfering with the entry of the plaintiff on the premises of the defendant for that purpose and from interfering, injuring or damaging in any way either personally or by his agents, servants or employees the said connection or the flow of water from the main of the Houlton Water Company through the premises of the defendant to the stable of the plaintiff." The precise question involved is whether under the facts of this case and under the circumstances and conditions existing when the deed was executed the plaintiff had an implied grant of the right to have the water pipes remain as at the time of conveyance, or at least in some other situation equally adapted to conveying water to the plaintiff's premises; in other words whether the plaintiff has an easement by necessity. The vital question is, did the parties intend that the right now claimed by the plaintiff should be granted? In our opinion they did.

The basis of the plaintiff's claim is the presumption of a grant arising from all the circumstances of the case. This is but the application of the general principle that the grant of a thing is presumed to include and carry with it as an incident of the grant, whatever right the grantor had in connection with it and could convey by apt words, without which the thing granted would prove practically useless to

the grantee. One of these circumstances, and oftentimes the controlling one, is the necessity, and however lenient other Courts may be in defining the degree of necessity which must exist in order to raise the implication that the easement or quasi easement passes, as in *New Jersey, Toothe* v. *Bryce,* 50 N. J., Eq., 589, and in *New York, Spencer* v. *Kileen,* 151 N. Y., 390, the rule has been firmly established in this State, and has been reiterated in many cases from *Warren* v. *Blake,* 54 Maine, 276, to *Doten* v. *Bartlett,* 107 Maine, 351, that there can be neither implied grant nor implied reservation unless the easement be one of strict necessity. Mere convenience, however great, is not sufficient.

This rule has been applied in cases of right of way of necessity as in *Whitehouse* v. *Cummings,* 83 Maine, 91; *Kingsley* v. *Land Co.,* 86 Maine, 279; *Hildreth* v. *Googins,* 91 Maine, 227; in case of stairway, *Stillwell* v. *Foster,* 80 Maine, 333, and of drainage, *Dolliff* v. *B. & M. R. R.,* 68 Maine, 173. And the test of necessity is whether the party claiming the right can at reasonable cost on his own estate and without trespassing on his neighbors create a substitute. See cases supra, and in case of a chimney, *Buss* v. *Dyer,* 125 Mass., 287, a drain, *Randall* v. *McLaughlin,* 10 Allen, 366, and *Thayer* v. *Payne,* 2 Cush., 327. Applying this test in the case at bar necessity in its strictest sense is seen to exist. It could not be seriously contended that a water supply to a stable from some source is not an absolute necessity, and the evidence here is uncontradicted that the only available source is by means of the pipe passing through the opera house cellar and connecting the pipe extending to the stable with the main. If the plaintiff's land extended to the street it might with reason be said that he should secure his supply direct from the street main. But his land is situated about 125 feet back from the street and his only means of ingress and egress is over a private way in which he has only a right of passage in common with others. Such a right of passage constitutes a limited easement, and gives him no such right in the soil that he could lay pipes in it to connect with the street main. He would be a trespasser should he attempt it. On all other sides his lot is bounded by land of other parties over which he has no rights.

The defendant suggests that if the plaintiff should apply to the Water Company for service that company would take the necessary

intervening land by right of eminent domain, and render the service desired. We do not think this argument removes the necessity and for several reasons.

In the first place, it is doubtful whether the Houlton Water Company under its charter,—Priv. L. 1880, Chap. 227,—has the legal right to condemn land of a private individual in order to construct a service pipe to one taker. In the second place there is no evidence that the Company would attempt to do this even if it has the legal right to do so. The suggestion of defendant is a mere assumption. There is no evidence of the fact. And in the third place, while a water company is obliged to furnish water to each abutting owner along the line of its mains,—*Robbins* v. *Railway Co.*, 100 Maine, 496,—it is not compelled to extend its mains at the request of individual takers. *Moore* v. *City Council*, 105 S. W., 926, *Lawrence* v. *Richards*, 111 Maine, 95. This suggested refuge is therefore too remote, indefinite and uncertain to be of any practical value in determining the question of necessity. That fact still remains.

A second fact to be considered in determining the question of implied grant is that the water pipe was open and visible. The rule laid down in *Whiting* v. *Gaylord*, 66 Conn., 337, is as follows: "The American cases have with almost entire unanimity limited easements by implied grant to such as were open, visible,—such as would be apparent to the ordinary observer,—continuous and necessary to the enjoyment of the estate, granted or retained." And the same element of visibility is recognized in the recent case of *Brown* v. *Dickey*, 106 Maine, 97, when this Court say: "An implied grant of an easement in favor of a grantee arises from circumstances where at the time of the conveyance the grantor was the owner of land constituting both the dominant and servient estates. Two classes are recognized, one called quasi easements which are existing conditions in the land retained, the continuance of which would be so clearly beneficial to the land conveyed that they would be presumed to be intended. These easements must be such as are apparent in the sense of being indicated by objects which are necessarily seen or would be ordinarily observable by persons familiar with the premises." In the case at bar the water pipe was plainly visible, its purpose was apparent, and when the defendant purchased the servient tenement he must have been fully apprised of the situation.

The third circumstance of strong corroborating force is to be found in the fact that from the time the water pipes were first installed in June, 1887, down to July, 1912, the plaintiff and his predecessors have enjoyed the use of the water flowing in identically the same manner. During nineteen years of that period, from 1893 to 1912, the plaintiff has been the owner of the dominant tenement, and during the most of that time Heywood, his grantor, was the owner of the servient tenement, and yet the plaintiff's right to have the water thus flow to him has never been questioned until the defendant shut off the supply in July, 1912, which was the occasion of these proceedings. This fact of continuous and unquestioned user for so long a period of time fortifies the contention of a grant by implication.

The defendant however contends that whatever the rights of the plaintiff might have been if the source of supply was upon the defendant's land, no easement was created here because the defendant neither owned nor controlled such source. This contention fails to note the distinction between the passing of an easement as an appurtenance and by implication. The reason why a deed is held not to convey as an appurtenance rights in lands other than of the grantor, is that the habendum clause cannot enlarge the grant, and if rights in another's land have already accrued and become a part of the estate granted, before the deed is given, then they pass with it; otherwise not. This is familiar law, as in *Spaulding* v. *Abbot*, 55 N. H., 423, where the defendant conveyed to the plaintiff a tract of land with buildings thereon, supplied with water from a spring on the land of H, by aqueduct, and it was held in an action for covenant broken that the word appurtenances in the habendum could not be construed to convey an easement in the land of H, which, not having ripened into a legal right, had not become legally attached to the premises conveyed. The same rule was followed in *Bumstead* v. *Cook*, 169 Mass., 410, also an action for covenant broken, where it was held that where A buys land of B, who has previously connected the land unlawfully with a public sewer, no right to use the sewer passes as an appurtenance, as he had no right in it which he could convey. But this line of cases, the soundness of which is not controverted, has no application to the case at bar. The plaintiff here is not claiming as an appurtenance some right in the land of a third party, but simply as an easement by necessity the right to have the water pipe supplying the granted premises remain in the same con-

dition as when the deed was given. The plaintiff does not claim that any easement in the water itself was granted as an appurtenance under his deed, but does claim an easement in the maintenance of the pipe whereby the water can continue to flow to his premises in the same manner as when they were bought in 1893. In short he does not ask an easement in what his grantor did not own and control, but in what he did. The source of supply being a public service corporation, he is thereby assured that his necessities will be met. The plaintiff's rights in the pipe independent of the source of supply is established by authority. In *Philbrick* v. *Ewing*, 97 Mass., 133, the Court held that pipe even extending through land of a third party, passed as a fixture annexed to the house, and the fact that the owner of the house had no right to the water except by contract did not affect his right of property in the pipe. In *Johnson* v. *Knapp*, 146 Mass., 70, the distinction is sharply made. In that case when the deed was given, an aqueduct or pipe led from a well or spring on the lot of one Emory, through the Williams lot to the land conveyed to the plaintiff and through and beyond that and through the Flint lot and the Clark lot to the dwelling house upon the Pomeroy lot, and supplied water from the Emory spring to the dwelling house upon each of these lots. In discussing the rights of the parties the Court say:

"It is true that the grant by Emory to William Brooks was limited to the right to take water for the use of the plaintiff's land, and that the right to take water for the use of the Pomeroy house was not appurtenant to the plaintiff's land, and Carpenter as owner of that land, had no right to grant it and a grant of it cannot be implied so as to create an easement in the land. But the right to maintain pipes in the land is distinct from the right to take water from the aqueduct on the land and is a right which Carpenter could have granted without the right to take the water. The right to take the water could be derived only from the owner of the Emory land; the right to maintain the pipes could be derived only from the owner of the plaintiff's land, and a grant of the latter without a grant of the former may be implied. . . . We think that a grant of the right to maintain the pipe in the plaintiff's land was implied in the deed to Pomeroy." The same case was again before the Court in 150 Mass., 267, where upon additional facts presented a different con-

clusion was reached as to the rights in the spring, and the implication of a grant, but in no way overruling the previous decision so far as the above quotation is concerned.

Without further discussion it is sufficient to say that the facts in the case at bar fully conform to the requirements in the decided cases and warrant the conclusion of an implied grant. The entry must therefore be,

Bill sustained with costs.
Perpetual injunction to issue.
Decree accordingly.

NELSON P. CUMMINGS

vs.

DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Oxford. Opinion November 28, 1914.

Deed. Exceptions. Equitable Title. False Representations. Insurance. Minor. Naked Legal Title. Ownership. Policy. Trustee.

Sometime in September, 1912, the plaintiff bought of Kate S. Rounds, through one Gray, the property on which the buildings insured stood. A deed to the plaintiff of said property was thereafter duly made, signed, acknowledged and delivered. Shortly after this deed was delivered to the plaintiff, and while he was trying to negotiate a mortgage for a portion of the purchase price at the trust company, it was discovered that the plaintiff was a minor. Thereupon the plaintiff asked to have a new deed made running to his father for his benefit, so that his father could execute a mortgage to the trust company and redeed the property to him. A deed from Kate S. Rounds of said property was duly made and fully executed from Kate S. Rounds to Bert F. Cummings, the father of the plaintiff, but Bert F. Cummings has never reconveyed said property to the plaintiff. On the 30th day of October, 1912, the plaintiff made application to the defendant company for a policy of insurance on said property, and on the same day the policy in suit was issued. In said application for an insurance, when asked "Who owns the buildings?" he replied, "Nelson P. Cummings."

Held:—

1. That the plaintiff's representation in his application that he was the owner of the property insured was true in fact.
2. It might well be claimed that Nelson P. Cummings was the legal owner of said property and that the full legal title was in him.
3. The first deed was actually delivered to him and there has been no conveyance from him. Title once acquired can be voluntarily divested in the life of the grantee only by deed.
4. The father, Bert F. Cummings, by the subsequent deed to him from Kate S. Rounds, took only the naked legal title, while the son Nelson P. Cummings took the equitable title. The father was the trustee, and the son was the beneficiary and equitable owner.
5. This not only gave him an insurable interest in the property, but made his answer in the application that he owned the property, a truthful one.

On exceptions by defendant. Exceptions overruled.

This is an action of assumpsit upon an insurance policy issued by defendant company October 30, 1912 for $1200.

The case was submitted to the Justice presiding on an agreed statement of facts, with right of exceptions in matters of law. The presiding Justice found in favor of the plaintiff, and the defendant excepted to said finding. Plea, general issue and brief statement of special matters of defense.

The case is stated in the opinion.

Walter L. Gray, James S. Wright, for plaintiff.

Samuel W. Gould, for defendant.

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

CORNISH, J. Action of assumpsit upon an insurance policy issued by the defendant on October 30, 1912, for the sum of $1200. The case was submitted to the presiding Justice on an agreed statement of facts with right of exceptions in matters of law. The presiding Justice found in favor of the plaintiff and the defendant alleged exceptions. The single question open to the defendant is whether or not the plaintiff in his application for insurance made a false representation as to ownership when in answer to the question "Who owns the buildings referred to" he replied "Nelson P. Cummings."

The facts in relation to ownership are stated as follows in the agreed statement: "That sometime in September, 1912, Nelson P. Cummings bought of Kate S. Rounds, of New York, through Walter L. Gray, the property on which the buildings insured stood, and agreed to pay her $1700.; that a deed dated October 3, 1912, was made, duly signed and acknowledged, from Kate S. Rounds to Nelson P. Cummings; that at some date, shortly after the date of the deed, this deed was actually delivered to Nelson P. Cummings who went to the Paris Trust Company for the purpose of mortgaging the premises, when it was discovered that Nelson P. Cummings was a minor; that thereupon Nelson P. Cummings went back to the office of Walter L. Gray and asked that a new deed be made, running to his father, so that his father could take title to the property for his benefit, execute the mortgage to the Trust Company, and re-deed the property to him; but he has never reconveyed to Nelson P.; that a new deed was made, duly signed and acknowledged and fully executed from Kate S. Rounds to Bert F. Cummings, the father of said Nelson P. Cummings, said deed being dated October 3, 1912, but acknowledged October 15, 1912; that on the 28th day of October, 1912, Bert F. Cummings wrote the defendant corporation a letter saying: 'My son has just purchased a farm and would like to have the buildings insured. Please send along an application.' That on the 30th day of October application was made by Nelson P. Cummings . . . . that on the same day a policy of insurance did issue. . . . . That from the time of said conveyance and issuing of said policy of insurance the said Nelson P. Cummings had full possession of the property and assumed the complete ownership of the same, and actually paid of his own money the sum of $300. and verbally promised to assume the mortgage that was issued thereon for the balance of said consideration; that the said Bert F. Cummings, the father of said Nelson P. Cummings never advanced a dollar of his own money in said purchase of said property, but held the deed thereof for the benefit of the said Nelson P. Cummings on account of the inability of the said Nelson P. Cummings to execute a legal mortgage, as stated aforesaid."

This agreed statement demolishes the contention of the defendant. The plaintiff's representation in his application that he was the owner of the property, was true in fact. It might well be claimed that he was the legal owner and that the full legal title was in him.

The first deed was "actually delivered" to him and there has been no conveyance from him. Title once acquired can be voluntarily divested in the life of the grantee only by deed. *Holbrook* v. *Tirrell*, 9 Pick., 105; *Hall* v. *McDuff*, 24 Maine, 311; *Patterson* v. *Yeaton*, 47 Maine, 314; *Chase* v. *Hinckley*, 74 Maine, 181.

But conceding what the defendant contends, that this delivery was only conditional, and made for the purpose of obtaining the greater part of the purchase price by mortgage, and when that purpose failed the delivery failed, still, under the agreed statement, the father, by the subsequent deed, took only the naked legal title while the son took the equitable title. The father was the trustee, and the son was the beneficiary and the equitable owner. The father had paid nothing. The son had paid in $300 and orally agreed to pay the mortgage. This not only gave him an insurable interest, *Gilman* v. *Ins. Co.*, 81 Maine, 494, *Getchell* v. *Ins. Co.*, 109 Maine, 274, but made his answer in the application a truthful one. Had the defendant desired more particular knowledge as to the kind or extent of his ownership it should have sought the information by more specific inquiry. *Getchell* v. *Ins. Co.*, supra. But this it did not do. Had it done so, the additional information would doubtless have been satisfactory and the policy would have been issued just the same, because the real party in interest was obtaining the insurance, and to ascertain that fact is the object of the inquiry on the part of the Company.

Exceptions overruled.

ELIZABETH GARMONG *vs.* JOHN B. HENDERSON.

Penobscot. Opinion December 3, 1914.

Amendment. Breach of Contract of Promise of Marriage. Date of Promise. New Cause of Action. New Count. Promise. Seduction.

1. In an action for breach of promise of marriage, an amendment to the declaration alleging a promise at an earlier date than those already alleged, followed by seduction, does not introduce a new cause of action.
2. An amendment to a declaration that is itself demurrable cannot be allowed.
3. A new count in a declaration in an action for breach of promise of marriage, which alleges a promise and a breach only inferentially and argumentatively is demurrable, and not allowable as an amendment.
4. Every traversable fact must be alleged as of a definite day, month and year.
5. In an action for breach of promise of marriage, when no time of performance is alleged, the plaintiff must aver that she was ready and willing to perform the contract on her part.

On exceptions by defendant. Exceptions sustained.

This is an action for breach of contract of marriage. The writ was entered at the January term of Supreme Judicial Court for Penobscot County, 1914. The defendant plead the general issue and filed a brief statement of special matters in defense. At the April term, 1914, of said Court, the plaintiff filed a motion to amend her writ by increasing the damages therein and by inserting an additional count in her declaration. The presiding Justice allowed the amendments, and the defendant excepted to the allowance of the additional count.

The case is stated in the opinion.

John B. Merrill, for plaintiff.

L. B. Deasy, and Fellows & Fellows, for defendant.

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

SAVAGE, C. J. Action for breach of promise of marriage. The writ was dated October 16, 1913. The original declaration contained

three counts, one alleging defendant's promise, March 10, 1910, at Washington, D. C., to marry the plaintiff "when he should be thereunto afterwards requested," a request, and a breach; another alleging, at the same time and place, mutual promises by plaintiff and defendant to marry each other, an offer by the plaintiff to marry the defendant on that date, and a breach by defendant; a third alleging, November 6, 1910, at Washington, mutual promises to marry on March 1, 1911, a request by plaintiff and a breach by defendant. The second and third counts contain also averments of the plaintiff's readiness and willingness to marry.

The plaintiff after entry asked leave to amend the writ by increasing the ad damnum, and to amend the declaration by adding a new count. Both amendments were allowed. Exceptions were taken to the allowance of the additional count, and are now before the Court for its determination.

The additional count alleges that "whereas when plaintiff was visiting at Bar Harbor, in the town of Eden, county of Hancock, and State of Maine, during the month of August, 1909, the said defendant courted and wooed her and declared to her his love and deep affection for the plaintiff; and by reason of his assurances of love and affection for the plaintiff, he persuaded and induced her to believe he was sincere in his protestations of love and affection and so believing the plaintiff then and there accepted and relied upon the defendant's said protestations of love, and in good faith accepted and reciprocated same by assuring him in return of her love and affection for him; and by reason of such mutual understandings, the plaintiff and defendant then and there, in said Bar Harbor, became and were engaged to be married to each other; and the plaintiff further says by reason of said mutual agreements, understandings and assurances, as stated last aforesaid, the plaintiff believed and so believing relied upon the fact that she and the defendant were, in good faith, engaged to be married to each other; and so believing in and relying upon the good faith of the defendant in making his said protestations of love and affection for the plaintiff, and believing and relying upon his good faith in entering into his said agreement with the plaintiff to marry her, she was induced by said defendant to permit him to kiss her, and finally in the month of February, 1910, while in the city of Washington, District of Columbia, permitted him to take other liberties and privileges with her, whereby she became pregnant with child by

the defendant and by reason thereof, she, on the eighth day of November, in the city of Washington, D. C., became a mother of said child. And plaintiff avers that by reason of the defendant's failure and refusal to carry out his mutual agreements and promises to marry the plaintiff as herein aforesaid stated, to wit, March 10, 1910, and November 6, 1910, the defendant has wantonly, deliberately and unjustifiably degraded and disgraced the plaintiff; and wantonly and without any justifiable excuse has mortified, wounded and injured the feelings and sensibilities of the plaintiff; and has wantonly and without any justifiable excuse subjected her to the greatest possible humiliation and mortification, and thereby caused her inexpressible anguish and pain of both body and mind; all of to the great and irreparable loss and damage of the plaintiff, to wit, in the sum of two hundred and fifty thousand dollars."

The defendant in argument contends that the amendment is not legally allowable for three reasons:—first because the amendment itself is demurrable; secondly because it sets up a new cause of action; and thirdly because, if allowed, it will result in great hardship and injustice to the defendant. The first two grounds present questions of law, proper for consideration now. The last was one proper to be addressed to the discretion of the presiding Justice who allowed the amendment. It raises no question of law, and is not open to exceptions. *Clark, Applt.*, 111 Maine, 399.

Disregarding for the present any want of sufficiency in the averments in the additional count, and assuming with the contention of the plaintiff that there is a sufficient allegation of a promise of marriage and of a breach, the question resolves itself to this. Having alleged in the original counts promises of marriage on March 10, 1910 and November 6, 1910, at one place, without averment of special or consequential damages, does the allegation of a promise of marriage in August, 1909, at another place, followed by seduction and pregnancy before March 10, 1910, set up a new cause of action? We think not.

A contract to marry from its very nature is attended by some peculiar incidents. It has been said that to put a contract to marry on the same footing as a bargain for a horse or a bale of hay is not in accordance with the general feeling of mankind. *Hall* v. *Wright*, Ellis, B. & E., 746; 5 Cyc., 998. The peculiarities of the contract affect the present discussion. If these parties ever promised to marry each other, no matter how many times the promise was

repeated, no matter at how many places the protestations were renewed, all together they constituted but one contract. If then, the defendant finally refused to perform his part of the contract, it was but one breach, and constituted but one cause of action. So that, if the plaintiff on March 10, 1910, and again on November 6, 1910, promised to marry the plaintiff, to show that he also made the same promise in August, 1909, does not on the face of it show a separate and independent contract. A contract to marry is evidenced ordinarily by many promises at many different times. Such is the nature of it. But there is only one contract. And in the end, if there is a breach, it is only one breach of one contract.

Sometimes causes of action are confounded with the facts and circumstances which give rise to them. *Anderson* v. *Wetter*, 103 Maine, 257. In cases like this, the ultimate breach of the contract existing at the time of breach is the cause of action. The right of action springs from the breach. It may be true indeed that earlier promises have been mutually rescinded. If so, it is a matter of defense. If there be mutual rescission, the contract up to that time is ended, and no cause of action exists. It may be that one or the other of the parties is guilty of a breach. If reconciliation and new promise follow the breach is waived. The contract continues. If no reconciliation, the cause of action continues. It may be that after mutual rescission, the parties may newly promise. If so, it is a new contract, of course, to which none of the consequences of the old contract attach.

But the point is that the allegation of several sequent promises to marry, whether in one count or several, does not raise any presumption of several contracts, but rather of the contrary. For as we have seen there can be but one existing contract that can be broken, and there is, and can be, but one actionable breach. There is and can be but one existing cause of action.

The amendment alleges a promise earlier than the ones in the original declaration. So far as the date is concerned, it is in one sense immaterial. While it is necessary in all declarations on a promise to allege a definite time, it is not necessary to prove the day as alleged. *Ripley* v. *Hebron*, 60 Maine, 379; *Duffy* v. *Patten*, 74 Maine, 396. Under the dates in the original declaration, the plaintiff might have proved a later promise, or an earlier one within the statute of limitations. If the defendant had been surprised, and

with reason, the Court could have and would have protected his rights. Where one promise is proved, all subsequent promises are merely ratifications of the first one, so far as the contract is concerned.

But the apparent purpose of the plaintiff in asking for this amendment alleging a date in 1909 is to be able to show seduction earlier than March, 1910. Evidence of seduction in February, 1910, under a contract to marry made in August, 1909, would be admissible, if alleged, as it must be. *Tyler* v. *Salley*, 82 Maine, 128. But it would be not admissible under a contract to marry not made until after the seduction.

But regardless of the purpose of the amendment, if it be proper, as we think it is, to amend so as to show an earlier promise, that is, the existence of the contract at an earlier date, we can see no reason why it is not proper to allege and show any special damages occasioned by the breach, on account of seduction at any time during the existence of the contract to marry. To allege matters in aggravation of damages is by no means to allege a new cause of action.

We conclude that in allowing the amendment, so far as the question of new cause of action is concerned, the presiding Justice violated no legal principle. The amendment in that respect being allowable as a matter of law, whether it ought to be allowed was a question addressed to his discretion.

This discussion has covered all the vital questions pertaining to the amendment, and has determined them favorably to the plaintiff. Yet the amendment in the form in which it was presented should not have been allowed. It was itself demurrable, and for that reason was not allowable. *Bean* v. *Ayer*, 67 Maine, 282; *Brown* v. *Starbird*, 98 Maine, 292. The pleader attempted to aver a promise to marry and a breach, but failed. The language of the Court in *Bean* v. *Ayers*, supra, is peculiarly apposite. "The weakness in the declaration is that, although an action of assumpsit, no promise is directly and positively asserted, but it is stated argumentatively, and only inferentially, if at all." The plaintiff after setting forth certain mutual assurance of love and affection alleges that "*by reason of such mutual understandings*, the plaintiff and defendant then and there became and were engaged to be married to each other." We think this is a non sequitur. The assurances and understandings set forth do not import a promise of marriage. And the only promise to marry, or engagement to be married, is alleged to have been *by reason of* these

understandings, that is, on account of them. We think it is not equivalent to a direct and positive averment of a promise on the part of either.

Besides, the plaintiff in this count does not aver that she was ready to perform and fulfil the contract on her part. This is a material averment in a case where no time of performance is alleged. *Hook* v. *George*, 108 Mass., 324; *Graham* v. *Martin*, 64 Ind., 567; *Burks* v. *Shain*, 2 Bibb., 341; *Clement* v. *Moore*, 11 Ala., 35; 5 Cyc., 1008; 3 Ency. Pl. & Pr., page 688. An averment that the promise was mutual is also material and necessary. *Burnham* v. *Cornwell*, 63 Am. Dec., at page 540, note; 3 Ency. Pl. & Pr., page 686.

Again the time alleged is "during the month of August, 1909." The day, month and year of every traversable fact must be alleged. *Platt* v. *Jones*, 59 Maine, 232; *Gilmore* v. *Mathews*, 67 Maine, 517. But as already stated, the party is not confined in proof to the date alleged.

Finally, no breach is alleged in this count, except inferentially, and argumentatively. The plaintiff avers only that by reason of the defendant's failure and refusal to keep his promise, she was degraded and disgraced. This is not a direct and positive averment of a breach, and is not sufficient.

Because of these manifest imperfections and insufficiencies in this count, the amendment should not have been allowed.

Exceptions sustained.

FRED JOWETT *vs.* ORIN F. WALLACE.

York. Opinion December 3, 1914.

Alienation of Wife's Affections. Burden of Proof. Carnal Intercourse. Certificate. Criminal Conversation. Identification of Parties. Legal Marriage in Fact. Record of Marriage.

1. In actions for criminal conversation, marriage between the plaintiff and his wife must be strictly proved.
2. In actions for criminal conversation, the plaintiff is competent to testify to the marriage ceremony and the identity of the parties.
3. The production of the record proof of marriage, from the proper public records, with proof of the identity of the parties, is sufficient, prima facie, to show a legal marriage in fact. The record affords presumptive evidence of regularity and authority.
4. In the absence of proof to the contrary, the law of another State or country is presumed to be like our common law, but not like our statute.

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

This is an action on the case against the defendant to recover damages for the alienation of the affections of the wife of the plaintiff. The defendant pleaded the general issue. The jury rendered a verdict for the plaintiff of $3500. The defendant filed a general motion for a new trial.

The case is stated in the opinion.

E. P. Spinney, and H. H. Varney, for plaintiff.

Cleaves, Waterhouse & Emery, and L. B. Lausier, for defendant.

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

SAVAGE, C. J. Case for criminal conversation. The verdict was for the plaintiff, and the case comes up on a motion for a new trial, alleging the usual grounds.

The burden was on the plaintiff to prove two things, namely, a legal marriage in fact, and carnal intercourse, which is the gist of the action, between his wife and the defendant. If he failed in either point he cannot maintain the action.

In actions for criminal conversation, as in prosecutions for bigamy and adultery, marriage between the plaintiff and his wife must be strictly proved. *Snowman* v. *Mason*, 98 Maine, 490; *Damon's Case*, 6 Maine, 148; *State* v. *Hodgkins*, 19 Maine, 155; *Pratt* v. *Pierce*, 36 Maine, 448; *Fornshell* v. *Murray*, 1 Bland's Ch. 479; *Morris* v. *Miller*, 4 Burr, 2057; *Birt* v. *Barlow*, Doug., 171; *Catherwood* v. *Coston*, 13 M. & W., 261; 2 Greenl. Ev., Sec. 461; 21 Cyc., 1630. That is, there must have been a marriage ceremony performed by some person authorized by law to solemnize marriages. In this case there was a marriage ceremony performed at Rochester, New Hampshire. The plaintiff so testifies, and he is a competent witness for that purpose. *State* v. *Marvin*, 35 N. H., 22. His testimony identified the parties. He also introduced copy of the record of marriage in the records of the city of Rochester. In his testimony he speaks of the officiating person as a "minister." In the record of the marriage the person officiating is styled a "clergyman." But no proof of his authority to solemnize marriages is shown, unless it is to be presumed.

Just how far it is necessary to go in cases of criminal conversation, bigamy and adultery, in proving, prima facie, a valid marriage in fact, the authorities are not entirely agreed. The defendant here contends that inasmuch as only such ministers of the gospel as are commissioned for that purpose by the governor can legally solemnize marriages in this State, it is to be presumed that the law of New Hampshire is the same, and that the plaintiff should have been required to prove that the minister who solemnized the marriage in this case was commissioned in like manner. But the presumption is not as claimed by counsel.

In the absence of proof to the contrary, the law of another State or country is presumed to be like our common law, but it is not presumed to be like our statute. *Carpenter* v. *Grand Trunk Ry.*, 72 Maine, 388. There is no presumption that the statute law of New Hampshire is like our statute.

But as we regard it, the rule as to proof of marriage in cases like this was settled in this State in *Damon's Case*, 6 Maine, 148. This was a prosecution for bigamy. The first marriage was proved by a witness who testified that he was present at the ceremony, and that the marriage was solemnized by a clergyman who had been a settled minister in the town for forty years. The second or bigamous

marriage was proved by a witness who was present. The ceremony was performed by a justice of the peace. But no evidence of his authority was produced, except a copy of his certificate of marriage recorded in the town records and certified by the town clerk. It will be noticed that the evidence of the second marriage was in all respects like that in this case, except that in one the officiating person was a justice of the peace, in the other a minister. The Court held that both marriages were sufficiently proved, prima facie.

The Court said:—"There must be evidence of a marriage in fact by a person legally authorized, and between parties legally competent to contract. Proof of such a marriage may be made by an official copy of the record, accompanied by such evidence as will satisfy the jury of the identity of the parties, or by the testimony of one who was present at the ceremony. But it is not necessary that the special or official character of the person by whom the rite was solemnized should be proved by record evidence of his ordination or appointment." Dane's Abr., Chap. 45, Art. 3, Sec. 4. The Court quoted and adopted the following language from Dane's Abridgment as a correct statement of the law:—"If it appears there has been a marriage in fact, either by town or parish certificates, or by a witness present, that saw the parties stand up, and go through the usual ceremonies of marriage, directed by one who usually or appeared usually to marry persons, the court will presume it is a legal marriage till the contrary is proved." Ibid., Sec. 18. *Wedgewood's Case,* 8 Maine, 75, supports this doctrine, although in that case the record was held insufficient proof, because of want of identification of the parties.

The defendant relies strongly on the case of *State* v. *Hodgkins,* 19 Maine, 155. That case was a prosecution for adultery. The marriage was attempted to be proved by a witness who saw the ceremony, but could not tell by whom it was performed, nor give any description of the person performing it, whereby his official character could be indicated. There was no public record of the marriage in evidence. The Court said that it is not enough to show that a ceremony was performed, and that cohabitation for a long time followed, without showing that the person who performed the ceremony was clothed with the requisite authority. The Court did not overlook *Damon's Case.* It cited it, and left it unmodified.

There is no inconsistency between *State* v. *Hodgkins* and *Damon's Case*. The former states what must be proved, and the latter how it may be proved. The latter case decided in effect that the production of the record proof of marriage, from the proper public records, with proof of the identity of the parties was sufficient, prima facie, with respect to the authority of the officiating person, and that the marriage would then be presumed to be legal until the contrary appeared. The record affords presumptive evidence of regularity and authority. No other question of law has been argued.

We have carefully examined and weighed the evidence, and are of opinion that a verdict against the defendant was warranted by it. The verdict for $3500, considered as actual damages, may he too large. But the jury had the right in their discretion to award punitive or exemplary damages, and we cannot say that they abused their discretion.

Motion overruled.

STATE *vs.* INTOXICATING LIQUORS

and

AMBROSE H. COOK, Claimant.

Washington. Opinion December 5, 1914.

Bailee for Hire. Claimant. Common Carrier. Intoxicating Liquors. Possession. Search and Seizure.

1. The claimant had the liquors in his possession to be transported to Campobello, New Brunswick. He was a bailee for hire, and as such, like a common carrier, had a special title which gave him a legal right to the custody as against one having no right.
2. The claimant Cook filed his claim and appeared and testified in the case. He claimed that he was hired by Calder, the consignee of the liquors, to transport said liquors to Campobello, but on arrival there found the water so low that he could not land and returned to Eastport for supper, intending to return to Campobello on flood tide. Before he could return and complete his contract, the liquors were seized. His credibility was not impugned and his conduct seemed honest, and so far as Calder is concerned, it might reasonably be inferred that he was attempting to avoid the custom laws of New Brunswick, rather than the prohibitory laws of Maine.

On report. Claim sustained. Order to issue for the return of the liquor seized to the claimant.

This is a process for search and seizure of intoxicating liquors. The liquors were taken from a boat owned and in possession of Ambrose H. Cook, in Eastport, Maine. At the hearing in the Eastport Municipal Court on the 29th day of May, 1913, Ambrose H. Cook made claim for said liquors, and the Judge of said Court ordered said liquors forfeited and turned over to the Sheriff, from which judgment said claimant appealed to the Supreme Judicial Court. Upon the conclusion of the evidence in the Supreme Judicial Court, the case was reported to the Law Court, upon so much of the foregoing evidence as is legally admissible, the Law Court to render final judgment in accordance with the legal rights of the parties.

The case is stated in the opinion.

H. J. Dudley, County Attorney, for the State.

L. H. Newcomb, for claimant.

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

CORNISH, J. On May 29, 1913, eleven barrels containing intoxicating liquors and three barrels containing "Allwanta" beer arrived in Eastport via Eastern Steamship Company from Boston. The eleven barrels were marked by tag "Louis Calder, Campobello, N. B.," the three barrels of beer, "Michael J. Kerwin, Eastport, Maine." All fourteen were marked with the letter "K" surrounded by a diamond. On June 5, 1913, the claimant, the owner of the boat "Alice M," accompanied by the consignee, Louis Calder, took the eleven barrels from the Eastern Steamship Company wharf, loaded them into his boat and sailed away for Campobello, an island belonging to the province of New Brunswick and three miles distant from Eastport. Calder, whose home was in Campobello, accompanied him. On reaching Campobello Calder landed, but Cook returned with the liquors to Eastport, moored his boat nearly opposite his own house and went home to supper. While there, an officer seized the eleven barrels, and removed them from the boat, obtained a warrant next morning, and libelled them. At the hearing in the lower Court Cook appeared as claimant, but the liquors were ordered forfeited, and after appeal the case was brought to the Law Court on report.

It is necessary to consider only two questions, were the liquors intended for illegal sale within this State, and was the claimant entitled to their custody? *State* v. *Intoxicating Liquors*, 112 Maine, 138.

The claimant, Cook, not only filed his claim, but appeared and testified in the case. He states that he was employed by Calder to transport these liquors to Campobello, that he started for that purpose, that on arriving at the island they found low water and could not land the liquors until the tide was up, and Calder told him to go back home for supper and return to Campobello on flood tide. This he proceeded to do, but the liquors were seized before he could return and complete his contract.

But the State claims that Calder's part in the transaction was a mere blind; that, although consigned in his name from Boston, these eleven barrels were really intended for Michael J. Kerwin, the consignee of the three barrels of non intoxicating beer, and who, the officer said, was engaged in the liquor traffic in Eastport. As intending to prove this theory the State calls attention to the fact that the eleven barrels consigned to Calder, as well as the three consigned to Kerwin, were all marked with the diamond K, that the tags with Calder's name had been removed after being taken from the Steamship Company, that Calder was put ashore at Campobello but the liquors came back to the American side and were there when seized. These facts certainly do cast suspicion upon the good faith of the transaction, but we do not think they outweigh the positive statements of Cook. He testifies emphatically that his contract was with Calder and not with Kerwin, that he was to land the liquors in Campobello and not in Eastport, and that the reason for not doing so was the honest one of the lowness of the tide. His credibility is not impugned, his conduct seems honest, and so far as Calder is concerned it might be reasonably inferred that he was attempting to avoid the custom laws of New Brunswick rather than the prohibitory law of Maine.

The second point is also established by the claimant. He had the liquors in his possession to be transported to Campobello. He was a bailee for hire and as such, like a common carrier, he had a special title which gave him a legal right to the custody as against one having no right. *State* v. *Intoxicating Liquors,* 83 Maine, 158.

The entry must be,

Claim sustained; order to issue for the return of the liquors seized, to the claimant.

J. MERRILL LORD *vs.* JOHN G. DOWNS.

York. Opinion December 5, 1914.

Assignment. Co-partnership. Dissolution. Insurance. Premiums. Renewal of Policies. Right of Assignee to Sue in his own Name.

The defendant obtained the renewal of two policies of insurance through the agency of Lord and Fenderson, and the premiums were paid by Lord and Fenderson. Subsequently, the firm of Lord and Fenderson was dissolved. At the dissolution, by mutual agreement between the parties, Lord took the assets, became liable for the debts, and settled with Fenderson on this basis; the account in suit being received at its face value. It was also understood between the parties that if suits were necessary for the collection of bills due the partnership, that such suits should be brought in the name of Lord, and the written assignment on June 1, 1913, was in furtherance of this agreement.

Held:

1. That this written assignment was confirmatory of his title and enabled Lord to bring suit in his own name, under Revised Statutes, Chap. 146, Sec. 84.
2. The oral agreement constituted an equitable assignment to Lord and would authorize him to bring suit in the name of the assignor, but not in the name of the assignee.
3. A partnership is regarded as continuing, even after a dissolution, for the settlement of its affairs, and each partner retains the full possession of his former powers, unless a different arrangement has been made.

On report. Judgment for plaintiff for $35.52, with interest from date of the writ.

This is an action of assumpsit upon an account annexed, and also upon a count for money laid out and expended at the request of the defendant to recover certain insurance premiums due the partnership firm of Lord and Fenderson, which was dissolved on December 31, 1912; and this suit was brought in the name of the plaintiff Lord as assignee of said claim by said firm. Plea, general issue. At the conclusion of the evidence, by agreement of parties, this case was withdrawn from the jury and reported to the Law Court for decision. Upon so much of the evidence as is legally admissible, the Law Court is to render such judgment as the legal rights of the parties require.

The case is stated in the opinion.
Allen & Willard, for plaintiff.
Connellan & Connellan, for defendant.

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

CORNISH, J. The plaintiff, as assignee of the firm of Lord and Fenderson, seeks to recover from the defendant, certain insurance premiums alleged to have been due to the partnership. Two defenses are presented, one a question of fact and the other a matter of law.

The defendant, in the first instance, says that he is not liable because he neither placed this insurance with the firm nor authorized them to place it in his behalf. The evidence on this issue is contradictory, and the burden rests on the plaintiff, but in our opinion that burden has been fully sustained. The defendant, in 1909, purchased certain real estate on which were two existing policies of insurance that were assigned to him at that time. Both of these policies came through the agency of Lord and Fenderson, one being placed directly by them and the other indirectly through the Batchelder agency at Sanford. About the time of their expiration in July, 1911, the plaintiff called upon the defendant and asked him if he wished to have the policies renewed. The plaintiff testifies that the defendant then and there authorized their renewal, but the defendant, while admitting the conference, claims that he authorized only a blanket policy. The defendant then signed an application for renewal in one company and gave it to the plaintiff who subsequently obtained the policy. Renewal of the other policy through the Batchelder agency was also obtained, the premium being paid by Lord and Fenderson. The plaintiff claims that both policies were mailed to the defendant, but he denies receiving them. Several statements of account were subsequently sent to him, to which he paid no attention and made no answer. The firm of Lord and Fenderson was dissolved on December 31, 1912, and this suit was brought by Mr. Lord to whom this claim had been assigned by the firm. It would serve no practical end, either in the decision of this case or as a precedent in others, to discuss the evidence in detail. It is only necessary to say that the

testimony, the conduct of the parties, and the surrounding circumstances impel us to the conclusion that the plaintiff's contention is right, and the defendant's liability is established.

The defendant's second contention is that the plaintiff cannot maintain this action as assignee, because at the dissolution in December, 1912, this account was assigned orally to the plaintiff, that he "thereby then and there became the owner of this account against John G. Downs and that, therefore, he should bring suit under the name of Lord and Fenderson; and further that his written assignment, dated June 1, 1913, conveyed nothing for the reason that this account had already been assigned orally."

The uncontradicted facts relating to the dissolution and assignment are these. At the dissolution by mutual agreement between the parties Mr. Lord took the assets, became liable for the debts, and settled with Mr. Fenderson on that basis, this particular account being reckoned at its face value and Mr. Fenderson receiving his due share thereof. This constituted an equitable assignment to Mr. Lord and would authorize the bringing of the suit in the name of the assignor but not of the assignee. *Serata* v. *Surace*, 111 Maine, 508.

But it was also understood between the partners that if any suits were necessary for the collection of the bills due the partnership, such suits should be brought in the name of Mr. Lord, and this assignment made on June 1, 1913, was executed in furtherance of that agreement. The fact that it was not signed on the exact date of the dissolution does not destroy its force. When executed it related back to the oral assignment which had been made for a valuable consideration. Fenderson had ceased to have any financial interest in the claim on December 31, 1912, and from that time forward it belonged to Lord. This written assignment was merely confirmatory of his title and enabled him to bring suit in his own name under R. S., Chap. 146, Sec. 84. Independent of such an agreement, a partnership is regarded as continuing, even after a dissolution, for the settlement of its affairs, and each partner retains the full possession of his former powers unless a different arrangement had been made. *Gannett* v. *Cunningham*, 34 Maine, 56.

The plaintiff's legal right to maintain this action in his own name is clear.

Judgment for plaintiff for $35.52 with interest from date of the writ.

GEORGE A. SWASEY

vs.

MAINE CENTRAL RAILROAD COMPANY.

Piscataquis. Opinion December 5, 1914.

Custom. Evidence. Exceptions. Material Evidence. Negligence.

1. The entire weight of judicial authority is against the reception of evidence of a custom of other persons on the defendant railroad, as to going between moving cars for the purpose of replacing or putting coupling pins where necessary; also as to such acts done by the plaintiff himself before the accident.
2. It was not material to the issue in this case whether or not some other individual had or had not been exposed to injury and escaped. The attention of the jury would be thereby diverted from the questions really in dispute and directed to what is collateral.

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

This is an action on the case brought by plaintiff against the Maine Central Railroad Company to recover damages for personal injuries alleged to have been sustained by the plaintiff, by reason of the negligence of the defendant. Plea, general issue. The jury returned a verdict for plaintiff of $10,000. The defendant filed exceptions to the admission and exclusion of certain evidence, and a general motion for a new trial.

The case is stated in the opinion.

M. L. Durgin, and Ira G. Hersey, for plaintiff.

Fellows & Fellows, for defendant.

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

PHILBROOK, J. Action on the case to recover damages for injuries alleged to have been sustained by reason of the negligence of the defendant. The case presents exceptions and motion for new trial by defendant.

At the trial, the presiding Justice, under objection of the defendant, permitted the plaintiff to introduce evidence of a custom of others on the defendant railroad as to going between moving cars for the purpose of replacing or pulling coupling pins when necessary, also as to such acts done by the plaintiff himself before the accident. An examination of the testimony shows that this was prejudicial error. It was not material to the issue in this case whether or not some other individual had or had not been exposed to injury and had escaped. "The entire weight of judicial authority is against the reception of the evidence received subject to objection. The attention of the jury would be diverted from the question really in dispute and directed to what is collateral." *Parker* v. *Portland Publishing Co.*, 69 Maine, 173, and cases there cited. This point being sufficient to support the defendant's exceptions, it becomes unnecessary to discuss other points in the bill of exceptions, or the motion for new trial.

Exceptions sustained.
New trial granted.

MARY A. BRITT

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion December 5, 1914.

Damage. Evidence. Fire Communicated by Locomotive Engine. Negligence.

1. The most favorable construction to be put upon the plaintiff's testimony is the deduction of the witness that fires one and three were set by a passing engine, because a train was due to pass about the time when the fire started.
2. With such insufficient evidence, the jury must have reached a verdict by conjecture, instead of proof, or that they substituted guess work for proof.

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

This is an action on the case to recover for damage to property by three fires, alleged to have been communicated to land of Mary A. Britt by a locomotive engine of the Maine Central Railroad Company. Plea, general issue. The jury returned a verdict for plaintiff of $399.71, and thereupon the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Connellan & Connellan, for plaintiff.

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

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

PHILBROOK, J. This case comes before us on motion by defendant to have the plaintiff's verdict set aside on the customary grounds that the same is against law, evidence and the weight of evidence. The plaintiff charges loss of property on account of three separate fires set by locomotives of the defendant on August 5th, August 11th and August 22d in the year 1913.

In support of her contention that the fires were started by defendant's locomotives she introduces the testimony of her husband who says:

"Q. Do you know whether or not, just previous to any of these three fires, any Maine Central engines passed up or down that road, whether freight or passenger?

A. Yes; I know there was.

Q. Which fire?

A. When it set the hemlocks afire the train went.

Q. That was fire No. 1?

A. Yes, sir.

Q. A train went by?

A. About half past eleven one goes by towards Portland; one meets it right there that goes toward Gray.

Q. On fire No. 2 do you know whether any engine passed just previous to your seeing the fire?

A. I couldn't say positive; no, sir, because that is Sunday.

Q. On fire No. 3 do you know whether or not there was any engines passed back and forth?

A. I know there was a train goes by the same time, about half past eleven, somewhere around that, about half past eleven."

As to fire No. 2 occurring on Sunday, Mr. Britt says:

"Q. On this particular Sunday, just previous or within a few hours previous to discovering this fire, whether or not any trains had passed by?

A. I couldn't just tell.

Q. Freight or passenger?

A. I think there was, yes, but I couldn't tell what time.

. . . . . .

Q. Do you know whether or not, on this particular Sunday, just previous to the fire, any engine had passed by on the railroad fronting your field?

A. I couldn't say positive there was, no, sir."

The most favorable construction to be put upon this testimony is the deduction of the witness that fires one and three were set by a passing engine because a train was due to pass about the time when the fires started. Trains may be late or be cancelled. The witness

assumes that trains were run on schedule time and from that assumption makes his deduction. As to fire No. 2 he is not even so positive as he is when testifying to fires one and three.

Mr. Sawyer, a former employee of the defendant, testified that on a Sunday his attention was called to a fire by a fire ticket thrown from a passing engine, but it is evident that such fire could not have been set by the engine from which the ticket was thrown for, if so, the fire would have started after the engine passed and would not have been burning so as to attract the attention of the engineer. He also testifies that when he was at fire No. 3 a train passed and that after it passed he saw a fire "right over in the pasture on the opposite side of the track from the pine growth." This latter fire is not one for which the plaintiff is seeking damages in this suit but the testimony was admissible as tending to show the inherent capacity of locomotive engines for communicating fires. He also testified that before the fire in the pines, fire No. 3, one engine had passed in the forenoon but there is no testimony to show proximity of time between the passing of that engine and the occurrence of the fire in the pines. This is all the testimony tending to show that the fires complained of were set by passing engines of the defendant. There is no testimony to show that any of these engines at whatever time they did pass, were emitting sparks; or that the fires were discovered shortly after any engines passed.

We feel that with such insufficient evidence the jury must have reached a verdict by conjecture instead of proof, or that they substituted guess work for proof. *Russell* v. *M. C. R. R. Co.*, 100 Maine, 106; *McTaggart* v. *M. C. R. R. Co.*, 100 Maine, 223.

Motion sustained.
New trial ordered.

WILLIAM T. VAN WART

vs.

WILLIAM A. REES and LAND AND BUILDINGS.

Aroostook. Opinion December 5, 1914.

Exceptions. Land and Buildings. Lien. Materials. Suspension of Work.

1. In an action to enforce lien for materials furnished, when all the materials are furnished under one entire continuing contract, though at different times a statement filed within the time fixed by statute after the last items furnished, is effective in regard to all the other items.
2. Even if the materials be not ordered at one and the same time, or the quantity or price of the materials be not agreed upon at the time of the first order, the contract will nevertheless be held a continuing one.
3. The interruption of the construction of a building on account of the season of the year, though it be for months at a time, will not prevent a mechanic's lien from attaching from the commencement of the building, if the construction be resumed without change of design and there is no evidence of an abandonment of the intention to prosecute the work.
4. The interruption of the work for a short time and its subsequent resumption without a change of the original design and character will not constitute a new commencement, or effect the attaching of the lien when the building was originally commenced.
5. The statute regarding liens on buildings and lots does not confine the right to any particular species of contract. It extends to and includes implied as well as express contracts and those which are entire, as well as those which are devisible.

On exceptions by plaintiff. Exceptions sustained.

This is an action of assumpsit to enforce a lien upon certain land and buildings, situated thereon, and owned by the defendant, for materials furnished and which entered into the construction of said house. Plea, general issue. This case was submitted to the presiding Justice, with right to except, upon an agreed statement of facts. The presiding Justice found for the plaintiff in the sum of $125.64. The plaintiff excepts to said finding.

The case is stated in the opinion.

W. S. Brown, for plaintiff.
Powers & Archibald, for defendant.
Howard Pierce, for E. M. Smith, owner of said buildings.

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

BIRD, J. This is an action of assumpsit to enforce a lien upon land and buildings for materials furnished in the construction of the latter. The case was submitted to the presiding Justice, with right of exception reserved, upon an agreed statement of facts of which the following only is material:—

"It is agreed that William R. Rees, the defendant, was on the first of October, 1911, the owner of the land described in the writ, and was building a house on said land.

"It is agreed that said Rees, with his carpenter, Frank Benjamin, made out a list of the interior finish that would be desired for said house; that with said list they went to the plaintiff Van Wart, and asked him if he would furnish the interior finish for the house described in the list, and what it would probably cost; that said Van Wart made an estimate of the total cost of the materials described in the list, estimating it at $262.45; that said Van Wart agreed to furnish the interior finish, and the defendant to have the right to make any changes in the items of this schedule as the work progressed that he might desire.

"That under this arrangement there were no articles furnished by Van Wart between December 5, 1911, and February 14, 1912; that beginning with February 14, 1912, down to and including March 2, 1912, at various dates the items were furnished as set forth in the account annexed to the writ.

"It is further agreed that the suspension of work between December 5th, 1911, and February 14, 1912, was caused by Benjamin, the carpenter, leaving the work, that Rees, as soon as he could get a carpenter, continued the work on the building and continued to obtain the materials from Van Wart; that, from the time said Rees and Benjamin first went to Van Wart and made these arrangements no different arrangements, or no talk in regard to the arrangements, were had whatever; that after the first arrangement for Van Wart to furnish this material, no other arrangements were made than to enter it under the agreement above named.

"It is also agreed that whatever was furnished from October 10th, 1911, was furnished under this arrangement, and that the prices therefor carried out in the account are correct.

"No question is raised in regard to the items from and including February 14th, 1912, it being admitted that the owner of the building is liable therefor."

The balance shown by the account annexed, less a deduction agreed to by parties, is $188.38 and the amount in dispute—the charges for items delivered to plaintiff by defendant, on October 10 and December 5, 1911—seems to have been assumed by Court and parties to be $62.74. The presiding Justice ordered judgment for $125.64 and the plaintiff excepts.

The only question argued by counsel upon the exceptions is whether or not the Court erred in disallowing as lien items the articles delivered by plaintiff to defendant Rees on the tenth of October and the fifth of December, 1911. The plaintiff urges that the facts agreed show a contract within the meaning of the statute, R. S., Chap. 93, Sec. 29, between plaintiff and defendant prior to the tenth day of October for furnishing the materials afterwards delivered and used in construction of the buildings.

The following propositions of law seem to be established:—Where all the materials are furnished under one entire continuing contract, albeit at different times, a statement filed within the time fixed by statute after the last item was furnished, is effective in regard to all the other items: *Hensel* v. *Johnson*, 94 Md., 729, 733; *State etc. Co.* v. *Seminary*, 45 Minn., 254, 255; *Union Trust Co.* v. *Casserly*, 127 Mich., 183, 185. And even if the materials be not ordered at one and the same time, or the quantity or prices of the materials be not agreed upon at the time of the first order, the contract will nevertheless be held a continuing one. *Smalley* v. *Gearing*, 121 Mich., 190, 205; *Hensel* v. *Johnson*, 94 Md., 729, 732, 733; *Premier Steel Co.* v. *McElwaine-Richards Co.*, 144 Ind., 614, 621. Not inharmonious with these principles, is *Baker* v. *Fessenden*, 71 Maine, 292, wherein it is said that the lien given by statute is definite and for a particular work, which may be of long continuance, although not for distinct jobs. Id., 294; nor is *Farnham* v. *Davis*, 79 Maine, 282; nor yet *Darrington* v. *Moore*, 88 Maine, 569.

The statute does not confine the right to any particular species of contract. It extends to and includes implied as well as express con-

tracts; (*Farnham* v. *Davis*, 79 Maine, 282, 283) and those which are entire as well as those which are divisible. *Felton* v. *Minot*, 7 Allen, 412, 413; see *Batchelder* v. *Hutchinson*, 161 Mass., 462, 465, 466; see also *Sprague* v. *McDougall*, 172 Mass., 553, 555.

The circumstances attending the suspension of the work for some nine weeks are not such as to indicate, in the opinion, of the Court an intention of abandonment of the enterprise by either owner or material-man, between whom alone the question arises, nor to impugn the good faith of the latter.

The interruption of the construction of a building on account of the season of the year, though it be for months at time, will not prevent a mechanic's lien from attaching from the commencement of the building, if the construction be resumed without change of design and there is no evidence of an abandonment of the intention to prosecute the work. *Manhattan Life Ins. Co.* v. *Paulison*, 28 N. J., Eq. 304. Nor will the interruption of the work for a short period and its subsequent resumption without a change of its original design and character, constitute a new commencement, or affect the attaching of the lien when the building was originally commenced. *Gordon* v. *Torrey*, 15 N. J., Eq. 112, 114.

See also *McLean* v. *Wiley*, 176 Mass., 233; *Shaughnessy* v. *Isenburg*, 213 Mass., 159, 161; *Thurston* v. *Blunt*, 216 Mass., 264, 268.

The exceptions are sustained.

JOHN S. WILLIAMS

Trustee in Bankruptcy of the Estate of Alton G. Crockett

vs.

NOYES & NUTTER MANUFACTURING COMPANY.

Piscataquis. Opinion December 5, 1914.

After Acquired Property. Bankruptcy. Creditors. Custody of the Law. Duress. Intention of Parties. Mortgage. Possession. Replevin. Trover. Trustee.

1. The rights of all parties depend upon the language used in a mortgage in reference to after acquired property, and the acts of the parties as declared by the record.

2. At common law, a mortgage of chattels not then in existence was invalid, but it has now become a settled principle in this State that a person may mortgage after acquired property.

3. As between the parties, a mortgage upon goods which authorizes the mortgagor to sell them and with the proceeds of such sale to purchase other goods to take their place, will be upheld.

4. The intention of the parties as gathered from the language of all parts of the agreement considered in relation to each other, and interpreted with reference to the situation of the parties, and the manifest object they had in view must always be allowed to prevail, unless some principle of law, or sound public policy, would thereby be violated.

5. When the trustee is appointed, his title to the bankrupt's estate relates back to the date of the adjudication, and he takes the property of the estate subject to all equities, liens and incumbrances existing against it in the hands of the bankrupt.

6. When the trustee took possession, the property was then in the custody of the law, and could not be removed from that custody by any private person, or by any process issuing out of this Court.

On report. Judgment for plaintiff for $460.64.

This is an action of trover by the plaintiff, the trustee in bankruptcy of the estate of Alton G. Crockett, against Noyes and Nutter Manufacturing Company, mortgagee under a mortgage given by said Crockett, dated September 10, 1910, of his stock of goods, fixtures, accounts, etc. On July 7, 1913, Crockett was adjudicated a bankrupt, and the plaintiff was appointed trustee of his estate and took possession of the bankrupt's estate. The defendant, upon refusal of the trustee to deliver said property, forcibly took the same from the plaintiff and sold them. Plea, general issue. At the conclusion of the evidence, the case was reported to the Law Court for determination, upon so much of the evidence as is legally admissible.

The case is stated in the opinion.

John S. Williams, for plaintiff.

C. W. Hayes, for defendant.

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

HANSON, J. Action of trover brought by the plaintiff as trustee in bankruptcy of the estate of Alton G. Crockett, reported to this Court for determination of the rights of the parties.

On September 10, 1910, Alton G. Crockett mortgaged his stock of goods, fixtures and accounts to the defendant to secure an indebtedness of $759.18. The value of the mortgaged property was then about $500. The mortgage contained the following provision as to after acquired merchandise: "It is understood that the said Crockett is to have the right to sell at retail in the ordinary course of business from said stock replacing the same with new stock and additions from time to time, keeping the stock to its present value and insured for the benefit of the said mortgagee; and the said Crockett hereby sells and conveys to the said Noyes & Nutter Mfg. Co. all and singular, all additions to merchandise, metals and stock, or accounts hereafter due for labor or material; and the same to be the property of the said Noyes & Nutter Mfg. Co., their successors or assigns. It being distinctly understood that this mortgage and conveyance covers all after acquired property, added to said business in any manner after the date of this mortgage or during the existence of said mortgage, to Noyes & Nutter Mfg. Co. To have and to hold

all and singular, the said goods and chattels, property rights and interests to the said Noyes & Nutter Mfg. Co., their successors and assigns."

The parties continued their business relations until July 7, 1913, when Mr. Crockett was adjudicated a bankrupt. He then owed the defendant $1229.69. The plaintiff was appointed trustee, qualified as such officer, and thereupon took possession of the merchandise in question. The inventory filed amounted to $921.28, which was later increased by sales from the stock not reported, aggregating $82.34, making $1003.62, as the value of the bankrupt estate. The mortgage was not foreclosed, and the bankrupt was in possession of the property at the date of adjudication, and delivered the same to the trustee.

The defendant, by its attorney, made demand upon the trustee for the goods, and, upon refusal, took the same forcibly from the plaintiff, and sold them.

Among the admissions and agreements made by counsel, two only are material:

1. "That in case judgment shall be rendered for the plaintiff, the damages shall be for the sum for which the defendant sold the goods, to wit, $460.64."

2. "While the mortgage never has been foreclosed, the plaintiff waives that omission."

The plaintiff contends that (1) "The mortgage is void because it was executed under duress." (2) "The terms of the mortgage are not sufficient to hold the property acquired subsequent to the execution of the mortgage, the trustee having taken possession thereof before the mortgagee, and Mr. Crockett having been adjudicated bankrupt." (3) The trustee's title is superior to that of the mortgagee, and the property passes to him for the benefit of the creditors of the bankrupt estate.

The defendant contends (1) that there was no duress, and (2) that while the mortgage does not say in terms that new goods shall be bought with the proceeds from the sale of old, that it is the plain intent of the parties and the necessary construction, because it says that Crockett had the right to sell from the stock, replacing the same with new stock, keeping the stock up to its present value, and cites *Bell* v. *Jordan*, 102 Maine, 67, and *Union Water Power Co.* v. *Lewiston*, 95 Maine, 171, as supporting its contention "that in the construction

of contracts, there is one fundamental rule or consideration, which is paramount to all others, and that is, that the intention of the parties, as gathered from the language of all parts of the agreement, considered in relation to each other, and interpreted with reference to the situation of the parties, and the manifest object which they had in view, must always be allowed to prevail, unless some established principle of law, or sound public policy would thereby be violated;" and further that "it is the manifest object of the parties in making this mortgage, that the stock of goods should be kept up to its present value, and the only possible way to do it lawfully and properly would be to use the proceeds of the sale for that purpose;" and that the mortgage under consideration "does not differ from the ordinary mortgage of this kind where authority to sell is given to the mortgagor, and he covenants to use the proceeds thereof to purchase new goods of like kind, and to keep the stock up to a given value." (3) That the title to the goods was in the defendant, who had lawful right to possession of the same, as between the parties, and as against any third party who has not acquired superior equities by attachment or otherwise and the taking of possession. In effect defendant claims that the plaintiff as trustee acquired no right to possession of the goods, and that the burden of proving the kind, quality and amount of goods in stock, and whether old or acquired after the date of the mortgage, is upon the plaintiff; that failing to do this, and for the further reason that the old and new goods were intermingled in such manner as to render division impossible, the plaintiff cannot recover.

The plaintiff's first contention is not supported by the evidence. The record discloses an attempt on the part of the defendant's agent to get security for a running account. Two demands for payment, at least, had been made by the defendant. The direct testimony on this point follows:

"Q. And what did Mr. Nutter tell you in regard to signing this mortgage?

A. He was prepared to close me up unless I did sign the mortgage."

The cross-examination brings out general statements of "threats," but the words used appear to have been the same in substance as given in direct examination. We are unable to find that there was duress. The defendant went about the business in the usual way, employing language expressing his intention to sue and attach if

security was not given. The bankrupt elected to make a mortgage, and for about three years thereafter carried on his business with the mortgage on his stock. The time involved negatives the claim of fraud or duress, and serves as a waiver of any right to now set up either claim.

The rights of all the parties therefore depend upon the language used in the mortgage in reference to after acquired property, and the acts of the parties as disclosed by the record.

While at common law a mortgage of chattels not then in existence was invalid, *Abbott* v. *Goodwin*, 20 Maine, 408; *Head* v. *Goodwin*, 37 Maine, 181; *Morrell* v. *Noyes*, 56 Maine, 458, it has now become a settled principle in this State that a person may mortgage after acquired property. *Abbott* v. *Goodwin*, supra, and cases cited; and as between the parties a mortgage upon goods which authorizes the mortgagor to sell them and with the proceeds of such sale to purchase other goods to take their place, will be upheld. *Allen* v. *Goodnow*, 71 Maine, 420; *Deering* v. *Cobb*, 74 Maine, 332, 334. Something more than the authority given in the mortgage under consideration, or the actual acquiring of the new property, is necessary where the right of third parties intervene, as in the case at bar. Where the power sought to be created is ineffectual, the mortgagee must be in actual possession of the property mortgaged if he would defeat the claims of other creditors. Such mortgage to have the effect contended for by the defendant must contain apt words to designate the power to sell from the stock so mortgaged, and the further stipulation that the proceeds of such sale shall be applied to the purchase of new articles of like kind to those sold, the chattels so purchased to become substituted for those sold at the instance and under the authority of the mortgagee so that the legal title to them may be said to pass to the mortgagee as effectually as if he had himself made the sale, by assent of the mortgagor, and with his own hand replenished the res. The mortgagor by so doing simply executes a power, performs a trust created by the mortgage, and thereby neither depletes the security nor defrauds his other creditors. *Abbott* v. *Goodwin*, 20 Maine, 408; *Sawyer* v. *Long*, 86 Maine, 541.

It is not contended that the mortgage meets the requirements of the decided cases upon this element of the case at bar, but counsel urges that the mortgage should be so construed, as that is the plain intent of the parties and necessary construction, because it says that

Crockett had the right to sell from the stock, replacing the same with new stock, keeping the stock up to its present value, and relies upon the doctrine of *Bell* v. *Jordan*, 102 Maine, 67, and *Union Water Power Co.* v. *Lewiston*, 95 Maine, 171, supra. The rule of construction emphasized in the cases cited, that the intention of the parties as gathered from the language of all parts of the agreement, considered in relation to each other, and interpreted with reference to the situation of the parties, and the manifest object they had in view, must always be allowed to prevail, unless some established principle of law, or sound public policy, would thereby be violated, is peculiarly applicable in the case at bar.

As bearing upon the intention of the parties, a reading of the last clause of the stipulation under consideration demonstrates that the defendant did not rely or intend to rely upon the agreement to "sell from the stock, replacing the same with new stock," but went far beyond the purport of such stipulation even, and caused his mortgage to include these words: "It being distinctly understood that this mortgage and conveyance covers all after acquired property, added to said business in any manner after the date of this mortgage, or during the existence of said mortgage to Noyes & Nutter Mfg. Co., their successors and assigns." In view of the many decisions of this Court sustaining a mortgage of after acquired property when such mortgage is properly drawn, when the rights of the parties, and particularly the rights of interested third parties, may be definitely known from inspection of the mortgage, or a record thereof, we hold that the defendant in any event could take under his mortgage only such goods or fixtures as he has shown title to, which were in existence at the date of the mortgage, and those substituted for articles sold by purchase from the proceeds of sales from such mortgaged stock. To hold otherwise would be a violation of an established principle of law, and sound public policy. *Sawyer* v. *Long*, supra; *Allen* v. *Goodnow*, 71 Maine, 420; *Deering* v. *Cobb*, 74 Maine, 332; *Williamson* v. *Neally*, 81 Maine, 447; *Dexter* v. *Curtis*, 91 Maine, 505.

The trustee in bankruptcy had taken possession of the bankrupt's stock from the bankrupt. The defendant dispossessed the trustee. Had he that right?

Where once the trustee is appointed, his title to the bankrupt's estate relates back to the date of the adjudication. 5 Cyc., 342. A trustee takes the property of the estate subject to all equities, liens

and incumbrances existing against it in the hands of the bankrupt. The plaintiff having taken possession, the property was then in the custody of the law, and could not be removed from that custody by any private person, or by any process issuing out of this Court. In *Crosby* v. *Spear*, 98 Maine, 542, two actions of replevin to recover possession of certain store fixtures which were in a bankrupt's possession at the time of his adjudication in bankruptcy, it was held that when a Court, State or Federal, has once taken into its possession a specific thing, no Court, except one having a supervisory control or superior jurisdiction in the premises, has a right to interfere with or change that possession. *Jones on Mortgages*, 6th ed., 1231-1232; *Carney* v. *Averill*, 110 Maine, 172. See *Chase* v. *Denny*, 130 Mass., 566; *Covell* v. *Heyman*, 111 U. S., 176; *White* v. *Schloerb*, 178 U. S., 542.

The case shows that the defendant's interest in the stock could not exceed $500, one of the conditions being that the mortgagor shall keep the stock to its present value, and the value of the stock when mortgaged did not exceed $500. He took from the plaintiff goods of the value of $1003.62, and disposed of them. Aside from the question of amount of the original stock remaining, and goods replaced, the defendant must account to the trustee for the excess in his hands over $500, which amount is greater than the judgment agreed upon.

But the plaintiff may recover upon other grounds. The trustee was an officer of the law; he had possession of the goods, and his possession was the possession of the law. The defendant's right to follow the property, if it ever existed, was suspended on the appointment of the trustee. The trustee had acquired superior rights by virtue of his office. The defendant, not having possession of the goods, and having no right to possession as against the trustee, had the burden of showing title to the goods claimed by it under the mortgage, viz., such goods as were in existence at the date of the mortgage, and the goods, if any, substituted for articles sold by purchase from the proceeds of sales. It did not attempt to show either. It could not hold after acquired goods because it did not have possession before the adjudication in bankruptcy. As to original goods on hand at the date of the mortgage, if any, the record is silent, and the trustee, who otherwise might have been able to determine the rights of all parties, was deprived of the only means of

accomplishing that end by the act of the defendant in removing the goods and placing them beyond the reach of the trustee and all other parties in interest. The defendant, after such act, may not now invoke the aid of the Court under the rule relating to personal property intermingled wilfully or otherwise.

The case discloses that the bankrupt's business amounted to about $5,000 per year, that much of his stock was purchased upon credit from others than the defendant, and some goods were paid for in cash, that of the stock on hand at the date of bankruptcy proceedings, one-third had been received from the defendant and two-thirds from other sources,—the later purchased largely upon credit, and not from sales from the mortgaged stock, a condition so inconsistent with the claim of the defendant's right to recover that further comment is unnecessary, save to say that from the nature of the stock and the general business of the bankrupt, the stock having been subject to sale for about three years, the inference necessarily arises that no part of the original stock was left at the date of proceedings in bankruptcy. In accordance with the stipulation the entry will be,

Judgment for the plaintiff for $460.64.

DENNIS A. MEAHER *vs.* LEWIS M. MITCHELL.

Cumberland. Opinion December 9, 1914.

Contempt. Divorce. Husband. Husband's Credit. Necessaries. Professional Services. Revised Statutes, Chap. 62, Sec. 6. Wife.

In an action of assumpsit on account annexed, brought by an attorney at law to recover for professional services rendered the defendant's wife in divorce proceedings instituted by the husband,

Held:

1. That the plaintiff cannot recover for services in consultations with merchants relating to supplies to be furnished to the wife during separation. The wife's implied agency or authority to pledge her husband's credit, arising from the marital relation alone, might have covered the supplies furnished, but not the apparently unnecessary services of an attorney for consultations with the parties furnishing them.
2. That in this State, an attorney cannot maintain an independent action against the husband for legal services rendered and disbursements made in connection with a divorce proceeding instituted by the husband, even though the wife prevails, because of the statutory means otherwise provided for their remuneration.
3. That under R. S., Chap. 62, Sec. 6, providing that "pending a libel, the Court, or any justice thereof in vacation, may order the husband to pay to the Clerk, for the wife, sufficient money for her defense or prosecution thereof, and enforce obedience by appropriate processes," the wife is guaranteed full and complete relief, is under no necessity of pledging her husband's credit for such expenses, and therefore has no implied power to do so.
4. That the statutory method of compensating attorneys best protects the interests of all parties, is in accord with sound public policy, and should be deemed exclusive.

On report. Judgment for defendant.

This is an action of assumpsit upon an account annexed and a special count, both for professional services and disbursements of plaintiff, as the attorney for the wife of the defendant, in proceedings for a divorce. This action was commenced and entered in the Superior Court for Cumberland County. Plea, general issue. At the

conclusion of the evidence, by agreement of the parties, this case was reported to the Law Court for its determination, upon the evidence admitted at the trial without objection, and upon such parts of the evidence offered and objected to as is legally admissible.

The case is stated in the opinion.

Dennis A. Meaher, for plaintiff.

Frank H. Haskell, for defendant.

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

CORNISH, J. The plaintiff, an attorney at law, seeks to recover in this action against the husband for professional services rendered the defendant's wife during divorce proceedings instituted by the husband. In those proceedings the libellee prevailed and the divorce was not granted. No express contract on the part of the defendant to pay for the services is alleged or claimed; but the plaintiff rests his case on the broad ground that the services rendered fall within the class of necessaries for which the husband may be held liable in an independent action.

Two small items in the account annexed cover services for consultations with merchants at about the time of separation relating to supplies to be furnished the wife, but the evidence fails to show that these services were in any way necessary. The wife could have applied directly to these parties for credit, and no reason is given for her not doing so. There was no necessity of employing an attorney to make the request in her behalf. The wife's implied agency or authority to pledge her husband's credit, arising from the marital relation alone, might have covered the supplies furnished, but could not be stretched so as to include the apparently unnecessary services of an attorney for consultations with the parties furnishing them. The defendant is not liable for these items.

The balance of the account embraces professional services rendered and disbursements made in the divorce proceeding itself as counsel for the wife, the libellee. Recovery for these items raises a novel question in this State, although it has been passed upon in many other jurisdictions, and the authorities are not in entire harmony. In Georgia, Iowa, Maryland, West Virginia, Texas, it has been held

that an attorney may recover in an action at law for services so rendered the wife in connection with divorce proceedings, and in most of these States it is immaterial whether she be libelant or libellee. *Sprayberry* v. *Mark*, 30 Ga., 81; *Porter* v. *Briggs*, 38 Iowa, 166; *Preston* v. *Johnson*, 65 Iowa, 285; *Clyde* v. *Peavy*, 74 Iowa, 47; *McCurley* v. *Stockbridge*, 62 Md., 422; *Peck* v. *Marling*, 22 W. Va., 708; *Dodd* v. *Hein*, 26 Tex., Civ. App. 164.

But the overwhelming weight of authority does not sustain this view. In Massachusetts, New Hampshire, Vermont, Connecticut, Illinois, Alabama, Arkansas, Kentucky, Michigan, Missouri, Nebraska, New Jersey, Wisconsin, Washington, the rule of non-liability is asserted and maintained without qualification. *Coffin* v. *Dunham*, 8 Cush., 404, *Morrison* v. *Holt*, 42 N. H., 478; *Ray* v. *Alden*, 50 N. H., 82; *Wing* v. *Hurlburt*, 15 Vt., 607; *Shelton* v. *Pendleton*, 18 Conn., 417; *Cook* v. *Newell*, 40 Conn., 596; *Dow* v. *Eyster*, 79 Ill., 254; *Pearson* v. *Darrington*, 32 Ala., 227; *Kincheloe* v. *Merriman*, 54 Ark., 557; *Willaims* v. *Monroe*, 18 B. Mo., 514; *Wolcott* v. *Patterson*, 100 Mich., 227; *Hamilton* v. *Salisbury*, 133 Mo., App. 718; *Yeiser* v. *Lowe*, 50 Neb., 310; *Westcott* v. *Hinckley*, 56 N. J., 343; *Clarke* v. *Burke*, 65 Wis., 359; *Zent* v. *Sullivan*, 47 Wash., 315, 13 L. R. A., U. S., 244 and 15 A. & E. Ann. Cas. 19, and exhaustive note.

Some Courts have based their decisions upon the broad principle that legal services in divorce proceedings cannot be classed as necessaries for which the husband can be held liable in an independent action, while others admitting the necessity of the employment rely upon the power in the divorce Court conferred by statute to compel the husband, pending the libel and as ancillary thereto, to provide an allowance sufficient to enable the wife to prosecute or defend. We adopt, without hesitation, the rule of non-liability in an independent action, not on the ground that such services cannot be classed as necessaries but because of the statutory means provided for their remuneration. Legal services rendered under some circumstances have been held to be necessaries, *Peaks* v. *Mayhew*, 94 Maine, 571. Were there no statute in this State providing for the allowance of the wife's reasonable expenses so incurred we should hesitate to say that in no case should she be allowed the means with which to protect her property, her good name, and herself. Suppose for instance a husband should bring a libel for divorce charging his wife with adultery.

Should she be left powerless to defend herself, and though innocent, should she be deprived of her good reputation as well as her share of her husband's property from which by a decree of divorce she would be barred? Certainly not. And it was to obviate such an unfortunate and unjust situation that our statute was passed. It reads: "Pending a libel, the Court, or any Justice thereof in vacation, may order the husband to pay to the Clerk, for the wife, sufficient money for her defense or prosecution thereof . . . . and enforce obedience by appropriate processes." R. S., Chap. 62, Sec. 6, (originally Public Laws, 1853, Chap. 30). If the husband refuses to comply with such order, he can be adjudged in contempt and ordered to be committed until he does comply, or execution may issue. *Russell* v. *Russell*, 69 Maine, 336.

This statute guarantees the wife full and complete relief, and provides the avenue through which her prosecution or defense of a libel may be maintained and the services of an attorney may be secured. It follows that, in this State, the wife is under no necessity of pledging her husband's credit for the expenses of prosecuting or defending a libel for divorce, and therefore she has no implied power to do so, and the husband is not liable in an independent action. This rule, which simply enforces the intention of the legislature as expressed in the statute, best protects the rights of all parties, and is in accord with sound public policy. "The divorce Court has before it the parties, their property, their merits and delinquencies, and can fix the amount of the husband's liability to the wife and her attorney on an equitable basis, without any inquiry into collateral facts, and we are satisfied that the rights of all parties will be best subserved by relegating the question of the husband's liability for the attorney's fees of the wife to that tribunal." *Zent* v. *Sullivan*, supra.

The plaintiff has misconceived his remedy, which could have been had only in the divorce proceedings in accordance with a long established practice, the adherence to which is both just and wise.

Judgment for defendant.

FRANK E. MACE, Land Agent, In Equity,

vs.

THE SHIP POND LAND & LUMBER COMPANY.

Piscataquis. Opinion December 9, 1914.

Bill in Equity. Laches. Location. Lots. Public Lands. Reservation. Statute of Limitations. Title.

In a bill in equity to recover, upon an accounting, the value of the stumpage cut and taken by the defendant from certain public lots in the Plantation of Elliotsville, the same having been referred to a master to determine the quantities and values, and the defendant claiming that no recovery can be had for stumpage cut more than six years prior to the date of the bill,

Held:

1. That under the deed from the Commonwealth of Massachusetts, to the trustees of the Saco Free Bridge Fund, dated October 28, 1829, conveying the Saco Tract so called, the fee vested in the trustees with a condition subsequent annexed to the grant.
2. That this condition imposed upon the grantees, their successors and assigns, the duty of causing the public lots therein mentioned to be set out.
3. That Public Laws, 1850, Chap. 196, Sec. 3, authorized the State Land Agent to institute proceedings for the location of reserved lots where they had not been located by the grantee for the purpose expressed in the grant.
4. That this Act neither removed nor lightened the burden already resting upon the grantee, nor upon this defendant as a successor in title.
5. That the defendant, having entered upon the entire and undivided tract and cut and carried away timber therefrom, regardless of the imposed condition, cannot now successfully set up laches on the part of the State as a defense to the repayment of the amount due. The defendant does not come into Court with clean hands.
6. That the other tract in question, the State Tract so called, was acquired by the State of Maine from the Commonwealth of Massachusetts under the Act of Separation.

7. That the State of Maine by Statutes 1824, Chap. 280 and 1828, Chap. 293, enacted by general law that there should be reserved in every township suitable for settlement, whether timber land or otherwise, one thousand acres of land to be appropriated to such public uses, for the exclusive benefit of such town, as the legislature should thereafter direct.
8. That although the subsequent deed of this tract from the State contained no express reservation of lots for public uses, the grantee is presumed to have known of this general law and took title subject to the public rights therein provided for, and the successors in title are also bound thereby.
9. That the application of laches in equity is largely a matter of judicial discretion, dependent upon the facts and circumstances of each particular case; and when, as here, lapse of time has not changed the situation of the parties, and one is asked to pay what is admittedly due and should have been paid long before, laches cannot be successfully invoked.
10. That the plaintiff should be charged for its proportional part of all expenses incurred by the defendant in connection with the preservation of the common property and for the common benefit of all persons interested therein.
11. That this rule includes fire protection, surveying of lines and scaling, but excludes taxes (in this case), services of defendant's general manager and legal expenses.

On report. Judgment for plaintiff for $3020.27, with interest from July 19, 1909.

This is a bill in equity, in which the plaintiff prays that an accounting may be taken of all stumpage and timber cut and had from certain designated public lots by the defendant, and that said defendant be ordered to pay over to said plaintiff, in his official capacity, such sums as shall be found to be equitably due from it on account of said public lots. An answer by defendant and replication thereto by plaintiff were filed. On the 5th day of December, 1913, the whole cause was referred to Henry W. Oakes, as Special Master to hear and determine the amount to which the plaintiff is entitled as stumpage, who made his report to the Court. At the hearing of the cause on the acceptance of the Master's report, the cause was reported to the Law Court, by agreement of parties, upon an agreed statement of facts and documents mentioned therein, the Law Court to render such judgment as the law and the facts require.

The case is stated in the opinion.

Scott Wilson, attorney general, *W. R. Pattangall*, attorney general, *and J. S. Williams*, for plaintiff.

Hudson & Hudson, for defendant.

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

CORNISH, J. Bill in equity to recover from the defendant corporation, upon an accounting, the value of the stumpage cut and taken from certain public lots before their location by commissioners duly appointed by the Court.

The facts leading up to these proceedings are these: Edgar E. Ring, then land agent of the State of Maine, on February 15, 1905, brought a petition, under the statutes, asking that the public lots reserved in the organized plantation of Elliotsville be designated and located. This petition was granted by this Court and the appointment of a Committee to locate the public lots was ordered. *Ring, Pet'r,* 104 Maine, 544. Subsequently the Committee made the location, dated September 13, 1910, viz: 168 acres in the Saco Free Bridge Tract, and 113.9 acres in the State Tract, but none in the Vaughan Tract, all within the limits of said plantation. The defendant had purchased these three tracts from the Onawa Land and Lumber Company on January 31, 1895, and had operated them more or less extensively up to the time of the location of the public lots, and this bill in equity was brought to obtain an accounting for and recovery of the value of the stumpage cut from these lots. The cause was referred to a Special Master whose report, together with the pleadings, is before this Court on an agreed statement of facts, the Court to determine what sum, if any, is due from the defendant.

The defendant in the first instance sets up the Statute of Limitations and contends that the plaintiff cannot recover for any stumpage which was due for more than six years prior to the date of this bill in equity. We will consider this defense in connection with each tract separately.

The Saco Free Bridge Tract.

This tract of 4400 acres was granted by the Commonwealth of Massachusetts to the Trustees of the Saco Free Bridge fund on October 28, 1829, with this condition attached, "Conditioned however, that said grantees, their successors and assigns shall lay out and reserve three lots of fifty-six acres each for the following purposes, viz: one lot for the use of the ministry, one lot for the first settled minister, his heirs and assigns, and one lot for the use of schools within the Township, said lots to average in situation and quality with the lands in said tract."

By this grant the title, the fee, vested in the grantees with a condition subsequent annexed to the grant. For non-performance of this condition the Commonwealth might, perhaps, have claimed a forfeiture and have entered upon the premises for condition broken. *Rice* v. *Osgood*, 9 Mass., 38. This however was not done, but the condition imposed upon the grantees, their successors and assigns, the duty of causing the public lots to be set out; This duty they failed to perform. In 1850 the legislature authorized the State Land Agent to institute proceedings in the Supreme Judicial Court for the location of reserved lots where they had not been lawfully located in severalty by the grantee for the purposes expressed in the grant. Pub. Laws, 1850, Chap. 196, Sec. 3, now R. S., Chap. 7, Sec. 20. But this neither removed nor lightened the burden already resting upon the grantees, nor upon this defendant corporation deriving title therefrom. The State, after the statute of 1850, had the power, but both before and after that time, the defendant and its predecessors in title, had both the power and the duty. Instead of exercising the power and performing the duty however, the defendant admittedly entered upon the entire and undivided tract and cut and carried away lumber therefrom regardless of the imposed condition, and now having taken property that rightfully should have been set apart by it and have been applied to public uses it raises the question of laches on the part of the plaintiff as a defense to the repayment. This defense cannot avail in this equitable proceeding. The defendant does not come into Court with clean hands, but with hands filled with the fruits of its own neglected duty. The accounting asked for must be made.

State Tract.

This tract, containing, according to the survey of Caleb Leavitt in 1830, 2626 acres, was acquired by the State of Maine directly from the Commonwealth of Massachusetts under the Act of Separation and is embraced in the division and allotment made December 28, 1822. *Ring, Pet'r*, 104 Maine, 549. Then followed general legislation in this State governing the reservation of lots for public uses. "By Statutes 1824, Chap. 280, as revised by Statutes 1828, Chap. 393, the State by general law enacted that there should be reserved in every township, suitable for settlement, whether timber land or otherwise, one thousand acres of land to be appropriated to such public uses, for the exclusive benefit of such town, as the Legislature should there-

after direct. By this legislation the State constituted itself a trustee, retaining, as such, the legal title, but subjecting the land to such future public uses, for the benefit of the town, as the State itself might afterwards direct, until the town should be incorporated, when, under the Statute of Uses, the title would vest in the town. *Dillingham* v. *Smith*, 30 Maine, 370. Until such incorporation the reserved lands and the funds arising therefrom are therefore under the general control of the State." *State* v. *Mullen*, 97 Maine, 331-335.

It appears that when the State conveyed this State Tract, so called, there was no express reservation of lots for public uses. But that was unnecessary. There was a general statute in existence expressly providing for such reservation, and purchasers from the State and their grantees are presumed to have known of its existence and to have taken their deeds subject to the public rights therein provided for. The Statutes of 1824 and 1828 have remained a part of the general law of this State and are now preserved in R. S., Chap. 7, Sec. 11. It was on this ground that the Court held this State Tract to be subject to these public lots in *Ring, Pet'r*, 104 Maine, 544, supra.

Just here lies the distinction between the effect of this public and general law, ignorance of which excuses no one, and the effect of the Resolve of the Commonwealth of Massachusetts passed March 26, 1788, declaring that thereafter in the conveyance of every township of six miles square a reservation of four lots of three hundred and twenty acres each should be made for public uses. That was a mere declaration of policy and did not of itself create any incumbrance upon the lands or any public rights in them, as was held in *Union Parish* v. *Upton*, 74 Maine, 545. That case in no wise conflicts with the case at bar.

Coming now to the question of laches raised by the defendant in connection with this State Tract it is to be observed, that while the Court in equity will ordinarily recognize and give effect to the Statute of Limitations affecting actions at law in analogous cases, it obeys the spirit rather than the letter of the statute, and adopts the reason and principle on which it is founded rather than the statute itself. *Phillips* v. *Rogers*, 12 Met., 411; *Lawrence* v. *Rokes*, 61 Maine, 38; *Sullivan* v. *P. & K. R. R. Co.*, 94 U. S., 806. The Statute of Limitations is a hard and fast rule applicable to actions at law, but the application of the doctrine of laches in equity is largely a matter of

judicial discretion dependent upon the facts and circumstances of each particular case. Equitable relief may be denied when less than the statutory period of six years has elapsed or it may be granted long after the expiration of that period. The chancellor is not bound by clock-ticks. Accordingly when lapse of time has not changed the situation of the parties and one is asked to pay what is admittedly due and should have been paid long before, such a one cannot successfully take refuge in the statute. The language of this Court in *Spaulding* v. *Farwell*, 70 Maine, 17, which was a bill in equity for an accounting between co-tenants, is strikingly apt here: "By the complainants' delay the defendants have lost no evidence necessary to a fair presentation of the case on their part; they have been deprived of no just advantage which they would have had if the claim had been sooner put in suit and they have been subjected to no hardship which might have been avoided by more prompt proceedings. They admit the receipt of the money and the complainant's just share of it as part owner; that they have never paid it to him and assign no just reason why they should not pay it." The facts of the case at bar call for the application of the same rule here, irrespective of the question whether the interest of the State in these public lots is such that the bar of the statute cannot be invoked on the ground that the statute does not apply to the sovereign whether State or National. *U. S.* v. *Beebe*, 127 U. S., 338; *U. S.* v. *Burrill*, 107 Maine, 382. The defendant has been asked here simply to pay what is admittedly due, and the delayed request has in no wise injured its rights.

The only question remaining is that of amount. The State's proportion of stumpage taken from the Saco Free Bridge Tract amounts to $2240.82, and from the State Tract is $838.45, a total of $3079.27 according to the report of the Master, upon the basis fixed by this opinion.

But the defendant sets up a counter claim or offset aggregating over $15,000 covering expenditures claimed to have been made in connection with these two tracts and the Vaughan Tract during the years of operation, of which it says the plaintiff should pay or allow its proportional part. This includes expenditures for taxes, scaling, running lines, fire protection, general management and legal services. We think the true rule to be adopted is this, that the plaintiff should be charged for its proportional part of all expenses incurred

in connection with the preservation of the common property and incurred for the common benefit of all persons interested therein, and also for its proportional part of the expense of scaling, as this was necessary in order to ascertain the quantities removed. Taxes we disallow. The public lots are not subject to taxes and the payment or non-payment of taxes on the portion owned by the defendant could in no wise affect the State's interest. Nor do we think the services of the general manager of the defendant, nor of its attorneys, were rendered for the common benefit. Aggregating therefore the expenses of scaling, including the board of scaler, of surveying lines, and fire protection, we find it to amount to $3539.50. But it appears that two-thirds of the operations calling for these expenditures took place on the Vaughan Tract which is not involved here, while one-third concerned the Saco Tract and the State Tract, reducing the total to $1179.83. The proportional part of this amount to be paid by the State according to the Master's figures is in round numbers one-twentieth, or $59, and that amount should be allowed in set-off.

The net balance due the plaintiff is therefore $3020.27 with interest from the agreed date, July 19, 1909.

Judgment for plaintiff for $3020.27 with interest from July 19, 1909.

WILLIAM A. J. GATO, In Equity,

vs.

GRACE L. CHRISTIAN.

Cumberland. Opinion December 9, 1914.

Decree. Divorce. Equity. Fraud. Injunction. Mortgage. Term of Court. Vacating Decree.

1. A decree of divorce may be set aside for good cause shown and a new trial granted by the presiding Justice at the same term at which the decree was entered, notwithstanding the death of the libelant in the meantime. It is a power inherent in the Court, during the term at which the decree is entered.
2. Such reversal, when made, relates back to the date of the original decree and renders it void from that time.
3. That a mortgage of real estate given by the libelant, the wife, without the joinder of her husband, the libellee, is void, because contrary to R. S., Chap. 63, Sec. 1, when the property had been conveyed to her by her husband during coverture.
4. That such a mortgage given by the wife between the date of the original decree and of its reversal is also void, even when given to a bona fide purchaser for value.
5. That such a purchaser took title pendente lite, because prior to the adjournment of the term at which the decree was granted, and therefore the title was liable to be defeated by a reversal of that decree.
6. That the plaintiff's rights remain unaffected by the mortgage held by the defendant mortgagee, and he is entitled to equitable relief, enjoining the foreclosure of the same.
7. That as a part of the proceeds of the loan made by the defendant, for which the mortgage was given, went to pay a prior mortgage of $300 held by one Bickford, in which the plaintiff joined and on which he was personally liable, the defendant should be subrogated to the rights of Bickford to that extent.
8. That the bill in equity be held, in order that by proper amendments before a single Justice, and the bringing in of all parties in interest, redemption of the property from all outstanding mortgages may be obtained under the principles laid down in this opinion. Temporary injunction to continue until the rights of the parties are finally determined.

On report on agreed statement of facts. Temporary injunction is continued, until the rights of the parties are fairly determined. Decree accordingly.

This is a bill in equity, in which the plaintiff prays that Grace L. Christian may be enjoined both temporarily and permanently from foreclosing certain mortgages, and that said mortgages may be cancelled and decreed to be void and of no effect as against the plaintiff, and that said Grace L. Christian may be ordered and decreed to surrender said mortgage deeds and discharge said mortgages. Answer of Grace L. Christian filed. The cause was reported to the Law Court on the agreed statement of facts.

The case is stated in the opinion.

Libby, Robinson & Ives, for plaintiff.

W. K. & A. E. Neal, for defendant.

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

CORNISH, J. Katie J. Gato began divorce proceedings against her husband, the plaintiff, at the January term, 1912, of the Supreme Judicial Court for Cumberland County, at which term the plaintiff appeared by his attorney and answered to the suit. At the April term, 1912, a hearing was had and a divorce granted on April 26th, in the absence of, and without notice to or the knowledge of the husband or his attorney, the presiding Justice being in ignorance of the fact that his appearance had been entered. The decree was signed and filed on May 1st, 1912. At the time of the divorce the wife held title to certain real estate in question, which had been conveyed to her on November 7th, 1889, one-half by her husband and one-half by her husband's brother, Francis E. Gato. Upon these premises she had, during coverture, placed several mortgages; one running to Heman W. Ladd on November 20, 1902, for $300 in which mortgage and the note secured thereby the husband joined. This was assigned to William H. Bickford on March 18, 1903, and on October 10, 1911, Bickford began foreclosure proceedings by publication. On November 6th, 1911, she executed a second mortgage on the same property to William D. Sawyer for the sum of $100, but in this mortgage the husband did not join. On

April 26, 1912, the date on which her divorce was granted, she executed a third mortgage to John B. Kehoe, her attorney, in the sum of $100. In this the husband did not join. On May 25th, 1912, and after the decree of divorce, Katie J. Gato executed two mortgages to the defendant Grace L. Christian, a first mortgage in the sum of $300 and a second in the sum of $400, with the net proceeds of which, the prior mortgages to Bickford, Sawyer and Kehoe were taken up and discharged. It is admitted that the agent and attorney of Grace L. Christian examined the records in the office of the Clerk of Courts to ascertain the facts in relation to the granting of the divorce, before these loans were made, and also that the plaintiff had no knowledge of the execution and delivery of these mortgages and received personally no part of the proceeds thereof.

On July 3, 1912, Katie J. Gato died intestate leaving five minor children, and no administration has been had on her estate. On July 18, 1912, and prior to the adjournment of the April term of Court, the plaintiff, as libellee, filed a motion for new trial in the divorce proceedings, alleging that in decreeing said divorce justice had not been done, because of fraud, accident, mistake or misfortune. After a hearing, ex parte and without notice to any one representing the libelant, a new trial was granted; and at the October term, 1912, the libel was dismissed. On December 19, 1912, Grace L. Christian began foreclosure proceedings by publication upon the four hundred dollar mortgage, and, prior to the expiration of the time of redemption, the plaintiff brought this bill in equity, asking that she be enjoined and restrained from foreclosing the same.

The first question that arises is the validity of the order of Court setting aside the decree of divorce and granting a new trial. This was done notwithstanding the libelant, the wife, had died in the meantime. But her death did not of itself render the decree unassailable. The great weight of authority sustains this power in the Courts where property rights are involved, although the libelant has died since the decree, and this Court in a recent case has so declared. *Stewart* v. *Leathers*, 108 Maine, 96, 27 A. & E. Ann. Cas., 366, and note page 369.

Nor does the fact that the hearing on the motion for a new trial was had ex parte render the granting of the motion void. The cases cited by the learned counsel for the defendant are not applicable, because they were subsequent and independent proceedings

in the nature of a petition for annulment, and it must be remembered that in the case at bar the motion was addressed to the presiding Justice at the same term that the divorce had been granted and before the adjournment thereof. There was no party upon whom notice could have been served, if required, because the libelant had died. And such notice in this case was not required. The Court, when convinced that the libellee had not had his day in Court and that this was due to no negligence on his part, but to some oversight or mistake on the part of the Court or of the attorney for the libelant, had the power acting upon the motion of the libellee, or even upon its own initiative to vacate the decree. It is a power inherent in the Court during the term at which the decree is entered, to correct errors and right wrongs of this nature.

"In this country all Courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the Court for that term. This is the case with regard to all the Courts of the United States, and if there be exceptions in State Courts they are unimportant. It is a general rule of the law that all the judgments, decrees or other orders of the Courts, however conclusive in their character, are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that Court." *Bronson* v. *Schulten*, 104 U. S., 410, 415. This legal doctrine is universally accepted, and the power is daily exercised by the Courts, for the prevention of fraud or error and the furtherance of justice. *Fraley* v. *Feather*, 46 N. J. L., 429, and see note to *Furman* v. *Furman*, (153 N. Y., 109), 60 Am. St. Rep., at page 638, and numerous cases cited. The Court exercised that power here and vacated the decree before the final adjournment of the term at which it had been entered. Such action was clearly within its province.

The next question is the legal effect of the setting aside of this decree, upon the transfer of title by mortgage given by the libelant to the defendant after the decree signed on May 1, 1912, and before it was set aside by the order of August 1, 1912. Obviously the order vacating the decree related back to the date of the decree itself, and in the eye of the law Mrs. Gato had remained a married woman, and subject to the restrictions imposed by coverture. The one-half of

the property that was conveyed to her by her husband during coverture could not be mortgaged by her without his joinder. Her conveyance by deed is prohibited by R. S., Chap. 63, Sec. 1, in these words: "Real estate directly conveyed to her by her husband cannot be conveyed by her without the joinder of her husband, except real estate conveyed to her as security or in payment of a bona fide debt actually due to her from her husband." And a conveyance by mortgage stands in the same category as a conveyance by deed, *Jewett* v. *Davis*, 10 Allen, 68. Otherwise that could be done indirectly by mortgage and foreclosure which could not be done directly by deed, and the purpose of the restriction in the statutes be completely thwarted. As to the one-half conveyed to her by her husband's brother, that was hers absolutely, subject to her husband's right to one-third by inheritance in case she should predecease him as she did. This one-third was not conveyed because he did not join in the mortgage.

The defendant, however, strongly urges that she is a bona fide purchaser for value; that at the time she loaned the money and took the mortgage, the records of the Court showed that the divorce had been decreed and therefore the wife had a right to convey absolutely. But the answer to this position is that the defendant was virtually a purchaser pendente lite, and with the risk that the decree so granted might subsequently be reversed. It is settled law that where an execution is extended upon land by levy and the land is subsequently sold by the execution creditor to a bona fide purchaser for value, and, later on, the judgment is vacated by writ of error, the purchaser will not be protected under a writ of entry because no title passed. *Mullin* v. *Atherton*, 61 N. H., 20; *Delano* v. *Wilde*, 11 Gray, 17. In *Bryant* v. *Fairfield*, 51 Maine, 149, this Court said: "If he (the execution creditor) elects to have it extended upon the lands of the debtor, his title will depend upon the validity of his judgment and must fail upon its reversal. Any one who purchases the land of him must run this risk; and there is no greater hardship in this than in any other case of failure of title. He may take care to be secured by the covenants in his deed; and if he distrusts the ability of the grantor he need not purchase."

The same reasoning and the same rule apply here. The decree of divorce was subject to reversal by the Court during the term at which it was entered, and whoever purchased land from the libelant

before the final adjournment took title with that potential defect. Reversal in the case of divorce proceedings should be followed by the same results as reversal of judgment after levy. This rule does not apply to execution sales at public auction, where for reasons of public policy purchasers at the sale are protected against a subsequent reversal of judgment. *Stinson* v. *Ross*, 51 Maine, 556. The distinction between levy and sale on execution is clearly recognized, and the case at bar falls in line with the former rather than the latter, because the conveyance was made by the party herself, and not by an officer of the Court at public auction. It is clear therefore that the plaintiff's rights remain unaffected by the mortgages given by his wife to the defendant, and those rights can be enforced at law by a writ of entry.

It should be added however that as a part of the proceeds of the loans made by the defendant and secured by these mortgages went to pay the prior mortgage for $300 held by Bickford in which, and in the note for which it was given as security, the plaintiff joined, and on which he was personally liable, the defendant should be subrogated to the rights of Bickford who received the amount due thereon and discharged the mortgage. Although discharged, equity will regard the Bickford mortgage as still subsisting and the defendant as the equitable assignee thereof. *Cobb* v. *Dyer*, 69 Maine, 494; *Fitcher* v. *Griffiths*, 216 Mass., 174. To this extent the defendant will be reimbursed, but the mortgage security for the balance of her loans to Mrs. Gato except the two-sixth interest acquired from the brother-in-law she must lose because of failure of title.

The pending bill asks simply for a permanent injunction. This alone would not furnish adequate relief nor fully work out the equitable rights of the parties. The bill therefore will be held in order that by proper amendments before a single Justice and the bringing in of all parties in interest, redemption of the property from both mortgages now held by the defendant may be obtained, under the principles laid down in this opinion.

The temporary injunction is continued, until the rights of the parties are finally determined.

Decree accordingly.

HENRIETTA W. SANDERS *vs.* MERLE MIDDLETON.

Hancock. Opinion December 9, 1914.

Collateral Agreements. Contract. Evidence to Vary Terms of Contract. Landlord and Tenant. Lease. Offset for Repairs. Rent. Written Contract.

Action to recover rent due under the terms of a written lease, in which the defendant claimed set-off for repairs done by himself and for which he says allowance should be made by virtue of an independent, oral agreement made at the time the written lease was made. The existence of such agreement was denied by the plaintiff.

Held:

1. The general rule is that parol evidence cannot be received to contradict or vary the terms of a written contract; that when an agreement is reduced to writing it must be considered as expressing the ultimate intention of the parties, and, in the absence of fraud, parol evidence may not be admitted to alter or modify the terms or legal effect of the written contract.
2. While there are exceptions to this rule which permit parol evidence of engagements collateral to, or independent of the provisions expressed in the written contract, and not within its terms, although made at the same time, yet the existence of such engagements must be supported by evidence of sufficient weight to produce a strong impression of its verity.
3. The doctrine of independent, collateral agreements, as expressed in *Neal* v. *Flint*, 88 Maine, 72, is not to be extended beyond its legitimate sphere.
4. Under the evidence introduced to support the existence of the independent, collateral agreement claimed by the defendant the verdict for plaintiff was properly ordered.

On exceptions by defendant. Exceptions overruled.

This is an action to recover $1375 for use and occupation of a cottage known as "Homewood" situated in the village of Bar Harbor, in the town of Eden, in Hancock County, under a lease dated December 30, 1908. By agreement, defendant filed in set-off a bill of $413.55 for outside painting, and the plaintiff plead the Statute of Frauds in answer thereto. Plea, the general issue. At the conclusion of the evidence, upon motion of the plaintiff, the Justice presiding ordered a verdict for the plaintiff; and the defendant

excepted to said order. In said exceptions, it was stipulated and agreed that if the order directing a verdict for plaintiff be sustained, judgment for plaintiff shall follow for the amount of $1430 debt, and that if such order be not sustained, judgment for plaintiff shall follow for such amount as the Court may determine.

The case is stated in the opinion.

Deasy & Lyman, for plaintiff.

Hale & Hamlin, for defendant.

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

PHILBROOK, J. This is an action to recover rent for use and occupation of certain real estate which began under a lease and continued by virtue of a provision in the lease for option of renewing the same for a term of three years from the expiration of the lease term. The occupancy and the non-payment of the rental sued for are both admitted by the defendant, but he claims that he should be allowed an offset for outside repairs done by him in accordance with an oral agreement which he says was entered into between himself and the plaintiff.

The lease under which this tenancy began was executed December 30, 1908. The defendant had occupied the same premises under prior leases, and he says that in November or December prior to the execution of the last lease he talked with plaintiff regarding a new lease, and that he said to her, "We have always agreed upon this point, that you pay for the work done on the outside, and I pay for the work done on the inside, and taking care of the grounds. Is there any reason why we should not renew the lease?" To this he says the plaintiff replied "No, and I will have Mr. D—attend to it and forward me the lease." On the other hand the plaintiff deposes, "I have never given any authority to Mr. Middleton or his representatives during this 1908 lease to make any repairs although I paid several small bills which Mr. Middleton sent me for repairs."

Subject to objection on the part of the plaintiff the defendant was allowed to testify as above under the claim that the oral agreement thus made was "a distinct, collateral agreement not inconsistent with the terms of the written stipulations of the parties and constituting in part the consideration of the written agreement." This claim the defendant stoutly maintains, and urges that his authority for it

is to be found in *Neal* v. *Flint,* 88 Maine, 72, wherein our Court has said; "The general rule is that parol evidence cannot be received to contradict or vary the terms of a written contract, and that when an agreement is reduced to writing it must be considered as expressing the ultimate intention of the parties to it, and therefore, in the absence of fraud, parol evidence is not admitted to alter or modify the terms or legal effect of it. The parties having reduced their contract to writing, their rights must be governed by and depend upon its terms as therein expressed, irrespective of parol evidence of what was intended, or what took place previous to or at the time of making the contract. But there are exceptions to this general rule which permit parol evidence of engagements collateral to, or independent of, the provisions expressed in the written agreement and not within its terms, although made at the same time and affecting the rights of the parties in relation to the subject matter of the writing. In such it is deemed only partially reduced to writing, and the collateral undertaking or stipulation exists in parol."

The defendant urges that his claim falls within the rule of such exceptions.

It may be proper to call attention to the fact that the opinion in *Neal* v. *Flint,* supra, was given by a divided Court. It may also be proper to add that in *Burnham* v. *Austin,* 105 Maine, 196, our Court has said, "we are not inclined to extend the doctrine of independent, collateral agreements, as expressed in *Neal* v. *Flint,* 88 Maine, 72, beyond its legitimate sphere."

While not repudiating this doctrine as to independent, collateral agreements, we are of opinion that the defendant's claim is not safely within that doctrine.

The lease contains the stipulation that "the lessor agrees hereby that the lessee shall have the option of renewing this lease for a term of three years from the expiration of the term hereby granted upon the same terms and conditions as contained herein." While the lease of 1908, the one in question, was not renewed in writing, at its expiration, yet the lessee continued to occupy after its expiration in the same way as before, and under this subsequent occupancy the rental accrued for which this suit is brought. When a tenant remains after the termination of the lease his so remaining is an election to continue the tenancy, *Holley* v. *Young,* 66 Maine, 520, and since the lease in this case stipulates that the renewal of the

term is to be "upon the same terms and conditions" as those contained in the lease, it follows that the lease also prescribes the "terms and conditions" of the subsequent occupancy.

The lease expressly provides that the lessee shall deliver the premises to the lessor, at the end of the term, "in as good order and condition (reasonable use and wearing thereof, or inevitable accident excepted) as the same are, or may be put into by the said lessor." Such a contract as the defendant claims cannot be said to be collateral to or independent of the lease, which contains the express provision just quoted from the lease, much less can it be said to be "not in conflict with the written agreement." It is to be noted also that the lease carefully provides for repairs in case of partial or total loss of the property by fire. This is strong evidence to disprove the doctrine that the "original contract was verbal and entire and a part only of it was reduced to writing," *Neal* v. *Flint*, supra. Could it be safely assumed that when parties so carefully provided for certain important elements of the contract they omitted the equally important element now claimed by the defendant. To support such a claim as that made by the defendant the evidence should be of sufficient weight to produce a strong impression of its verity, to say the least.

It is the opinion of the Court that the verdict for the plaintiff was properly ordered.

Exceptions overruled.

CAROLYN C. VERMEULE *vs.* THE YORK WATER COMPANY.

SAME, In Equity, *vs.* SAME.

York. Opinion December 10, 1914.

Equity. Execution. Injunction. Judgment. Reference. Revised Statutes, Chap. 56, Sec. 6. Revised Statutes, Chap. 47, Sec. 71. Sale. Scire Facias. Title. Void Sale.

In an action of scire facias brought to revive a judgment for $2021.83 debt or damage and $29.36 costs of suit, and for an alias execution, the Justice at nisi prius having ordered the same to issue,

Held:

1. That the seizure and sale of all the franchises, privileges, plant and property of the York Water Company, under R. S., Chap. 56, Sec. 6, as personal property, instead of under R. S., Chap. 47, Sec. 71, applicable to corporations, one method being provided for the sale of real estate and all rights and interests therein, and another for the sale of personal property, were invalid.
2. That the property seized and sold, although nominally divided into four items by the officer in his return, was in reality an entity, the plant of the York Water Company, its entire water system embracing real estate, buildings, pumping station, stand-pipe, reservoirs, pipe lines, materials, tools, rights, franchises and privileges, and the failure of title because of errors of procedure was a failure of title to the entire system. There could be no practical dismemberment.
3. That the award of the referees in the real action brought by the Water Company to recover the property so seized and sold, on the ground of the invalidity of the sheriff's sale, restored the entire property to the Company and assessed rents and profits against Carolyn C. Vermeule for use and income of the same in the sum of $1593.90.
4. That the plaintiff's judgment has therefore been in no part satisfied and she is entitled to an alias execution therefor.
5. That the injunction granted on the bill in equity should be modified so that the defendant may be allowed to enforce its judgment and execution for rents and profits, by way of set-off but not otherwise.

On exceptions by defendant in scire facias. Exceptions overruled. In the equity case, bill sustained with costs and decree to be entered in accordance with this opinion.

Scire facias brought by plaintiff to revive a judgment recovered in the Supreme Judicial Court for York County, at the May term, 1908, against the defendant. Upon the execution which was issued on said judgment, the officer sold certain described property of the defendant to the plaintiff, and the plaintiff took possession as purchaser of said property. The seizure and sale of said property were unauthorized and void and conveyed no title thereof to the plaintiff. The defendant plead in answer to this action that the said seizure and sale recited in plaintiff's writ were valid.

On September 2, 1909, the defendant brought a real action against this plaintiff, as purchaser of said property, to recover possession of the land so sold as specified in the officer's return. This action was referred to referees, who awarded that plaintiff, being the defendant in this action, recover of the defendant, being the plaintiff in this action, judgment for the possession of the land described in the writ and for the rents and profits assessed in the sum of $1593.90. This award being accepted by the Court, judgment thereon was duly entered and execution issued on said judgment.

The bill in equity was brought by the plaintiff to restrain the defendant from enforcing said execution against plaintiff for the rents and profits awarded by the referees. At the hearing, the presiding Justice ordered an alias execution to issue, and the defendant excepted to this ruling.

The case is stated in the opinion.

Leroy Haley, for plaintiff.

Littlefield & Littlefield, and George C. Yeaton, for defendant.

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

CORNISH, J. At the May term, 1908, of the Supreme Judicial Court for York County the plaintiff recovered judgment against the defendant in the sum of $2021.83 debt or damage, and $29.36 costs of suit. Execution was duly issued on this judgment and on June 25, 1908, a deputy sheriff seized, and on July 6, 1908, sold at public auction certain "goods, chattels, franchises, fixtures, pipes, fountains, lands and interests in lands" to satisfy the same, the plain-

tiff creditor being the purchaser thereof. The officer's return subdivides the property into four items. Item one covers a certain tract of land containing one acre more or less and described by metes and bounds, together with the buildings and machinery thereon, apparently embracing the pumping station. Item two covers a certain tract containing about one-third of an acre on which stood the water tower. Item three specified "All the rights, privileges and franchises vested in the York Water Company by the town of York, and giving and granting unto the said York Water Company, rights to lay water pipes along the highways and to dig up the said highways and streets for purposes of laying and repairing such pipes." And item four embraced "All the aqueducts, pipe lines, wells, springs, tanks, reservoirs, material on hand, tools, pumping stations, machinery and other appliances and all other plant, leases and franchises or privileges used, owned, or held or enjoyed by the said York Water Company, for the purposes of supplying water to the inhabitants of the town of York. . . . . meaning and intending hereby to include all of the property, plant, leases, privileges and franchises vested in the said York Water Company or constituting a part of the property under the ownership and control of the said York Water Company whether the same has been acquired and conveyed to the said York Water Company under deed made and executed by Henry E. Evans and Charles E. Carter bearing date the 16th day of December, 1892, . . . or subsequently acquired in any other manner by the said York Water Company either by purchase or by the extending, rebuilding or enlarging the plant in any manner whatsoever."

The seizure and sale, by mistake, were made under R. S., Chap. 56, Sec. 6, which provides for the execution sale of the "franchises, fixtures, pipes, fountains and interests in lands" of aqueduct corporations as personal property, instead of under R. S., Chap. 47, Sec. 71, the defendant corporation having been organized under the general law and its property being subject to attachment on mesne process and levy on execution "in the manner prescribed by law." The law prescribes one method in the case of real estate and all rights and interests therein, and another in the case of personal property. The plaintiff entered into possession under this defective execution sale.

On the ground that this sale was unauthorized by statute and therefore conveyed no title to the plaintiff as purchaser, the Water Company on September 2, 1909, brought a real action against the plaintiff to recover all the property thus sold, setting forth in the declaration in terms the same four items specified in the officer's return. This action was referred to referees who, after hearing, awarded "that the plaintiff (The York Water Company) recover judgment for the possession of the land described in the writ and for rents and profits assessed in the sum of $1593.90 and costs of Court to be taxed by the Court." On this award of the referees, judgment was duly entered.

On June 6, 1912, Carolyn C. Vermeule brought this action of scire facias in which she seeks to revive the judgment and to have an alias execution issued for the full amount of the original judgment and costs, on the ground that because of the invalidity of the sheriff's sale that judgment has been in no part satisfied. The presiding Justice ordered the alias execution to issue and defendant's exceptions to this ruling have brought the case to the Law Court for determination.

The form of remedy by writ of scire facias is not questioned by the defendant. R. S., Chap. 78, Sec. 19, *Pillsbury* v. *Smyth*, 25 Maine, 427. And it admits the invalidity of the sheriff's sale so far as the real estate is concerned, but contends that certain personal property passed to the plaintiff under items three and four, valued at $50 and $1941.47 respectively, and therefore that an alias execution can issue only for the amount of the failed consideration of items one and two aggregating one hundred dollars.

This contention we cannot sustain. It is undoubtedly true that where a levy has been made upon real estate and it is afterwards discovered that the title to a definite portion of the property has failed either through want of ownership or invalid proceedings, the creditor is entitled to a new execution only for the amount remaining unsatisfied. *Rice* v. *Cook*, 75 Maine, 45. But the facts do not permit the application of that rule here. The property seized and sold, although nominally divided into four items by the officer in his return was in reality a unit, the plant of the York Water Company, its water system, embracing its real estate, buildings, pumping station, stand-pipe, reservoirs, pipe lines, materials, tools, rights, franchises and privileges. All these, and the four items

specifying these, are so closely connected and interwoven that dismemberment means ruin. Item one apparently covers the pumping station and lot, item two the stand-pipe and lot, item three rights and permits in the highways, and item four an omnibus description covering property real, personal and mixed. The defendant's theory would give the plaintiff title under the sale to items three and four, and deprive her of items one and two; that is it would recognize the plaintiff's ownership of the distributing system at a valuation of $1991.97, but withhold from her the pumping station and stand-pipe, and would allow her an alias execution for $100 as the title to those two fractions of the plant has failed. Such a theory cannot be upheld. The seizure and sale were of an entire water system and the failure of title, because of errors of procedure, was a failure of title to the entire system.

This certainly was the view which the defendant itself took of the transaction because it brought its real action to recover all the property, and claimed not merely the two lots of land with structures thereon embraced in items one and two, but the entire water system, specifying in detail in its declaration all four items which the officer had set forth in his return. This real action was heard by the referees and the defendant now contends that their award gave only the first two items to the Company and left the title to the remainder in Carolyn C. Vermeule, because its language is, "we award that the plaintiff recover judgment for the possession of the land described in the writ." But to hold that this excluded all but items one and two is too narrow a construction. The declaration was "in a plea of land" and the award simply meant judgment for the plaintiff, and recovery of all that was claimed. Item three embraced rights in land, and item four specified in terms "all of the property, plant, leases, privileges" etc. That this was the opinion and intention of the referees is apparent from the further fact that they also assessed rents and profits against Carolyn C. Vermeule in the sum of $1593.90. Such a sum could not have been imposed upon her for the use and income of the pumping station and lot and the stand-pipe and lot, but for the use and income of the entire water plant, which had been in her possession and had been operated by her after the sheriff's sale. Viewed from every angle the result is the same. The plaintiff's execution has been in no part satisfied and under this form of pro-

cedure she is entitled to another. The debtor will lose and the creditor will gain no rights thereby, and that exact justice between the parties will be attained which the writ of scire facias in such cases is designed to accomplish.

The bill in equity was brought to restrain the defendant from enforcing its execution against the plaintiff for the amount of rents and profits awarded by the referees, until the determination of this action of scire facias, in order that, if the scire facias were maintained and alias execution issued, the executions might be offset against each other. A temporary injunction was granted by the sitting Justice. As, under this opinion, an alias execution is to issue, the injunction should be modified so that the defendant may be allowed to enforce its judgment and execution by way of offset, but not otherwise.

Our conclusion therefore is that in the action of scire facias the exceptions are overruled. In the equity proceedings the bill is sustained with costs, and decree is to be entered in accordance with the opinion.

So ordered.

AUGUSTUS PEROW COMPANY

vs.

LEWISTON SECURITY COMPANY.

Sagadahoc. Opinion December 12, 1914.

Foreclosure. Interest. Mortgage. Promissory Note. Public Laws, 1905, Chap. 90. Public Laws, 1907, Chap. 97. Revised Statutes, Chap. 46, Sec. 2. Sale. Waiver.

The defendant held a note of the plaintiff for borrowed money, secured by a mortgage of chattels. The mortgage had been foreclosed, and after the time of redemption had expired, one of the defendants, with an officer, went to the plaintiff's place of business prepared to replevy the goods mortgaged. The defendant demanded the money due on the note. Afterwards, upon receiving the amount due on the note and mortgage, the defendant endorsed upon the mortgage the following:—"The within mortgage and the note which it secures having been paid in full, it is hereby discharged." The plaintiff's claim was that the interest reserved in the note was in excess of six per cent per annum in contravention of the statutes.

Held: That this transaction did not constitute a sale of the goods mortgaged to the plaintiff, but constituted a payment of the amount due on the note and a waiver by the defendant of their rights by reason of the foreclosure.

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

This is an action on the case, brought under Revised Statutes, Chap. 46, Sec. 2, as amended by Chap. 90 of Public Laws of 1905, and Chap. 97, of Public Laws of 1907, to recover from defendant interest claimed to have been paid by plaintiff to defendant in excess of six per cent per annum, reserved in the note held by defendant corporation against the plaintiff. Plea, general issue and brief statement. At the conclusion of the evidence, the presiding Justice directed the jury to return a verdict for plaintiff for the sum of $104.62. To this direction, the defendant excepted and filed a general motion for a new trial.

The case is stated in the opinion.

Arthur J. Dunton, for plaintiff.

Newell & Skelton, for defendant.

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

BIRD, J. This action on the case is brought under the provisions of R. S., Chap. 46, Sec. 2, as amended by Chap. 90, Public Laws, 1905 and Chap. 97, Public Laws, 1907, for the recovery of payments of interest alleged to have been made in excess of six per cent per annum in contravention of the provisions of these statutes.

The defendants held the note of plaintiff corporation, for borrowed money, secured by a mortgage of chattels. The plaintiff claims that the rate of interest reserved violates the statute. This is not controverted by defendants. The mortgage was foreclosed and after the period of redemption had expired, one of the defendants repaired to the place of business of plaintiff with an officer provided with process for replevin of the goods mortgaged. There is some difference in the accounts of the parties as to what was said but in view of subsequent occurrences and of the testimony of the officer, we conclude that the defendant declared that he had come for his money or the goods and, had a jury found otherwise, that their verdict could not be allowed to stand. Plaintiff corporation undertook to procure the money demanded, which was the sum defendants claimed due upon the note. Plaintiff later succeeded in obtaining the required sum, the goods in the meantime remaining in the custody of the officer. Upon receiving this sum, the defendant who had had the negotiations with plaintiff, delivered note and mortgage to plaintiff, having made and signed in due form upon the mortgage the following indorsement:—

"The within mortgage and note which it secures having been paid in full it is hereby discharged."

Defendants assert that the transaction constituted a sale of the goods and not a payment of the note. To this, for the reasons already set forth, we do not assent. We conclude that plaintiff made payment of the amount due upon note and defendants waived their rights by foreclosure. *Winchester* v. *Ball,* 54 Maine, 558, 560; see

also *Greene* v. *Dingley*, 24 Maine, 131, 137; *Stetson* v. *Everett*, 59 Maine, 376, 380; *Dow* v. *Moor*, 59 Maine, 118, 120; *Phelps* v. *Kendrick*, 105 Mass., 106.

Finding no error in the direction of the presiding Justice, the entry will be,

Motion and exceptions overruled.

MADELINE B. COOMBS, et als.,

Appellants from Decree or Judge of Probate.

Androscoggin. Opinion December 12, 1914.

Appeal. Burden. Decree. Devisees. Fraud. Will.

The will of Marcia G. Coombs, late of Lisbon, in the County of Androscoggin, was admitted to probate by decree of the Judge of Probate of said County. From this decree, the contestants appealed to the Supreme Court of Probate for said County. The contestants claimed that the instrument produced was not the last will of the deceased, by reason of the fraud of one of the devisees. The issue involving this question of fraud was framed and submitted to the jury and their verdict was in favor of the appellants and contestants. The proponents and appellees carried the case to the Law Court upon a motion and exceptions for a new trial.

Held: That the evidence adduced by the contestants is insufficient to sustain the charge of fraud. The burden of proof is not only upon them, but they must sustain this burden by clear and convincing evidence.

On exceptions and motion for new trial. Motion sustained. Exceptions not considered. The case is remanded to the Supreme Court of Probate for the County of Androscoggin for further action in accordance with this opinion.

This is an appeal from the decree of the Judge of Probate for Androscoggin County, allowing will of Marcia G. Coombs. From this decree, an appeal was taken to the Supreme Court of Probate. The contestants claimed that on account of fraud, the instrument

purporting to be the will of Marcia G. Coombs was not the last will and testament of Marcia G. Coombs. The jury returned a verdict in favor of appellants, and contestants, and the proponents and appellees filed a motion for a new trial and had exceptions to the exclusion of certain evidence.

The case is stated in the opinion.

Ralph W. Crockett, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

BIRD, J. The will of Marcia G. Coombs was allowed by decree of the Judge of the Probate Court of Androscoggin County and from this decree appeal was taken to the Supreme Court of Probate where, as in the Probate Court, contestants claimed that the instrument produced was not the last will of deceased by reason of the fraud of one of the devisees. In the Supreme Court of Probate an issue involving this question was framed and submitted to the jury. The verdict was in favor of the appellants and contestants. The case is before us upon the exceptions and motion for new trial of the proponents and appellees.

There was evidence before the jury offered by contestants as showing gross fraud upon the part of one of the two daughters—both devisees—of the testatrix, whereby an absolute devise to her son was changed by testatrix to a devise for life with remainder over to the daughters. This evidence consisted substantially of the testimony of one witness attempting to give a conversation between the son and the daughter which contestants claim was falsely communicated by her to testatrix. It is not pretended that the whole conversation is detailed but only detached portions many of which are as consistent with the contention of one party as with that of the other. The daughter's testimony is a substantial denial of the conversation. The will as executed was in accord with testatrix's prior declarations. A more detailed statement of the evidence will not be profitable. Considering all the testimony we can but conclude that the evidence adduced by the contestants is insufficient to sustain the charge of fraud. Not only is the burden of proof upon them, but they must sustain this burden by clear and convincing evidence.

Liberty v. *Haines*, 103 Maine, 182, 190; *Strout* v. *Lewis*, 104 Maine, 65, 67. The verdict, therefore, must be set aside, or disregarded, as dissonant to the conscience of the Court. *Bradstreet* v. *Bradstreet*, 64 Maine, 204, 209; *Larrabee* v. *Grant*, 70 Maine, 79; *Rolfe* v. *Fire Ins. Co.*, 105 Maine, 58, 60; *Farnsworth* v. *Whiting*, 106 Maine, 430, 435.

Nor is this Court of the opinion that a further trial by jury is desirable or required to aid the conscience of the Court. *Rolfe* v. *Ins. Co.*, supra.

The conclusion reached upon the motion for a new trial renders the consideration of the exceptions unnecessary.

The decree of the Judge of Probate must be affirmed.

The case is remanded to the Supreme Court of Probate for the County of Androscoggin for further action in accordance with this opinion.

ABBOTT J. FULLER

vs.

ISAAC B. GAGE et als., and TRUSTEE.

Knox. Opinion December 14, 1914.

Allegations. Declaration. Demurrer. Exceptions. Time. Traversable Fact.

No rule has been better established in this State than that requiring in declarations that the time of every traversable fact shall be named. The pleader must name some certain day, whether correctly named or not. Declarations omitting this certainty of allegation have been repeatedly held to be bad on demurrer. This rule of pleading was violated in the case at bar.

On exceptions by defendant. Exceptions sustained.

This is an action on the case against William B. Lindsey, Isaac B. Gage and C. H. Robbins, for conspiring to injure the plaintiff in his

good name and in his professional capacity as physician and surgeon. The writ was entered at the January term, 1914, of Supreme Judicial Court for Knox County, and at said term the defendants filed a special demurrer to said declaration. The presiding Justice overruled the demurrer and the defendants filed exceptions to the overruling of said demurrer.

The case is stated in the opinion.

Charles T. Smalley, and Hinckley & Hinckley, for plaintiff.

A. S. Littlefield, for defendants.

Allan L. Bird, for trustee.

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

PHILBROOK, J. Exceptions to the overruling of defendant's demurrer. Upon a single ground the defendant is entitled to prevail, and it therefore becomes unnecessary to consider the others. The allegations in the plaintiff's writ as to the time of the acts complained of are, "that on or about the first day of September, 1912, and on divers other days and times from the said 1st day of September, 1912, to the day of the date of this writ;" also, "on about September 11, 1912, and at divers other times from the said 11th day of September, 1912, to the date of this writ;" also, "during a long period of time, to wit, from said first day of September, 1912, to the day of the date of this writ;" also "on or about the eighth day of June, 1913;" also "on divers times and at divers places since the first day of September, 1912, to the day of the making of this writ," the defendants had done certain things and said certain things to the harm of the plaintiff.

"No rule has been better established in this State than that requiring in declarations that the time of every traversable fact shall be named. The pleader must name some certain day, whether correctly named or not. . . . . Declarations omitting this certainty of allegations have been repeatedly held in this State to be had on demurrer." *Shorey* v. *Chandler,* 80 Maine, 409.

Exceptions sustained.

JOHN J. PAUL, Collector, *vs.* B. D. E. HUSE.

Knox. Opinion December 14, 1914.

Assessment. Bonds. Collector. Loan. R. S., Chap. 86, Sec. 30. R. S., Chap. 4, Sec. 9. Tax.

In an action of debt, brought by the collector of the Camden Village Corporation to recover taxes assessed against the defendant for the years 1912 and 1913.

Held:

1. That where a municipality is granted the power to create a municipal debt, and no other provision is made for its payment, it has the implied power to levy the necessary taxes to pay it. The one is the complement of the other. The right to borrow carries with it the obligation to pay, and as a municipality has no means of paying its indebtedness except through taxation it necessarily has this power.
2. Warrants for calling corporation meetings may be signed and directed either in accordance with the charter requirements or as provided by R. S., Chap. 4, Sec. 9, if the corporation has designated at what and how many places the notices shall be posted. The corporation is not required to use the statutory method alone.
3. The assessments were not rendered invalid by the fact that the assessors did not make up an original and independent assessment but simply copied the valuation as made by the assessors of the town.
4. The error of the assessors, in so doing was not such an omission or defect as went to their jurisdiction or deprived the defendant of any substantial right, and therefore did not defeat his liability in this form of action.

On report. Judgment for plaintiff for $25.08 and interest from date of writ.

This is an action of debt, brought by the plaintiff as collector of taxes of Camden Village Corporation against the defendant, an alleged tax payer of said corporation. Plea, is the general issue. At the conclusion of the evidence, by agreement of parties, this case was reported to the Law Court on an agreed statement of facts for final determination, the Law Court to render such final judgment therein as the law and the evidence require.

The case is stated in the opinion.

Reuel Robinson, for plaintiff.

Montgomery & Emery, for defendant.

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

CORNISH, J. Action of debt brought by the collector of the Camden Village Corporation to recover taxes assessed against the defendant for the years 1912 and 1913. Three points are pressed in defense.

1. First, that the charter of the Village Corporation and the amendments thereto do not authorize an assessment for the payment of the debt, either principal or interest, incurred by the corporation under legislative authority, for the erection of a village hall building.

The Camden Village Corporation whose original charter was granted in 1867, was subsequently "authorized and vested with power to raise by loan, for the purpose of rebuilding or assisting in rebuilding its village hall building, destroyed by fire, and for furnishing the same, said loan not to exceed thirty thousand dollars, and to issue its bonds for said purpose, on such terms and at such rate of interest as said corporation may vote, &c." Priv. and Sp. L. 1893, Chap. 407. The corporation accepted the Act and raised the requisite amount by loan, of which the sum of $26,600 is still outstanding, and the assessments of 1912 and 1913, of which the defendant is asked in this suit to pay his proportionate share, were made for the purpose of paying the interest or the interest and a portion of the principal on these Village Hall bonds. The learned counsel for the defendant urges that as the Act does not in express terms provide for the assessment of taxes with which to meet either principal or interest, the Corporation had no power to make the assessment. The answer to this contention is that where a municipality is granted the power to create a municipal debt, and no other provision is made for its payment, it has the right to levy the necessary taxes to pay it, and the power attaches by necessary implication. The one is the complement of the other. The right to borrow carries with it the obligation to pay, and as a municipality has no means of paying its indebtedness except by taxation it necessarily has this power. *State* v. *Bristol*, 109 Tenn., 315; *Wilson* v. *Florence*, 40 S. C., 426; *Char-*

lotte v. *Shepard,* 122 N. C., 602; *Slocomb* v. *Fayetteville,* 125 N. C., 362; *Lowell* v. *Boston,* 111 Mass., 454, 460; *U. S.* v. *New Orleans,* 98 U. S., 381. Any other interpretation would work a fraud upon the public who in good faith purchase the authorized bonds. A bond is itself evidence of indebtedness and an obligation to pay, and yet it is argued that while the legislature has authorized the issue and thereby permitted the corporation not only to borrow the money but to become legally indebted therefor, it has failed to open the only avenue by which that indebtedness can be met. Such a position is untenable.

It is suggested however that the holders of the bonds should look to the property into which their money has gone, as their security, in this case the town hall building, and that the income therefrom should be applied to the payment of the interest. This plan would be somewhat difficult of execution in case the bonds were issued for municipal purposes like sewers or street improvements; but the fatal objection to it is that the bonds represent the unsecured indebtedness of the municipality, and in case of non-payment the holder may sue the municipality, irrespective of the purpose for which they were issued, and all the goods and chattels of the inhabitants, and all the real estate situated therein, are subject to execution sale to satisfy the same. R. S., Chap. 86, Sec. 30. Such a suit was brought and recovery had upon interest coupons on scrip issued by the town of Houlton in aid of the Houlton Branch Railroad Company, the Act authorizing the town to issue the scrip being entirely silent as to the assessment of taxes with which to pay the same. Priv. and Sp. L. 1867, Chap. 287. *Deming* v. *Houlton,* 64 Maine, 254. The first objection raised by the defendant is without merit.

2. The second contention is that the warrants for the corporation meetings of 1912 and 1913 were not legally directed and posted and no legal return upon them was made. These warrants were signed by the assessors of the corporation, were directed to the legal voters of the corporation, were duly posted in two public and conspicuous places within the corporation limits seven days prior to the meetings, and the returns were duly signed by the assessors. This method was in exact accordance with the charter requirements for all meetings after the first. Priv. and Sp. L. 1867, Chap. 266, Sec. 7.

But the defendant calls attention to R. S., Chap. 4, Sec. 9, which provides as follows: "The meetings of any village corporation may

be notified by the person to whom the warrant is addressed, by posting attested copies in two or more public and conspicuous places within the corporation limits seven days before the meeting, instead of in the manner provided by the Act creating such corporation; provided that such corporation shall first at a legal meeting designate at what and how many places such notices shall be posted." There is no evidence that the Camden Village Corporation has complied with this proviso and has designated at a legal meeting "at what and how many places such notices shall be posted," unless it is embraced in the admission in the agreed statement of facts, "that the Corporation had acted on all general and special laws relating to Village Corporations." It may be doubted whether this was intended to include the point now under discussion. But, if it was, the corporation was not bound to use the statutory method alone. The statute simply gives it the option to do so if it chooses. "The meetings of any village corporation may be notified" etc. If accepted and the places actually designated the corporation would not be thereby absolutely deprived of using the method designated in its charter. The meetings were legally called.

3. The defendant finally contends that the assessments were invalid because the assessors in both years did not make up an original and independent assessment, but simply copied the valuation as made by the assessors of the town of Camden. The charter provision relating to assessment is as follows: "Any money raised by said corporation for the purposes aforesaid, shall be assessed upon the property and polls within the territory aforesaid, by the assessors of said corporation in the same manner as is provided by law for the assessment of county and town taxes; and said assessors may copy the last valuation of said property by the assessors of the town of Camden and assess the tax thereon, if said Corporation shall so direct" etc., Sec. 3.

It is admitted that the Corporation had not "so directed," but this error on the part of the assessors is not sufficient to create a defense to this suit. We need only to quote the rule adopted in this State in this class of actions, that "this not being a case where the defendant's person or property is levied upon by direct warrant from the assessors, but being, instead, an action for the tax, the action will not be defeated by any mere irregularities in the election of assessors or collector, or in the assessment itself, but only by such omissions

or defects as go to the jurisdiction of the assessors, or deprive the defendant of some substantial right, or by some omission of an essential prerequisite to the bringing of the action." *Greenville* v. *Blair*, 104 Maine, 444; *City of Rockland* v. *Farnsworth*, 111 Maine, 315.

The omission here falls within the non-jurisdictional and harmless class.

Judgment for plaintiff for $25.08 and interest from date of the writ.

CHARLES H. DUDLEY *vs.* R. P. HAZZARD COMPANY.

Kennebec. Opinion December 14, 1914.

Assumption of Risk. Contributory Negligence. Damages. Personal Injuries. Negligence.

In an action to recover for personal injuries while in the defendant's employ in its shoe factory at Gardiner, the jury having rendered a verdict for the plaintiff in the sum of $6500 and the case being before the Law Court on defendant's motion, it is,

Held:

1. That upon the question of the defendant's legal liability, and the plaintiff's right of recovery the record fails to convince the Court that the verdict was manifestly wrong.
2. That upon the question of damages the verdict is so extravagantly large as to warrant its diminution or the granting of a new trial. After critically studying and balancing the testimony on this branch of the case, the conclusion is that the sum of three thousand five hundred dollars would be full and fair compensation for the injuries received.

On motion for new trial by defendant. If the plaintiff, within thirty days after the certificate is filed, remits all of the verdict in excess of $3500 motion overruled; otherwise, motion sustained.

This is an action on the case to recover for personal injuries alleged to have been sustained by plaintiff while in the employ of the defendant, on account of the negligence of the defendant. Plea, the general issue.

The jury returned a verdict for the plaintiff of $6500, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Benedict F. Maher, for plaintiff.

McGillicuddy & Morey, and Andrews & Nelson, for defendant.

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

CORNISH, J. Action on case to recover for personal injuries sustained by the plaintiff on January 13, 1912, while in the defendant's employ in its shoe factory at Gardiner. The jury returned a verdict for the plaintiff in the sum of $6500, and the case is before the Law Court on defendant's motion.

The plaintiff, a man fifty-four years of age, was employed in the basement of defendant's Mill No. 2, and his work consisted in sorting wooden lasts, removing them from a box where they were deposited by a chute from the finishing room on the third floor of Mill No. 1, and placing them in their proper bins in the basement of Mill No. 2. This chute was constructed of a six inch wrought iron pipe, which extended between the two parallel buildings with a drop of six inches per foot for a distance of forty-two feet. The chute entered the basement of Mill No. 2 through the foundation wall and then, by means of a cast-iron elbow was turned parallel with the wall, and continued on down to within a few feet of the floor, where the pipe from the elbow entered a wooden box or bin built to receive the lasts as they were delivered from the chute. Prior to December 23, 1911, the elbow was immovable, with a manhole on top through which the chute could be cleared in case of clogging, and if the cause was beyond the arm's length a jointed rod was used consisting of three or four sections of half inch iron pipe, each about ten feet long and having a thread on one end and a coupling on the other. This method of chute construction had caused so much trouble in the way of clogging, that in an attempt to obviate the difficulty, on December 23, 1911, three weeks before the accident, a detachable

was substituted for the fixed elbow, and the chute was lowered where it entered the basement so as to increase the pitch. After these changes and up to the time of the accident there appears to have been no plugging of the chute and therefore no necessity of using the jointed rod.

On the morning of the accident, according to the plaintiff's testimony, he discovered that the chute had become clogged, and he reported the fact to Mr. Turner, the foreman, who replied, "Let it go to h——." The plaintiff replied "All right," and started off about his work, when Turner said, "I guess I will go upstairs and see about it." Shortly after, the plaintiff heard a rapping on the pipe, and ran and hoisted up the cover of the box and asked what was wanted. Mr. Turner, who was then at the upstairs end of the chute, replied, "Take the elbow off and light a match at the end of the pipe." This the plaintiff proceeded to do. He climbed up on a pile of sacks filled with lasts, began to unhitch the fastenings of the elbow and with the help of another man took it down. He found a jam of a dozen lasts in the elbow, removed them and then lighted a match and held it up to the end of the chute as ordered. He continues: "The chute was right opposite me, and I asked Mr. Turner if it was all right and he said "Yes." And then I stepped back with my right foot off from the lasts, back on to the floor, and then the rod hit me." When standing upon the sacks he says the elbow was breast high and that at the time he was struck, he was stepping down from the sacks, having one foot on them and the other on the floor. The entire rod did not come down but only one section which became unjointed because of worn-out threads.

A thorough study of all the evidence convinces us that the jury had a right to accept the plaintiff's story as true. He is not seriously contradicted, and on the other hand he is corroborated by two eye witnesses of the accident. Nor do we think the verdict upon the question of legal liability is so manifestly wrong as to warrant this Court in disturbing it.

1. *Defendant's Negligence.*

The negligence relied upon by the plaintiff is incidentally the insufficiency in the size of the chute, but principally the furnishing of a defective rod with which to remove any jam that might be formed. It is the latter which he claims to be the sole cause of the accident. The sections were exhibited to the jury and have been produced

before the Law Court. The jury found that the threads had been badly worn, allowing the sections to become easily unjointed and that they were in an unsafe condition for use. This finding was justified by the facts. It was the duty of the defendant to exercise reasonable care in providing reasonably safe machinery and appliances and a reasonably safe place in which its employees could work. It must be conceded that the chute, as first constructed and operated, did not meet this requirement. The smallness of the pipe, only six inches in diameter, combined with its manner of construction permitted frequent cloggings, and to free these, these defective sections were furnished. Only a few weeks before the accident the rod had separated under similar conditions, when being used by the foreman Turner, and had stopped at the manhole, as it must under the former style of construction, and the plaintiff helped take the rod out. He testifies that he subsequently showed it to the Superintendent, Mr. Thompson, and told him the threads were badly worn, and that Thompson acknowledged they were in bad shape and promised to have them repaired. It is true that all this happened before the change, and that the defendant took steps to obviate the difficulty in the chute. But that of itself did not relieve it from the duty resting upon it. It was still bound to use reasonable care in furnishing a reasonably safe chute. It changed the elbow and increased the pitch, but it did not enlarge the pipe nor repair the rods. It is not enough to say that with the changed construction it had no reason to expect that further cloggings would occur. If they should occur the appliances provided for the remedy were the same thread-worn sections, and when the chute did clog on the day of the accident it was these thread-worn sections in the hands of the foreman Turner that caused the injury. Moreover, under the old construction the use of the unsafe rod was attended with less danger than under the new because the immovable elbow would stop its course, if it became detached and escaped, but the movable and removed elbow allowed it a free vent.

Some testimony was introduced in regard to another rod, a "thirty foot rod," which was kept outdoors between the two buildings, and which is claimed to have been in good condition. But that has no bearing upon this case. It was used, if at all, through a manhole cut in the chute outside the building, and not in the manner nor from the place where the defective rods were used. This is not the case

of where a plaintiff has the selection of his tools and himself chooses a defective instead of a sound one, but where the injury is caused by the foreman using the only tool at hand. This rod was in the hands of Turner and not of Dudley. Considering all the testimony we cannot say that the jury were palpably wrong in finding that the defective condition of the rod was the proximate cause of the accident, that the defendant was legally responsible for that condition, and that it had not exercised the degree of care required of an employer under all the circumstances.

2. *Contributory Negligence.*

Whether or not the plaintiff was guilty of contributory negligence depends upon where he was and what he was doing at the time of the accident. The defendant in an elaborate argument, based upon mathematical computations, contends that the plaintiff carelessly placed himself directly in front of the chute and in the path of anything that might be passing through it. The plaintiff admits that he appreciated the possible danger in so doing, and that he supposed he was out of the range, but that the sacks on which he stood were unstable and in stepping from them to the floor he must in some way have gotten in range and so received the injury. The defendant further argues that the plaintiff must have been carelessly looking up the pipe; but this the plaintiff emphatically denies, and the two young ladies who were near by and were witnesses to the accident corroborate his statement.

It is needless to further discuss the evidence on this point which is purely a question of fact. The record fails to convince us that in this respect the verdict was manifestly wrong.

3. *Assumption of Risk.*

This point raised in defense also fails. It is true that the plaintiff had known and appreciated the defective condition of the rod-sections but he testifies that he called the attention of Superintendent Thompson to the fact and the Superintendent promised to have them repaired. This statement the Superintendent denies. It was for the jury to determine which statement was correct, and they accepted the plaintiff's. There is nothing inherently improbable in it, and on the contrary it has the atmosphere of reasonableness and probability. If this was the fact then the plaintiff had a right to continue his work on the strength of that promise, and was relieved from the burden of himself assuming the risk. *Dempsey* v. *Sawyer*, 95 Maine,

298. And it should be added that this jointed rod had been used in connection with the chute before the changes were made and not after, and the plaintiff had a right to assume that by the new construction this use had been rendered unnecessary.

4. *Damages.*

On this point the Court is of opinion that the verdict is so extravagantly large as to warrant its diminution or the granting of a new trial.

The plaintiff was fifty-five years of age. His injuries consisted in the loss of the right eye and a resulting disturbance of the nervous system. The practical consensus of the medical testimony is that there has been a substantial improvement in the nervous condition which may be expected to continue. The plaintiff testified that at the time of the trial he slept "quite well, fairly well," that his appetite had been all right, and his weight was 213 pounds. His suffering must have been severe for a time at least. The accident happened on January 13, 1912. He was under medical treatment until October 31, 1912, when the eye was removed, and since that time he has received more or less medical services. But during the summer of 1912 he worked eighty-four days on the log boom in the Kennebec River, although he claims that his associates performed a great part of his duties. His wages were $2.75 per day, the same as before the accident. In the summer of 1913, he worked again for the same company, and at the same task, eighty-five days at the same rate. His pay at the shoe factory was ten dollars and fifty cents per week. His medical expenses aggregate about three hundred dollars.

After critically studying and balancing the testimony on this branch of the case our conclusion is that the sum of three thousand five hundred dollars would be full and fair compensation for the injuries received,

If the plaintiff, within thirty days after the certificate is filed, remits all of the verdict in excess of $3,500 motion overruled, otherwise motion sustained.

SARAH T. ROLLINS *vs.* OWEN E. BLACKDEN.

Penobscot. Opinion December 14, 1914.

Adverse Use. Burden. Damages. Easement. Inchoate Easement. Nominal Damages. Prescription. Trespass. Water.

1. An easement to take water from a well of another is created by prescription only by an adverse use of the privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible and uninterrupted that knowledge will be presumed and exercised under a claim of right, adverse to the owner and acquiesced in by him, for at least twenty years.
2. If the adverse use of a privilege continues for twenty years without interruption or denial on the part of the owner having knowledge of it, it is conclusively presumed to have been with his acquiescence.
3. The grant of an easement to take water from a well interrupts an inchoate easement claimed by another by prescription. It disproves acquiescence.
4. An inchoate easement to take water from a well is interrupted by an actual disturbance of and interference in, the exercise of the claimed right.
5. In a suit to recover damages for taking water from a well, when it appears that the plaintiff is entitled only to so much water as is needed for the lot on which the well stands, the burden is on the plaintiff to show how much was needed.

On report. Judgment for plaintiff for one dollar damages.

This is an action of trespass in which the plaintiff alleges that defendant at Dexter, in the County of Penobscot, on October 12, 1897, and on divers days and times between that day and the date of writ, September 4, 1904, with force and arms unlawfully broke and entered the plaintiff's close in Dexter Village, in said County, and dug ditches and canals through her said grounds and laid aqueducts and water pipes in said ditches, etc.

Plea, the general issue, with brief statement and counter brief statements by plaintiff. At the conclusion of the evidence, by agreement of parties, the case was reported to the Law Court for decision, upon so much of the evidence as is competent and legally admissible.

The case is stated in the opinion.

D. D. Stewart, for plaintiff.

F. D. Dearth, and Louis C. Stearns, for defendant.

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

SAVAGE, C. J. Trespass quare clausum. The case comes before the Law Court on report.

The most important controversy between the parties relates to the right of the defendant to draw water from a well on the land of the plaintiff. One phase of this controversy was considered by this Court in *Rollins* v. *Blackden,* 99 Maine, 21.

We gather from the evidence the following statement of facts. The plaintiff is the owner of two adjoining lots of land lying on the south side of Main Street, in Dexter. Her fee in each lot extends to the center of the street. Both lots formerly belonged to one Bryant. Bryant conveyed the westerly lot, on which plaintiff's buildings stand, to the plaintiff's mother, from whom she took title several years prior to 1882. It was said in argument to have been in 1872. The easterly lot was conveyed by Bryant to the plaintiff in 1882. In 1871, one Flynt dug a well twelve feet deep on the front end of the easterly lot, within the limits of the street, and about one rod easterly from the dividing line of the lots. He dug a trench in the street, westerly across the westerly lot and so on to the hotel now owned by the defendant, but which was then owned or leased by one Hayes. He laid a one inch pipe from the well to the hotel, and from that time on until 1897, when he sold his right, such as it was, to the defendant, he continued to draw water from the well and sell it to the owners or occupants of the hotel. It appears that the pipe entered the well about six feet below the surface of the ground and was bent down in the water, which was thus siphoned out. In 1881 Bryant, who then owned the easterly lot, but not the westerly one, conveyed to one L. D. Hayes who then owned or occupied the hotel "the right to draw water by an aqueduct from the well" . . . for the accommodation of the hotel, and for any other purpose, "with the right to convey the same on the southerly side of said road, but within the limits of the road, so far as my land extends westerly," which was about one rod, "and with the right of ingress and egress for the purpose of repairing said well or aqueduct." The deed contained

the following reservation:—"Whenever the lot on which said well is situated shall become the property of any other party than myself, then all rights hereby conveyed shall cease to this extent, viz: whoever may occupy said lot shall have the preference of the water of said well for all purposes whatsoever useful for the accommodation of said lot, or of any buildings that may be placed thereon, and said grantee, his heirs and assigns, shall have only the right to said water so far as not needed for said lot and buildings." This conveyance created an easement by grant. It does not clearly appear just what exercise Hayes ever made of the privilege granted by this deed. It gave him no right to convey the water across the westerly lot then owned by the plaintiff. The water continued to run as before in the Flynt pipe from the well to the hotel. There is some evidence from which it may be inferred that Flynt and Hayes made some arrangement for the use of the water. Hayes had an easement, exclusive so far as Flynt was concerned, in the right to draw water and convey it by pipe as far as to the plaintiff's westerly lot, but no farther. Flynt had put in a pipe system across the westerly lot and to Hayes' hotel. Neither ownership alone was of any value. But it appears that afterwards Hayes paid Flynt $45 annually for the water service.

The deed of Bryant to Hayes of the right to draw water was not recorded until after the 1882 deed of the easterly lot on which the well was situated, by Bryant to the plaintiff. But as was held in the former case, *Rollins* v. *Blackden*, 99 Maine, 21, the plaintiff took her title in 1882 with notice of the grant of water rights to Hayes. This appears by the following modified covenant of Bryant in her deed, viz: that the premises "are free from all incumbrances, except surplus water from well beside road conveyed to L. D. Hayes, and the right to maintain his aqueduct."

The case shows that in 1882, after the plaintiff purchased the lot on which the well is situated, while Flynt was fixing the well, or digging about it, the plaintiff went to the well, told him that it was hers, and objected to his meddling with it, or digging around it, or on her terraces. Flynt told her that by authority of the town he had the right to go into the well, and that he owned it and the water pipe. He made no claim of right except that the town had given him authority.

Later, but about the same time, when Flynt was working on her land near the well, trying to find a leak in the pipe, the plaintiff told

him that he had no right there, and forbade his going on the land or digging any further. She showed him a copy of the deed from Bryant to Hayes, of the water rights. He replied in substance that the well was in the road, that she had no control in the road, and could not help herself, and that the town had given him the right. He kept on working.

Several years later, prior to 1888, Flynt, who owned the land on the northerly side of Main Street, began digging a trench across the street from his lot to the well, for the purpose, as he said, of running across to his own house to get the benefit of it for himself. The plaintiff told him. "You cannot do it. I will not have it." He replied that he had permission from the selectmen and should do it. She immediately consulted Mr. Crosby, an attorney, who went with her to the premises. He said to Flynt:—"Flynt, you stop. You know you haven't any right to take the water and if you don't stop I will take you into Court." He also gave Flynt written notice that he had no right to dig the trench upon the plaintiff's land, and draw the water from her well, forbidding him in behalf of the plaintiff from doing so. Flynt then stopped. The ditch itself had not reached the center of the road, which was the plaintiff's line, but Flynt had torn up the sidewalk on the plaintiff's side of the street, and put it over onto the plaintiff's terrace, and had dug along the edge of the terrace towards the well. Flynt replaced the sidewalk and went away.

In 1897, Mr. Flynt conveyed to the defendant "my well at south side of Main Street, abreast of Miss Sarah Rollins land, also my well situated in my garden in Flynt Place, north of upper Main Street, the right to go to and from for purpose of repairs, and all the pipe running from the above wells to said Blackden's cellar." On November 5, 1900, the son and sole heir of L. D. Hayes conveyed to the defendant all the water rights that his father had had under the 1881 deed.

Immediately after the defendant purchased the wells of Flynt in 1897, he reconstructed the system. He dug a trench in a practically straight line from the hotel to the well. The trench was all within the road limits, but it crossed the plaintiff's westerly lot, and extended a rod on the easterly one to the well. At the same time the defendant laid a two inch pipe, which entered the well about one inch from the bottom. The new pipe did not follow the line of the old one, except as in one or two places the new trench crossed the old. The

trench was dug deeper and wider than the old one, and the pipe naturally conveyed more water than the old one. At the same time the defendant dug a trench and laid a pipe from the Elder well, so called, on the Flynt lot, southerly across Main Street, and thence westerly within the road limits, and across the plaintiff's easterly lot to the Rollins well, so that the water from the Elder well, instead of being conveyed directly to the Flynt pipe, as formerly, was caused to run first into the Rollins well, from which it was conveyed with the other water to the defendant's hotel. And these are the acts of alleged trespass of which the plaintiff complains in her declaration. She sets forth the digging of the soil, the opening of the trenches, the laying of pipes; also the taking of water from the time of the trespass until the date of her writ, which was September 19, 1904.

One other feature of this litigation must be mentioned. On December 5, 1900, the plaintiff sued out a writ of entry against the defendant, for the recovery of both lots of land. No mention of easements was made in the declaration. But she demanded damages "for rents and profits received by said Blackden therefrom, and for the trespass and injuries committed by him thereon." The defendant, without filing the general issue, undertook to disclaim specially, except as to the well and aqueduct. His plea was held to be faulty, was ordered stricken off, and general judgment was ordered for the plaintiff. Exceptions were taken to the order, which were subsequently overruled by the Law Court, with an order that the damages be assessed at nisi prius. At the hearing in damages, the defendant offered evidence in reduction of damages, of a prescriptive right to draw water from the Rollins well, and to take it across the plaintiff's premises towards his hotel. The plaintiff objected to the evidence on the ground that the defendant was concluded by the pleadings and judgments already entered. Thereupon the question of damages, and the admissibility and effect of the evidence respecting damages were reported to the Law Court. The Law Court, finding that the plaintiff had not shown herself damaged, or to put it another way, that she had not shown that the defendant had received, or become accountable for, any rents and profits which belonged to her, had no occasion to consider any other question, and directed that the plaintiff have judgment for the demanded premises, but without damages for the rents and profits.

In the former opinion, if we may judge from expressions in the brief of the eminent and learned counsel for the plaintiff, the Court failed to make clear the grounds of exclusion of damages, especially with respect to the trespasses. It is pertinent to this discussion to do so now. The action was a real action. In her writ the plaintiff claimed damages in the way of rents and profits and for certain unspecified trespasses. The real bone of contention was the use of the water. In a real action, the plaintiff may recover for rents and profits, which are defined to be the clear annual rental value of the premises while the defendant is in possession, and for any destruction or waste. These are the limitations of the statute. R. S., Chap. 106, Secs. 11 and 12. A plaintiff cannot recover for trespasses not amounting to destruction or waste. The rule of the common law is modified by the statute. *Larrabee* v. *Lumbert*, 36 Maine, 443. The trespasses complained of did not amount to destruction or waste. Besides, damages for destruction and waste were not declared for.

The defendant has pleaded the general issue, and by way of brief statement, the statute of limitations, a prescriptive right to draw the water from the well by means of the ditches and pipes mentioned, a right by grant to do the same, and that the plaintiff is barred by the former judgment from recovering damages for the water taken.

The plaintiff takes issue with these claims. And particularly with reference to the claimed prescriptive right, she contends that if Flynt ever had an inchoate prescriptive easement it was interrupted by the deed from Bryant to Hayes of the water privilege in 1881, by the plaintiff's denial of right and forbidding the use of water by Flynt in 1882, and lastly by what took place when Mr. Crosby was present and gave notice, oral and written, to Flynt to proceed no further.

First, we will inquire whether the defendant has an easement by prescription. On this question the burden of proof is on the defendant. *Sargent* v. *Ballard*, 9 Pick., 256. If the proof be left doubtful, he fails. 2 Greenl. Ev., Sec. 539.

An easement to take water from another's spring or well is an incorporeal hereditament. It may be created by grant or by prescription. It is created by prescription only by an adverse use of the privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible and uninterrupted that knowledge will be presumed, and exercised under a claim of

right adverse to the owner and acquiesced in by him . . . for a period equal at least to that prescribed by the statute for acquiring title to land by adverse possession. *Stillwell* v. *Foster*, 80 Maine, 333; *Sargent* v. *Ballard*, 9 Pick., 251; *Arnold* v. *Stevens*, 24 Pick., 112; *Powell* v. *Bagg*, 8 Gray, 441; *Smith* v. *Miller*, 11 Gray, 145; *Blake* v. *Everett*, All., 248; *School Dist.* v. *Lynch*, 33 Conn., 330; *Lehigh Valley R. R. Co.* v. *McFarlan*, 30 N. J., Eq. 180; *Workman* v. *Curran*, 89 Pa., At. 226; *Nichols* v. *Ayler*, 7 Leigh., 546; *Bealey* v. *Shaw*, 6 East., 216; *Livett* v. *Wilson*, 3 Bing., 115; 2 Greenl. on Ev., Sec. 539; Washburn on Easements, (3rd Ed.) page 160; Jones on Easements, Sec. 164; 14 Cyc., 1147. Each of the elements essential to the creation of a prescriptive easement is open to contradiction and liable to be disproved. *Smith* v. *Miller*, supra. But the existence of all the elements for the requisite period creates a right resting upon a presumption, juris et de jure, conclusive against attack.

The actual point of attack in this case is the acquiescence of the owner, Bryant at first and the plaintiff afterwards, for a continuous period of twenty years. Proof of acquiescence by the owner is essential. So, in effect, say all the authorities above cited. Where the adverse use has continued for twenty years without interruption or denial on the part of the owner, and with his knowledge, it is conclusively presumed to have been with his acquiescence. *School Dist.* v. *Lynch*, supra; *Perrin* v. *Garfield*, 37 Vt., 304. In the matter of acquiescence, the creation of a prescriptive easement logically differs from the acquisition of a title to real estate by adverse possession. In the former the possession continues in the owner of the servient estate, and the prescriptive right arises out of adverse use. In the latter, the owner is ousted from possession, and the right or title arises out of adverse possession; and nothing short of making entry, or legal action, will break the continuity of possession. *Powell* v. *Bagg*, supra; *Workman* v. *Curran*, supra; Washburn on Easements, page 163.

The plaintiff contends the original use now claimed to have been prescriptive was by license. If so, it is conceded that there was no prescription until the use became adverse. The authorities all agree on this point. Jones on Easements, Secs. 179, 799. The fact that Flynt claimed his right through the permission of the town or selectmen, and not from the owner of the servient estate, furnishes ground for the inference that the digging and subsequent use were

adverse to the owner. At the best, there is very little in the case to indicate whether the use was originally permissive, or was adverse. But if we assume that it was adverse and prescriptive, we next meet the contention that the easement was interrupted.

While the authorities agree that acquiescence is essential, they are not agreed as to what kind of degree of non-acquiescence will work an interruption. On one side the leading case is *Powell* v. *Bagg*, 8 Gray, 441, in which the Court held that if before the lapse of twenty years "the owner of the land, by a verbal act upon the premises in which the easement is claimed, resists its exercise, and denies its existence, his acquiescence is disproved, and the essential elements of a title by adverse use are shown not to exist." The Court said explicitly that it was not necessary to use actual force to dispossess the intruder.

The doctrine of *Powell* v. *Bagg* was approved and applied in *Lehigh Valley R. R. Co.* v. *McFarlan*, 30 N. J., Eq. 180; *Workman* v. *Curran*, 89 Pa. St., 226; *C. & N. W. Ry. Co.* v. *Hoag*, 90 Ill., 339; *Nichols* v. *Ayler*, 7 Leigh, 546; *Field* v. *Brown*, 24 Gratt., 74. See also *Bealey* v. *Shaw*, supra; *Stillman* v. *White Rock Mfg. Co.*, 23 Fed. Cas., 549; Washburn on Easements, page 162; 14 Cyc., 1147.

On the other hand, the Supreme Court of New Jersey in *Lehigh Valley R. R. Co.* v. *McFarlan*, 43 N. J., Law 605, virtually overruling the Vice Chancellor in the case between the same parties in 30 N. J., Eq. 180, held that mere denials of the right, complaints, remonstrances or prohibitions of user, unaccompanied by any act which in law would amount to a disturbance, and be actionable as such, will not prevent the acquisition of a right by prescription. The Court following by analogy the doctrine of adverse possession, based the doctrine on public policy, and said:—"Protests and mere denials of right are evidence that the right is in dispute, as distinguished from a contested right. If such protests and denials, unaccompanied by an act which in law amounts to a disturbance and is actionable as such, be permitted to put the right in abeyance, prescriptive rights will be placed upon the most unstable of foundations. . . . . If they be not accompanied by acts amounting to a disturbance in a legal sense, they are no interruptions or obstructions of the enjoyment."

The same doctrine is stated in *School Dist.* v. *Lynch*, 33 Conn., 330; *Okeson* v. *Patterson*, 39 Pa. St., 22; *Tracy* v. *Atherton*, 36 Vt., 503; *Kimball* v. *Ladd*, 42 Vt., 747. The authority of *Okeson* v.

Patterson is shaken by the later case of *Workman* v. *Curran*, supra, in the same Court. In both Vermont cases, *Powell* v. *Bagg* is discussed, and sought to be distinguished. In *Tracy* v. *Atherton*, the Court said of *Powell* v. *Bagg*:—"The owner of the land being already in possession could not make an entry to stop the effect of the user, or possession, and his act on the land of forbidding the other to enter and use the aqueduct was all that he could do to prevent him unless he resorted to force, and oridinarily the law does not require one to use force to assert his rights." "That decision (in *Powell* v. *Bagg*) was founded apparently on a sound distinction between an actual adverse possession of lands, and a mere easement upon lands, of which the owner himself is in actual possession."

While we shall not need to inquire whether mere denials of the right, and protestations against its exercise are an interruption of an inchoate easement, the discussions to which we have adverted are illuminating on the question why acquiescence is an essential element of a prescriptive easement.

In this case we must hold that the grant of the easement to take water made by Bryant, the owner of the land, to Hayes, in 1881, was an effectual interruption of Flynt's inchoate easement. As the authorities cited by the defendant show a deed by an owner does not interrupt the continuity of an adverse possession. But it seems to us that it is an act of the strongest potency to rebut the presumption of acquiescence in an adverse use. If the word "acquiescence" has any signification, it would seem that a conveyance of the thing itself, while it would not interrupt an adverse possession, would interrupt an inchoate easement, one feature of which must be acquiescence.

And if this were not enough, we think there was an interruption later when the attorney gave Flynt oral and written notice not to proceed further in digging to the well and drawing water therefrom, and Flynt heeded the notice and left. It is true the new ditch had not quite reached the plaintiff's premises. But the purpose was evident. And Flynt had then gone upon the plaintiff's land and digged and removed the sidewalk to effectuate his purpose of getting to the well. Here was an actual disturbance and interference, for which Flynt would have had a remedy if the plaintiff had been in the wrong. It seems to measure up to the rule of the cases which hold that mere denials and protestations are not enough, and that actual disturbance is necessary. And there has been no twenty year period of uninterrupted use since.

The defense of prescriptive easement then fails. The defendant had no right or title to the water and pipe, until the Hayes deed to him of November 5, 1900, and then only to so much water as was not needed for the plaintiff's easterly lot, with a right to maintain the pipe to the easterly line of the westerly lot, but no further. The acts of the defendant in 1897, in changing the system, putting in larger pipe, and bringing the water from the Elder well to the Rollins well were all trespasses, and running the water since from the well through the pipe upon the plaintiff's land has been a continuing trespass.

But the remedy for all acts in 1897 is barred by the statute of limitations. This action was not commenced until September 19, 1904. All claims for damages prior to September 19, 1898, are thus barred. The only damages now open for consideration are those of the continuing trespass since that date, that is, the maintenance of the pipes on her land, the bringing of water across her land from the Elder well, and taking water from the Rollins well through the pipe so far as it extended on her land. But in her real action commenced December 5, 1900, the plaintiff claimed, as rents and profits, the rental value of the water taken by the defendant up to that time. And that issue was tried out and determined adversely to the plaintiff, for want of proof, as stated in the opinion in that case, *Rollins* v. *Blackden*, 99 Maine, 21. The damages therefore, for water taken prior to December 5, 1900, have been litigated and settled. But the plaintiff may recover so much damages as she has proved for taking water and maintenance of pipes between December 5, 1900, and the commencement of this action. And the extent of damages to be recovered must be measured and limited by the plaintiff's right, and not by the defndant's want of right. She may recover the rental value of the water which the defendant has taken as belonged to her, and for no more.

The plaintiff claims that she was entitled to all the water in the well, and hence that she may recover for all that the defendant took. We do not think so. The question presented is the same question that was presented and decided in the former case, 99 Maine, 21. In that case we held that the grant to Hayes in 1881 of the right to draw water from the well was determinable as to so much of the water as might be needed for the easterly lot whenever that lot should become the property of another than the grantor, but that

until then, and afterwards until the water should be needed for the lot, and always as to so much of the water as should not be needed, the grant was absolute. It was also held that the plaintiff took her title to the easterly lot in 1882, with notice of the prior grant of the water right to Hayes, and that she did not acquire an absolute right from the well, but only, to use the language of the deed, "to have the preference of the water of said well for all purposes whatsoever for the accommodation of said lot, or of any buildings that may be placed thereon," and that she had a priority or first right to so much water as was useful and needed for the lot and buildings, but only to so much. We think the opinion in 99 Maine, 21, states accurately the right and the limitations of the right of the plaintiff. And it follows that if the defendant has deprived her of the exercise of her preference or priority, and has taken water from the well which was needed and would otherwise have been used for the benefit and accommodation of the easterly lot, he is so far liable. And here it may be noted again that after November 5, 1900, the defendant, under his deed from the heir of Hayes, owned the right to draw from the well all the surplus water, that is, all not needed for the easterly lot of the plaintiff. He had the right to conduct it across that lot, but not across the westerly lot.

The burden is on the plaintiff to show the amount of her damages, and again, as in 99 Maine, 21, we are troubled by the lack or indefiniteness of proof. There are no buildings on the easterly lot. The testimony discloses no need of water from the well, except for the use of a garden on that lot. Of the size of the garden, and of any special needs for water, there is no hint. And yet it is common knowledge that a garden needs some water. It does not appear that there was not at all times water enough in the well for the needs of the garden, which she could have drawn. The defendant's pipe enters the bottom of the well, but that does not necessarily mean that he has kept the well drawn down. In a water system supplying buildings through pipes that must necessarily end in faucets, there can be no presumption that the water is kept down to the level of the pipe as it enters the well or reservoir. She says that she would be glad to have the water for the garden, and would have used it if she could have had it. She says further that for two summers she did use water from the well, and one summer it was nailed up. But it does not appear whether these summers, or any of them, were

before December 5, 1900, or afterwards. It is true in any event, that she has never put a pipe into the well, nor a pump, nor meddled with it in any way. On October 30, 1900, and again in August 11, 1904, the plaintiff gave the defendant written notice to remove the pipes from the well, and from her land, stating therein that she needed and claimed all the water that naturally came into the well. In the latter notice, given about a month before this suit was commenced, she said she needed the water for the garden and the crops thereon, "and for the use and benefit of much larger crops and garden that could and would be cultivated but for the want of water of said well." But a notice is not proof. Notice of need is not proof of need. The notices in evidence express the wishes of the plaintiff, and her claims, too, but they do not prove the needs of her garden. Her right to water exists only when there is a present need for it. If her garden needs water she can take all it needs. If she wishes a larger garden, she can make one, and then take all the water which that needs. If she builds a house on the easterly lot, when water is needed for it she can take it from the well. But at all times she is limited by existing needs of the lot and building. The surplus belongs to the defendant.

Past needs are a matter of proof. As already stated, the garden has presumably needed some water. And it may be that the defendant's denial of her right was a sufficient excuse for her not taking it. But the question still remains, how much damage? We do not think the plaintiff has given us data sufficiently definite to make it proper, or even possible, for us to determine how much. The annual rental for water for the garden cannot be large. If assessment of actual damages were undertaken, the assessment should not go beyond the maximum damage proved, and we have nothing by which we can fix that limit. The plaintiff therefore must be content with nominal damages. The damages occasioned by continuing the pipes in the plaintiff's land are also nominal.

The certificate must be,

Judgment for plaintiff for one dollar damages.

CHARLES MORIN *vs.* ANATOLE MOREAU.

Androscoggin. Opinion December 16, 1914.

Attorney at Law. Exceptions. Justification. Malice. Malicious Prosecution. Probable Cause.

The defendant sought to justify and exonerate himself, because he first obtained the opinion of the magistrate who issued the warrant, who was a practicing attorney, and acted, in what he did, upon his advice.

Held:

1. That the cases are uniform that where a complainant consults an attorney at law and makes a full, fair and truthful statement of the facts, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the prosecution, which is thereupon commenced, it will go far, in the absence of other facts, to show probable cause and to negative malice, in an action for a malicious prosecution.
2. The details of the statement made by client to counsel, upon which the opinion is predicated, are indispensable in order to enable the jury to determine whether the necessary conditions are fulfilled.
3. It matters not that the magistrate was a practicing attorney, the advice being given not as an attorney, but as a magistrate. It is in such case insufficient to show probable cause or excuse the want of it.

On exceptions by defendant. Exceptions overruled.

Action to recover damages for malicious prosecution. The defendant was arrested on a warrant issued by the Municipal Court of Lewiston, in the County of Androscoggin, on complaint of the defendant. Plea, the general issue and brief statement, setting up a justification for the arrest. The jury returned a verdict for the plaintiff for $196.00. The defendant filed exceptions to the exclusion of certain evidence, which are considered in the opinion.

The case is stated in the opinion.

J. G. Chabot, for plaintiff.

McGillicuddy & Morey, for defendant.

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

HANSON, J. This was an action to recover damages for a malicious prosecution. The jury returned a verdict for the plaintiff in the sum of $196.00, and the case is before the Court on exceptions to the ruling of the presiding Justice excluding certain evidence.

The following from the exceptions substantially states the facts involved:

"The defendant owned a tenement house in Lewiston, the plaintiff was his tenant; the defendant ordered the plaintiff out of his rent; there was a bed of chives in the garden that both of the parties hereto claimed to own; the plaintiff pulled them up; the defendant went to the Clerk of the Lewiston Municipal Court and swore out a warrant for the arrest of the plaintiff herein. The plaintiff was arrested on the warrant and brought to the City building but was not actually put into the lock up although he did remain in the custody of the officers until he was admitted to bail about an hour later."

The defendant sought to justify his action under the following brief statement:

"That the plaintiff herein trespassed upon his garden and willfully entered on and passed over the garden of the defendant which said land was cultivated, between the first days of April and December after being forbidden so to do by the defendant and his agent, and thereupon a police officer of the City of Lewiston advised the defendant to procure a warrant for the arrest of the plaintiff herein and the defendant herein fully and fairly stated his case to Robert J. Curran, Esq., an attorney at law and clerk of the Lewiston Municipal Court and that thereupon a warrant was issued for the arrest of the plaintiff herein; that is all that he did he said in good faith, without malice and in pursuance of his legal rights."

The rulings excepted to related to proceedings in the Municipal Court, and particularly to the application for the warrant before mentioned, viz: "1. Q. And did you tell the clerk everything you knew about the case?

2. Q. When you went to Mr. Curran, the clerk of the Municipal Court, did you fully, in every particular, state your case?

3. Q. In acting in getting him arrested and going up to have him arrested, did you have any malice toward Mr. Morin, any desire to do him injury?"

The purpose of the first two questions was to show that the defendant was exonerated from responsibility to some extent, if not wholly, by relating his case to the clerk of the Court, who was an attorney at law, as well as clerk of the Court.

The point sought to be made by the defendant's counsel is that his client did in legal effect solicit the deliberate opinion of one learned in the law, and followed his advice in the premises, and that such action should negative want of probable cause, and also negative malice; and counsel cites *Stevens* v. *Fassett*, 27 Maine, 267; *Soule* v. *Winslow*, 66 Maine, 447; *Hopkins* v. *McGillicuddy*, 69 Maine, 273; *White* v. *Carr*, 71 Maine, 557, in support of his contention. But the cases cited do not support the position of the defendant. In each case the opinion sought was that of an atttorney at law as such, and not that of a magistrate, or clerk of a Court.

The cases are uniform that where a complainant consults an attorney at law, and makes a full, fair and truthful statement of the facts, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the prosecution, which is thereupon commenced, it will go far, in the absence of other facts, to show probable cause, and to negative malice, in an action for a malicious prosecution. *Stevens* v. *Fassett*, supra; *Finn* v. *Frink*, 84 Maine, 261, and cases cited. The complainant should state what he said, as well "as all he knew." The details of the statement made by client to counsel upon which the opinion is predicated are indispensable in order to enable the jury to determine whether the necessary conditions are fulfilled. *Watt* v. *Corey*, 76 Maine, 87. And it matters not that the magistrate was a practicing attorney, the advice being given not as an attorney, but as a magistrate. It is in such case insufficient to show probable cause, or excuse the want of it. 26 Cyc., 34, 35; *Comery* v. *Manning*, 163 Mass., 45; *Black* v. *Buckinham*, 147 Mass., 102. It is not seriously contended, nor does it appear in the record, that the defendant sought the advice of the magistrate even. The defendant can take nothing by the foregoing exceptions. The last objection has not been argued by counsel. We think, however, that the evidence attempted to be introduced was inadmissible. Mr. Curran was not an attorney within the rule. His advice as an

attorney was not solicited, and the representations made to him do not appear either from the defendant or Mr. Curran. In view of the record we hold that a proper foundation had not been laid for the introduction of the evidence excluded, if admissible at all.

Exceptions overruled.

SARAH CALKINS *vs.* ROSAN PIERCE.

Aroostook. Opinion December 17, 1914.

Agreement. Deed. Exceptions. Life Lease. Real Action. Revised Statutes, Chap. 106, Sec. 5. Seal. Tendency from Year to Year.

The plaintiff and defendant executed a written agreement, not under seal in substance that the plaintiff leased to defendant her homestead farm in Caribou, called by plaintiff a life lease; that the defendant was to support plaintiff as long as she lived, and to live and stay with her as long as she lived, at her home and pay the taxes, for the rent of said farm.

Held:

1. It is the law that a tenancy which operates as an estate for life, being a freehold, can only be passed by deed, that is, by writing under seal.
2. It does not follow that such a writing is invalid to create any estate, or right of possession of the property described, in the defendant.
3. The plaintiff has the legal title to the life estate in the land, but to maintain this action she must be entitled to possession as well. One may retain his title to real estate while debarring himself from the right of entering into possession.
4. Before the plaintiff can repudiate her agreement, or avoid it, as between her and the defendant, she must prove that the defendant has failed or refuses to perform her part of the contract, for the plaintiff is precluded by her own written agreement from asserting that the defendant disseized her or refuses to turn over the premises to her.
5. The defendant being in possession of the premises with the consent of the plaintiff and by virtue of a contract which binds her to render valuable services

to the plaintiff, the plaintiff cannot be permitted to avoid the contract which she entered into confessedly lawful and not repudiated by the defendant.

6. There being nothing illegal in the terms of the contract, the Court will not aid one party to violate it, when it has been performed or is being performed by the other party.

On exceptions by defendant. Exceptions sustained.

This is a real action to recover possession of a lot of land situate in Caribou, in the County of Aroostook. Defendant plead general issue, and by brief statement disclaimed any right and title to land outside of that formerly known as the "James Calkins Homestead," and the house on said farm. At the February term, 1914, the case was referred to the Court on an agreed statement of facts, with right of exceptions. The Court ordered judgment for the plaintiff and the defendant excepted to said order.

The case is stated in the opinion.

Wm. P. Allen, and Powers & Guild, for plaintiff.

A. B. Donworth, and Shaw, Burleigh & Shaw, for defendant.

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

HALEY, J. This is a real action brought to recover the possession of a lot of land situated in Caribou, County of Aroostook, and was heard at the February term, 1914, by the Court without a jury on an agreed statement of facts, with the right of exception.

The material facts of the agreed statement are, that the plaintiff was devised for her life by the will of her husband, proved and allowed in the Probate Court on the third Tuesday of December, 1895, the lot of land demanded and described in the writ; that on May 4th, 1909, the plaintiff and the defendant entered into the following agreement:

"Caribou, Aroostook County, Me.
May 4, 1909.

I, Sarah Calkins, this 4th day of May 1909 do lease to Rosean Pierce my homestead farm in the town of Caribou, this being a life lease, and said Rosean Pierce, is to support me Sarah Calkins as long as I live and said Sarah Calkins is to live and stay with me as long as she lives. I am to clothe and support the same at my home

for the rent of her farm. I Rosean Pierce am to pay all taxes on said farm and if I should die before this lease expires, this lease is void. The house on this said farm is not included in this lease."

Within a week of the date of said agreement the defendant, Rosean Pierce, went into possession of the premises described in said writing, which are the premises demanded in the writ, and has remained in possession ever since.

The parties agreed that the only contested point was the construction of the lease or writing above mentioned, submitted by the defendant under the above state of facts.

The Court filed the following ruling:

"I think the writing relied upon by the defendant, if it had been sealed, would have operated to create a tenancy for life. A tenancy which operates as an estate for life, being a freehold, can only pass by deed, that is, by writing under seal. It follows that the writing referred to is invalid to create any estate or right of possession in the Defendant, Rosean Pierce" and ordered judgment for the plaintiff, to which the defendant excepted, and the case is before this Court upon her exceptions. The ruling of the Court that "A tenancy which operates as an estate for life, being a freehold, can only be passed by deed, that is, by writing under seal," is undoubtedly the law. But it does not follow that the writing referred to is invalid to create any estate or right of possession of the property described, in the defendant, for, as said by the Court in *Hurd* v. *Chase*, 100 Maine, 561, "it may be conceded that the plaintiff has the legal title to the life estate in the land, but to maintain this action (ignoring technicalities in pleading) she must be entitled to possession as well. R. S., Chap. 106, Sec. 5. One may retain his title to real estate while debarring himself from right of entering into possession."

The plaintiff relies upon Sec. 35 of Taylor on Landlord and Tenant, which, after stating that a life estate can only be created by deed, reads: "An agreement, not under seal, that a lessor shall not turn out a tenant so long as he paid rent, has been held invalid; because the tenancy created by it would not be determinable so long as the tenant complied with the terms of his agreement, and would, therefore, operate as an estate for life, which, being a freehold, can only pass by deed."

The authority for the text is *Doe* v. *Browne*, 8 East., 165. An examination of the case shows that it does not support the text to

the extent claimed by the plaintiff. It was an action to recover possession of a messuage that the defendant was in possession of under an agreement not under seal, whereby the defendant was to have possession of certain premises for a certain rent, payable quarterly, which contained the following clause: "That W. Warner shall not raise the rent nor turn out J. Brown so long as the rent is duly paid quarterly, and he does not expose for sale or sell any article that may be injurious by W. Warner in his business." It was not claimed the tenant had broken any of the conditions, but the plaintiff rested his case on proving half a year's notice to the defendant to quit on the 25th day of March, and the question was whether the lessor had a right to determine the tenancy on such notice, considering the defendant as tenant only from year to year.

At the trial Lord Ellenborough, C. J., held the notice to be good, and a verdict was accordingly taken for the plaintiff with leave to the defendant to move to enter a nonsuit; a rule having been obtained for that purpose, upon the ground that the agreement operated as a lease for so long as the tenants pleased and he complied with the conditions. The case was argued in the King's Bench, and Lord Ellenborough stated, "that either his estate might enure for life, at his option; and then, according to Lord Coke, such an estate would, in legal contemplation, be an estate for life; which could not be created by parol; or; if not for life, being for no assignable period, it must operate as a tenancy from year to year; in which case it would be inconsistent with, and repugnant to the nature of such an estate, that it should not be determinable at the pleasure of either party giving regular notice." Lawrence, J., said: "If this interest be not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life; which can only be created by deed, as a feoffment, or a conveyance to uses. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield has been long exploded." The only point that case decided was that an estate for life can only be created by deed or will, and that the writing did not create a life estate, but did create an interest in the land; viz., a tenancy from year to year.

Green v. *Proctor*, 4 Burrows, 2208, was the case in which it was stated that the notion was advanced by Lord Mansfield of a tenancy from year to year, the lessor binding himself not to give notice to

quit. The case was tried before Lord Mansfield, and a verdict for the plaintiff was taken. The case was then taken to the King's Bench, and at the trial, Lord Mansfield stopped the argument for the defendants, saying, "At the trial I had no doubt upon the construction of the articles, and none of us have any doubt now, . . . the plaintiff cannot recover against his own covenant." Justice Yates said: "Even as a license to inhabit, it amounts to a lease," and it was the unanimous opinion of the Court that a nonsuit should be entered. The case shows, not the notion of Lord Mansfield of a tenancy from year to year, the lessor binding himself not to give notice to quit, being valid between the parties, but the unanimous opinion of King's Bench that that was the law.

The same principle was enforced in *Kelliher* v. *Fogg*, 108 Maine, 181, where the defendant was in possession of a store under a contract, not under seal, whereby he and his brother were to pay rent at the rate of twenty dollars per month during the winter and until the beginning of spring, and after that period to pay twenty-five dollars per month, and also, "that they are to have the use and occupation of said store as long as they want it." The defendant claimed he was occupying as lessor, under a written lease, with an option upon his part to hold a life estate. The plaintiff contended it was a tenancy at will, and after defendant had been in possession several years gave notice to terminate the tenancy. The Court held the plaintiff bound by his agreement, upon the authority of *Sweetsir* v. *McKenney*, 65 Maine, 225. From a hasty reading of the case it might seem that the Court decided that a life estate could be created by an instrument not under seal, but a careful reading shows that it was not so intended, but that it was intended to be an affirmance of the doctrine of *Sweetsir* v. *McKenney*.

The agreement did not convey a life estate, yet there is no pretense that it was not executed knowingly and understandingly by both parties. No fraud is claimed, and relying upon the agreement the defendant entered into possession of the premises. It is not claimed that the defendant has failed to perform her part of the agreement. In *Sweetsir* v. *McKenney*, supra, the Court, in discussing the same claim advanced by the plaintiff in this case said: "We think that in any view which could be taken, these plaintiffs are estopped by their agreements, from maintaining this process to oust the defendant from the possession that they gave him, so long

as he lives up to that agreement and desires to remain." Approved in *Willoughby* v. *Atkinson Co.*, 93 Maine, 189. Although the agreement did not convey a life estate, yet it was a valid agreement between the parties, and conveyed to the defendant an interest in the land, viz., the right of possession. It is not necessary, under our statute, that a lease of land be under seal. R. S., Chap. 75, Sec. 13; Chap. 96, Sec. 10, and the plaintiff, before she can repudiate it, or avoid it, as between her and the defendant, must prove that the defendant has failed, or refuses to perform her part of the contract, for the plaintiff is precluded, by her own written agreement, from asserting that the defendant disseized her, or refuses to turn over the premises to her, for the defendant is in possession of the premises with the consent of the plaintiff, and in possession by virtue of a contract which binds her to render valuable services to the plaintiff, and the plaintiff cannot be permitted to avoid the contract which she entered into, confessedly lawful and not repudiated by the defendant. There being nothing illegal in its terms, the Court will not aid one party to violate it when it has been performed, or is being performed, by the other. *Sweetsir* v. *McKenney*, supra, *Kelliher* v. *Fogg*, supra.

Exceptions sustained.

ISAAC T. ALLEN

vs.

MAINE CENTRAL RAILROAD COMPANY.

DANIEL T. BISBEE et al.

vs.

MAINE CENTRAL RAILROAD COMPANY.

Androscoggin. Opinion December 17, 1914.

Fire. Locomotive Engine. Preponderance of Evidence.

1. The testimony as to engine of defendant passing the lot just before the fire, and that other engines of defendant had set fire in that vicinity, tended to establish the possibility and consequential probability that the fire was communicated by the locomotive engine of defendant, but that alone does not satisfy the rule that the plaintiff must prove, by a fair preponderance of the testimony, that the engine did communicate the fire.
2. If other causes are eliminated; if other facts and circumstances are proved, tending to support the theory that a locomotive engine communicated the fire, the probabilities may turn the scales in favor of the plaintiff, but in this case other causes are not eliminated; and the facts and circumstances proved do not corroborate the plaintiff's theory.

On motion for new trial in each case. Motion in each case sustained and new trial granted.

These are actions on the case to recover the value of certain described property alleged to have been destroyed by fire communicated thereto by a locomotive of the defendant. The general issue was plead in each case. In the case of *Allen* v. *Maine Central Railroad Company*, the jury returned a verdict for plaintiff of $430.90, and in the case of *Bisbee* v. *Maine Central Railroad Company*, the jury returned a verdict for plaintiff of $866.08. The defendant filed a general motion for a new trial in each case.

The cases are stated in the opinion.

A. E. Verrill, for plaintiffs.
White & Carter (*Charles B. Carter*), for defendant.

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

HALEY, J. Two actions on the case brought by the plaintiffs to recover the value of property destroyed by fire alleged to have been communicated by a locomotive engine of the defendant. The cases were tried together at the January term in Androscoggin County, and the verdicts were for the plaintiffs, and the cases are before this Court upon motions to set aside the verdicts as against law and evidence.

The land of the plaintiff Allen, which was burned, adjoined the railroad and contained twenty-four acres. The plaintiff Allen also owned some cord wood on the land which was burned. The plaintiff Bisbee owned the sawed lumber on the lot. The fire occurred June 28, 1913, and the property of both plaintiffs was destroyed and damaged to the amount found by the jury.

The only question before us is did the testimony authorize the verdicts?

It was proved that shortly before the fire two trains of the defendant passed by the land, and there was some evidence that one of the engines emitted a large quantity of smoke. The wind was blowing down the track toward the place where the fire was discovered. The winter preceding the fire, the plaintiff Bisbee cut the pine upon the lot and sawed it into box bolts and lumber. The slash from the winter's operation remained upon the ground where it fell, was thoroughly dry, and of course very inflammable. Before the fire Hilda Atwood, who lived a short distance from the lot, was on the lawn in front of the house. She was taking care of, or looking out for her brothers, Charlie Atwood, eight years old, and Clyde Atwood, six years old, and Frank Thorne a neighbor's boy was playing with them. She heard the last train pass about twenty minutes before the fire was discovered. About three minutes before the discovery of the fire she went out back of the house where the boys were playing, over by the pine grove and by the ledge that the Thorne boy, called "his rock," but a few feet from where it is claimed the fire started, about one hundred feet from the track of the defendant.

At that time, three minutes before the fire was discovered, she saw no fire or smoke and returned to the house. The three boys had two boxes of matches and an empty syrup can, and were trying to light a smudge in the can when the Thorne boy left, the smudge being of dry pine spills. They could not make the matches burn at first. The Thorne boy left for home, and then started for the post office. The other boys began to scream, and Hilda Atwood went to the back of the house and saw the fire, and Mrs. Brissard looked across the railroad track and saw the two boys by the fire when it was as big as a water pail, and saw them run away, the Thorne boy, who had just left the Atwood boy, told that Charlie Atwood set the fire, and Hilda Atwood heard Charlie Atwood say he set the fire. There is a dispute in regard to where the fire started. The witness Spear, who was some seven hundred and fifty feet away loading cars, locates it within thirty feet of the railroad track, but before he came to where the fire was he took his horses to the stable and put them up. Meanwhile the fire had made great progress, and a Mrs. Jeans, who lives across the track, thought it was some thirty feet from the track; but her testimony is so indefinite that it must be a guess. The testimony showed that the fire backed towards the railroad, which would account for the location given by these witnesses after it had gotten under way.

The testimony as to the engines passing the lot just before the fire, and that other engines of the defendant had set fire in that vicinity, tended to establish "the possibility and consequential probability" that the fire was communicated by the locomotive engine of the defendant, but that alone does not satisfy the rule that the plaintiff must prove, by a fair preponderance of the testimony, that the engine did communicate the fire. If other causes are eliminated; if other facts and circumstances are proved tending to support the theory that a locomotive engine communicated the fire, the probabilities may turn the scales in favor of the plaintiff; but in this case other causes are not eliminated; and the facts and circumstances proved do not corroborate the plaintiff's theory, or tend to strengthen the probability that the engine of the defendant communicated the fire, but tend to prove that it did not. The evidence shows a possibility that the locomotive engine of the defendant communicated the fire. It also shows a possibility that the Atwood boy caused the fire.

As said by the Court in *Titcomb* v. *Powers*, 108 Maine, page 349, "To choose between two possibilities is guesswork, and not decision, unless there is something more which may lead a reasonable mind to one conclusion than the other." There is nothing in the evidence that authorizes the conclusion that the cause of the fire was the locomotive engine of the defendant rather than the act of the Atwood boy. To choose between the two possibilities is guesswork and not decision. An examination of the evidence shows but a possibility in support of the plaintiffs' claims, and make it manifest that the verdicts cannot stand.

Motions sustained.
New trials granted.

WILTON WOOLEN COMPANY and GEORGE G. FERNALD, In Equity,

vs.

G. H. BASS & COMPANY.

G. H. BASS & COMPANY, In Equity,

vs.

WILTON WOOLEN COMPANY.

Franklin. Opinion December 17, 1914.

Deeds. Privilege. Reservations. Rights. Vent. Water Power. Water Rights.

In bills in equity brought to determine the respective rights of the three owners of the water power developed by a dam at the outlet of Wilson Lake in the town of Wilton, it is,

Held:

1. That all these rights became united in one F. J. Goodspeed, and he is the admitted source of title under whom the three present owners claim.
2. That under the deed from Goodspeed to G. R. and Gardner G. Fernald dated November 12, 1898, the grantees were given a sufficient quantity of water from the canal through a penstock to supply a water wheel not venting over one hundred square inches of water.

3. That this grant to Fernald was unlimited and unrestricted, and has the priority over the power remaining at that time in Goodspeed, the grantor, or in his successors in title.

4. That under the same deed a restriction was imposed upon Goodspeed, his heirs and assigns, whereby, when the water in the pond should fall below four and one-half feet from the top of the dam, Goodspeed could not use more than one hundred square inches. This is subject to the Fernald priority of one hundred square inches. So that, at that head, both could not use jointly more than two hundred square inches; and if the quantity is less than that, Fernald is entitled to one hundred square inches and Goodspeed (now Bass & Co.) to the balance, up to one hundred square inches.

5. That Goodspeed conveyed the balance of the real estate and water rights to the Wilton Woolen Company on January 15, 1903, the Woolen Company thereby succeeding to his rights and being bound by his limitations.

6. That under the deed from the Woolen Company to Bass & Company, dated September 18, 1903, the Woolen Company conveyed not their entire water rights except what were reserved in the deed itself, but carved out a second and limited portion from the original Goodspeed ownership, leaving the residue in itself unconveyed.

7. That Bass & Company took under this deed the right "to draw from Wilson Lake sufficient to furnish 40 horse power, with latest improved wheels" etc., and no more. That its grant is limited, under conditions existing at the time of the conveyance, to forty horse power, and this continues until the water has reached a point four and a half feet below the top of the dam, subject at all times to the Fernald grant of one hundred square inches.

8. That the Wilton Woolen Company during that same period is entitled to all the water in excess of the Fernald grant and of the Bass & Company grant.

9. That when the water reaches the four and a half foot mark, Bass & Company are entitled to, and limited to, one hundred square inches, subject to the Fernald grant of the same amount; and if at any time Bass & Company are not using that full quantity the Wilton Woolen Company is entitled to the difference between what Bass & Company are using and the full one hundred square inches, so that the joint use of Bass & Company and the Woolen Company shall not exceed one hundred square inches.

10. That, no limitation as to time being stated in the deed, Bass & Company have the right to use the water, to which they are entitled, as many hours a day as they deem proper.

11. That the one hundred square inches of water to be used by Bass & Company when the four and a half foot point is reached, is to be measured at the water wheel, the same place where the forty horse power is to be measured.

12. That the matter of regulating the use of the water to comply with the rights of the respective owners is one of hydraulic engineering rather than of law, and can doubtless be arranged by agreement.

On report. Bill of *Wilton Woolen Company* and *Fernald* v. *Bass & Company* sustained with costs. Bill of *Bass & Company* v. *Wilton Woolen Company* dismissed. Case remanded for further proceedings in accordance with this opinion.

Bills in equity to determine the respective rights of the three owners of the water power developed by a dam at the outlet of Wilson Lake in the town of Wilton. Answers were filed to both bills and replications to the answers were filed. The Justice hearing the above cause, being of the opinion that questions of law were involved of sufficient importance to justify the same, and the parties agreeing thereto, this cause was reported to the Law Court upon so much of the foregoing evidence as is legally admissible, the Law Court to render such final judgment as the equitable rights of the parties may require.

The cases are stated in the opinion.

C. N. Blanchard, and E. E. Richards, for Wilton Woolen Co. and G. G. Fernald.

Frank W. Butler, and Wm. M. Bradley, for G. H. Bass & Company.

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

CORNISH, J. The problem before the Court in these cases is the determination of the respective rights of the owners of the water power developed by a dam at the outlet of Wilson Lake in the town of Wilton. Prior to November 12, 1898, there existed various water rights owned by several different persons, the old saw mill property being situated nearest the dam and the old grist mill property farther down the stream. What these rights were and how they were distributed among the owners becomes immaterial here, because it is admitted that they were all united in one F. J. Goodspeed, under deed from G. R. Fernald dated November 9, 1898, and from Franklin J. Clark dated July 11, 1899. Goodspeed is the agreed fountain of title to the rights now under consideration, and these rights are now owned by the three parties to these bills in equity, Gardner G. Fernald, G. H. Bass & Company, and the Wilton Woolen Company.

1. *Fernald Privilege.* The first parcel carved out was the Fernald property which was by deed dated November 12, 1898. This con-

veyance covered a part of the old grist mill lot with buildings thereon, subject to certain reservations immaterial here. The water rights conveyed and now in controversy were as follows:

"I also grant and convey to the said G. R. Fernald and Gardner G. Fernald their heirs and assigns, the right to construct and maintain a penstock over my land, under the surface, of sufficient capacity to supply a water wheel not venting over one hundred square inches of water. By the term "vent" meaning the area of the opening that will discharge the same amount of water the wheel uses under the same head as the wheel is placed.

The head of said penstock to start from any place in the wall of the canal, back of the present mill shed not nearer than twenty feet from the present flume to the present grist mill, and run to the land now deeded; granting the said G. R. Fernald and Gardner G. Fernald, their heirs and assigns the right to enter on or over my premises at any and all times for the purpose of making repairs on said penstock or to look after the rock at the head of said penstock. The head of said penstock not to be below the level of the flume of the grist mill. The rock for said penstock to be allowed to project into the canal a sufficient distance to allow the water to pass freely to the mouth of said penstock.

Also hereby conveying to said G. R. Fernald and Gardner G. Fernald their heirs and assigns, the right and privilege of having and using, on these premises herein described at all times a sufficient quantity of water from the above mentioned canal, through the penstock aforesaid to supply a water wheel not venting over one hundred square inches of water.

When the water in the pond is lower than within four and a half feet of the top of the present dam across the outlet of Wilson Pond, I restrict myself, my heirs and assigns from using from the power now owned by me an amount of water greater than that herein deeded to G. R. Fernald and Gardner G. Fernald, their heirs and assigns, viz: one hundred square inches."

The controversy on this conveyance arises over the restriction in the last paragraph. Mr. Fernald claims that he is entitled to one hundred square inches of water, whatever the head may be, while Bass & Company, as a subsequent grantee from Goodspeed, contend that when the water in the pond is lower than within four and a half feet from the top of the dam, then Fernald is not entitled to a priority

of one hundred square inches, but the then available water must be divided equally between Fernald and the Bass Company. That is, if under that condition there are only one hundred and fifty square inches available, Fernald is not entitled to one hundred and Bass & Company to fifty, but each is entitled to seventy-five.

In our opinion the Fernald contention must be sustained. When Goodspeed carved out the one hundred square inches and retained all the balance, then Fernald had a priority in the quantity granted. The right of the grantee to the extent of the grant is superior to that of the grantor, and neither the grantor nor those holding under him have the right to interfere with the grant nor diminish the quantity of water granted. *Oakland Woolen Co.* v. *Gas Co.*, 101 Maine, 198. The grant to Fernald was unlimited and unrestricted. Its terms are: "the right and privilege of having and using on these premises herein described, *at all times* a sufficient quantity of water from the above mentioned canal through the penstock aforesaid to supply a water wheel not venting over one hundred square inches of water." The only restriction is that self imposed upon the grantor, Goodspeed, as to the rest of the power. When the water reaches that low level, then "I restrict myself, my heirs and assigns from using from the power now owned by me an amount of water greater than that herein deeded to G. R. Fernald and Gardner G. Fernald, their heirs and assigns, viz: one hundred square inches." This imposes no restriction upon the grantee for the benefit of the grantor, but upon the grantor for the benefit of the grantee. The grantor at that low head cannot use more than one hundred square inches. Fernald has a priority for his grant of one hundred, and the grantor or his successor can use all in excess of one hundred up to two hundred but no more. The object of the restriction was to prevent the head from being drawn down by the grantor to too low a level and thereby unduly diminish or destroy the power already granted to Fernald. We need say no more concerning the extent of the Fernald grant and the quantity of water to which he is entitled.

2. *G. H. Bass & Co. and the Wilton Woolen Co.*

After the conveyance to Fernald, already considered, Goodspeed conveyed to the Wilton Woolen Company, on January 15, 1903, the balance of the real estate and water rights owned by him, and the Woolen Company therefore stood in his place, succeeding to his rights and being bound by his limitations.

On September 18, 1903, the Woolen Company conveyed to G. H. Bass (the predecessor in title of G. H. Bass & Co.) "Certain real estate and water power . . . . described as follows:

"The saw mill at outlet of Wilson Lake and yard subject to any rights of way hitherto reserved, or other reservations or restrictions of use of land heretofore made, and being the same mill described in deed by R. C. Fuller and George R. Fernald to Hiram Holt by deed of Sept. 13, 1883, and of record book 98, page 352, in Franklin Registry with the following water power and privilege *and none other* to wit: the right to draw from Wilson Lake water sufficient to furnish forty (40) horse power with latest improved water wheels, after a reasonable development of the privilege, until the water reaches a point four and one-half ($4\frac{1}{2}$) feet below the top of the dam as now used, but when the water has reached said point his right to use water is limited to one hundred square inches and he is to have that right, and in case the dam furnishing said power is raised or the power from said lake is in any way increased the said Bass shall be entitled to his full proportionate benefit. In case at any time when the water is below the four foot and one-half mark, and the grantee is not using the full one hundred square inches of water thereof, the grantor reserves the right to draw sufficient water through its own private waste gate to make up the full one hundred inches including that used by the grantee. Said grantee is to bear one-half of the expense of keeping in repair and maintaining canal on land herein conveyed, head gates and dam.

Also herein conveying all the machinery, tools and fixtures belonging to the grantor in said saw mill or used with and belonging to it."

What water rights do Bass & Company have under this deed and what, if any, still remained in the Woolen Company. The Woolen Company claims that this conveyance carved out a second portion from the original ownership and granted to Bass & Company certain real estate and a portion of the water rights, leaving in itself the residue unconveyed; while Bass & Company urge that the conveyance of the land at the outlet of the lake, the only point where the water could be used, conveyed ex necessitate rei their entire water rights also, except what were expressly reserved in the deed, and that such reservation marks the limit of the power remaining in the Woolen Company.

On this we must sustain the Woolen Company. True that company might have conveyed, by appropriate deed, all its real estate, dam, and water rights, but this it avoided with scrupulous care. It conveyed not all its property but only certain designated portions. It granted "the saw mill" and "yard," but not the dam, nor the head gates, nor the land on which they rest. They remained the property of the grantor, and there is an express provision that the grantee shall bear one-half the expense of maintaining them, the grantor of course to bear the other half, a strange provision indeed if title to the whole had passed to the grantee. Further, the deed granted, not all the grantor's water power and rights, but "the following water power and privilege *and none other*, to wit: the right to draw from Wilson Lake water sufficient to furnish forty horse power with latest improved wheels" etc. This is the limit of its grant, forty horse power, under conditions existing at the time of the conveyance and continues until the water has reached a point four and a half feet below the top of the dam. When it reaches that point, Bass & Company are limited to one hundred square inches, but their grant is at all times subject of course to the prior grant to Fernald, so that if, at that low level, there is a total of two hundred square inches, Fernald and Bass & Company are each entitled to one hundred; if there is more than that quantity, still they are limited to the one hundred each, while if there is less, Fernald has a priority of one hundred and Bass & Company the balance. This is in exact accord with the provisions in the Fernald deed from Goodspeed. Bass & Company have taken the place of Goodspeed. The restriction as to the use of one hundred square inches which Goodspeed imposed upon the power remaining in his hands has passed and remains attached to the same power in the hands of Bass & Company. But it is further provided that if at any time when the water is below the four and a half feet level, Bass & Company are not using the full one hundred square inches, then the Woolen Company may draw and use through its own private waste gate the surplus up to that amount, so that their joint use will only aggregate the one hundred square inches. It should be observed in this connection however that the quantity to be used by both the Woolen Company and Bass & Company, when the latter are not using all to which they are entitled, cannot infringe upon or diminish the prior one hundred inches belonging to Fernald.

Bass & Company contend that this reservation of a portion of the one hundred square inches is all that was retained by the Wilton Woolen Co. from its entire water power ownership when the conveyance to Bass was made. We can hardly conceive on what ground or for what purpose the grantor should have excepted the possible use of this insignificant quantity and have disposed of all the rest. It could be of no practical value of itself, uncertain as it is in both quantity and availability. But taken in connection with the retention of all the power over and above what was conveyed to Bass, the possible value of this increment can be seen.

The great contention between the parties, however, arises during the period before the four and a half foot limit is reached. That is the burden of the cross bill brought by Bass & Company in which they claim that the Woolen Company is not entitled to any water before that limit, that they are entitled to it all, except the Fernald grant, and they ask for an injunction to restrain its use by the Woolen Company. This claim assumes that the Woolen Company retained no water rights after the Bass deed was given, and that assumption we have already shown to be groundless. The maximum ownership of Bass & Company until the four and a half foot level is reached is 40 horse power, and all the power in excess of that (excepting of course the Fernald one hundred square inches) belongs still to the Woolen Company, and can be used by it in connection with its plant still further down the stream. No other reasonable construction can be given to the deed, viewed in the light of all the facts and circumstances.

This then defines the mutual rights of Bass & Company and the Woolen Company at the various stages of water on the dam. The testimony of the hydraulic engineer fixes the capacity of the Bass & Company's present water wheel at 40 horse power when the water is $4\frac{1}{2}$ feet below the top of the dam, and 65.35 horse power when one foot flash-boards are on the dam making a 19 foot head. They are entitled to the former, but not to the latter. The matter of regulating the use to comply with the right is one of hydraulic engineering rather than of law, and can doubtless be arranged by agreement.

In the first bill in equity we are asked to fix the number of hours that the water, to which Bass & Company are entitled, shall be used. No limitation as to time being stated in the deed the rule has been adopted in this State that the grantees have the right to use the

water as many hours a day as they deem proper. *Carleton Mills Co.* v. *Silver,* 82 Maine, 215; *Oakland Woolen Co.* v. *Gas Co.,* 101 Maine, 198, supra. Any other rule would seem to be an assumption of arbitrary power on the part of the Court.

We are also asked to designate the place where the 100 square inches of water to be used by Bass & Company, when the water in the dam is below the four and a half foot point, shall be measured. We think this should be measured at the water wheel. That is the point of measurement where the forty horse power is to be calculated, and we think the same point should be taken when the reduced quantity is used.

It is unnecessary to consider the case further. We have determined the construction to be placed upon the grants under which the several parties hold, and have defined their rights thereunder. The bill brought by the Wilton Woolen Company and Fernald is sustained with costs. Doubtless a final decree in that case can be agreed upon by the parties. If not, the sitting Justice can order a decree after such further hearing as he may deem necessary, and can issue a permanent injunction restraining Bass & Company from using any water in excess of the quantity to which they are entitled. The cross bill brought by the Wilton Woolen Company against Bass & Company is dismissed.

Case remanded for further proceedings in accordance with this opinion.

BERENICE A. MONK, Admx., *vs.* BANGOR POWER COMPANY.

Penobscot. Opinion December 17, 1914.

Assumption of Risk. Negligence. Nonsuit. Reasonable Care. Revised Statutes, Chap. 89, Secs. 9 and 10.

Both on account of the failure to satisfactorily prove negligence on the part of the defendant and upon the doctrine of assumption of risk, it is held that the plaintiff's action cannot be maintained, and that the nonsuit was properly ordered.

On exceptions by plaintiff. Exceptions overruled.

An action on the case to recover damages of defendant for negligently causing the death of plaintiff's intestate. The action is brought under the provisions of Revised Statutes, Chap. 89, Secs. 9 and 10. Defendant plead the general issue and filed a brief statement, alleging that the death of Benjamin W. Monk was caused solely by the negligence of Benjamin W. Monk. At the close of plaintiff's evidence, the presiding Justice directed a nonsuit, and the plaintiff excepted to said direction.

The case is stated in the opinion.

Bartlett Brooks, for plaintiff.

E. C. Ryder, and Edgar M. Simpson, for defendant.

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

PHILBROOK, J. This is an action on the case brought against the employer of the intestate, charging that his death was caused by the negligence of that employer. The action is brought under the provisions of R. S., Chap. 89, Secs. 9 and 10, for the exclusive benefit of his widow, who is the administratrix, and of his four children. At the close of the plaintiff's evidence the presiding Justice ordered a nonsuit to be entered, to which order the plaintiff seasonably excepted and the case is before us upon those exceptions.

The first burden resting upon the plaintiff is to prove the negligence of the defendant by a fair preponderance of all the evidence in the case. This leads us to a careful study and analysis of the evidence presented in the record.

It appears that the defendant, at the time of the death complained of, was the owner, and was in control of and operating a certain dam and power house on the Penobscot river, between the town of Milford and the city of Old Town, for the purpose of generating and supplying electric power. The intestate was an employee of the defendant, working, as occasion required, on the switchboard, as lineman and at general work about the power house. The plaintiff claimed that intestate was never a foreman or assistant superintendent.

The dam was composed of concrete, having wooden timbers set into its top and extending longitudinally its entire length. These timbers were twelve inches square, with four inch pipes in the upper surface, into which wooden stakes were driven for the purpose of holding flash-boards in place. These stakes required renewal and replacement from time to time and while performing this task in the middle of December, 1912, when ice was running and water was flowing over the dam, the plaintiff's intestate was swept from the dam into the water below and quickly drowned. A fellow workman describes the accident thus: "Well, we went out beyond that ledge, and were putting the stakes in, and I went back onto this ledge to get another stake. We could only put in one at a time. A man could only lug one stake and put it out there in what we called safety. And Ben was taking out the stakes, and I was putting in the new ones. I would lug out one, and then every time I would go back to the ledge and get another one where we had taken them across and put them on the ledge, and while I was back to the ledge,—I just got back to the ledge,—we had to watch our chances to go by—so I was back to the ledge getting another stake, and as I turned around I saw Ben down on the dam hanging onto a broken stake, and I dropped this stake and run out where he was, and just got hold of him just as a cake of ice slid up on his arms, and then another cake of ice struck me. He was going when I got hold of him, and another cake of ice struck me about in the knees there somewhere, and the current turned the upper edge of it down and made a regular coffer dam of my legs. I had to let go of him to swing around. I didn't want to go down over there head first." The first name of the plaintiff's intestate was Benjamin, and was referred to by this witness as "Ben."

The negligence declared upon in the writ and relied upon as a basis of action may be thus epitomized:

1. Failure to draw the water off from the dam to a safe and convenient level.

2. Failure to moor a boat over and above the dam for the purpose of placing the flash-boards therefrom.

3. Failure to provide other and suitable safeguards.

In other words, the plaintiff says that failure in these respects constituted want of ordinary care on the part of the defendant. Ordinary care is synonymous with reasonable care. And in all cases reasonable care means such care as reasonable and prudent men use under like circumstances. *Caven* v. *Granite Co.*, 99 Maine, 278. It is such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs under like circumstances. And this rule is now generally held to apply to employment in the most perilous places and in the manipulation and use of the most dangerous agencies. *Raymond* v. *Portland Railroad Company*, 100 Maine, 529.

Does the record disclose the exercise of ordinary care on the part of this defendant? We think the question must be answered in the affirmative. The situation was similar to that existing in many cases where dams are erected and water power is developed in our State. One witness called by the plaintiff testified that he was familiar with the usual precautions taken when flash-boards are put on and that they were put on in different ways; that they were sometimes put on from boats or scows, sometimes the workmen wade out on the dam as in this case, that in one place they were put on in one way and in other places in other ways. It does not appear that on this particular dam any method was used except that of wading out on the dam. It also appears that the stake holes were only five feet apart and when only one hole was prepared at a time and a new stake inserted therein the workmen had a substantial support on which to depend as the work progressed. It appears that the intestate had thus done the work on previous occasions. On this particular occasion, although warned to the contrary, he took out six or seven old stakes before replacing new ones, an act which the employer was not bound to anticipate, and an act which added materially to the danger of the situation. This was not a condition of danger for which the employer was bound to provide. So far as the evidence discloses, it appears that under all the circumstances, judging from

general experiences of the past and not by the backward look from the vantage ground of a particular event, the usual, ordinary duty which the defendant company owed to this plaintiff was fully done.

But another important element is to be considered. The servant is conclusively held to have assumed the risks of dangers which are known to him, and, as well, those which are incident to his work and which are obvious and apparent to one of his intelligence and experience. He is chargeable with knowledge of the things and conditions which he sees or ought, by the exercise of reasonable care, to see. And the master has a right to presume that he will see and guard against obvious dangers. If the servant fails in this respect, he is negligent. *Caven* v. *Granite Co.*, supra. In this case, whatever risks existed must have been fully known by this intestate, with his experience and intelligence, and he must be charged with assumption of those risks.

But the plaintiff urges that long continued labor, without sufficient rest, rendered the servant incapable of appreciating these risks. While such instances, under certain conditions and with certain risks, may arise, we do not think the record here supports the plaintiff's contention. Indeed the testimony would seem to clearly negative the idea. And not only this but when cautioned by a fellow workman as to the added danger arising from removal of extra stakes he acknowledged the warning. He had done the same work before, he assumed to give some directions at least to his fellow workmen, and so far as the evidence shows fully understood the task he was undertaking, and if so must have understood the risks of that undertaking.

Both on account of failure to satisfactorily prove negligence on the part of the defendant, and upon the doctrine of assumption of risk, it is apparent that the plaintiff's action cannot be maintained; and it was not only competent but proper for the presiding Justice to so declare by directing a nonsuit. *Bryant* v. *Great Northern Paper Co.*, 103 Maine, 32.

Exceptions overruled.

VINCENZO SURACE, In Error, *vs.* GUISEPPE PIO.

Cumberland. Opinion December 19, 1914.

Amendment. Motion. Pleading. Revised Statutes, Chap. 114, Sec. 2. Revised Statutes, Chap. 84, Sec. 11. Writ of Error.

1. That at common law amendments changing the parties are not allowable. Misnomers may be corrected, but the parties cannot be changed.
2. That under R. S., Chap. 84, Sec. 11, (originally Pub. Laws, 1874, Chap. 197), "In all civil actions the writ may be amended by inserting additional plaintiffs, or by striking out one or more plaintiffs where there are two or more and the Court may impose reasonable terms."
3. That the statute does not permit the substitution of one sole plaintiff for another, and therefore this amendment should not have been allowed.
4. That R. S., Chap. 84, Sec. 10, providing that "no process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only or for circumstantial errors or mistakes, which are by law amendable, when the person and case can be rightly understood" does not apply to the change of parties.
5. That under that section misnomers may be corrected, but the distinction between cases of misnomers and of a substitution of parties like that at bar is that the former state the wrong name of the right party, while the latter state the right name of the wrong party.

On report. Writ of error. Sustained with costs. Judgment reversed.

This is a writ of error to reverse a judgment rendered on default, in which Isaac Abrams was plaintiff and Michele E. Pagano and Vincenzo Surace were defendants, returnable to the September term, 1913, of Superior Court for Cumberland County. At this term, the defendants were defaulted without appearance. At the October term of said Court, on motion of plaintiff's attorney, the default was striken off, and the name of Guiseppe Pio substituted for that of Isaac Abrams, and the action again defaulted and went to judgment November 28, 1913. Vincenzo Surace sued out this writ of error on November 28, 1913. The plea was the general issue.

At the hearing below, the case was reported to the Law Court by agreement of parties, upon writ of error, pleadings in the original writ in *Pio* v. *Surace*, petition to amend original writ and decree allowing said amendment.

The case is stated in the opinion.

Charles G. Keene, and R. S. Oakes, for plaintiff.

M. P. & H. P. Frank, for defendant.

SITTING: SAVAGE, C. J., SPEAR, CORNISH, BIRD, HALEY, HANSON, PHILBROOK, JJ. BIRD, J., did not concur.

CORNISH, J. Writ of error based on the following facts. On July 18, 1913, a writ was sued out of the Superior Court for Cumberland County returnable at the September term, in which Isaac Abrams was named as plaintiff and Michele Pagano and Vincenzo Surace were defendants. Upon this writ Surace was arrested on July 18, 1913, under R. S., Chap. 114, Sec. 2, and committed to jail. No service was made upon Pagano. At the return term no appearance was entered for the defendant and the action was defaulted. At the October term the plaintiff's attorney filed a written motion asking that the default be striken off, and that the name of Guiseppe Pio be substituted for that of Isaac Abrams as plaintiff. The motion stated that Pio was the real plaintiff in interest; that his name was intended to be inserted as plaintiff in the writ when drawn; that the insertion of the name of Abrams was a clerical error on the part of the stenographer, that it was a mere circumstantial error or mistake and should be amended as the person and the case could be rightly understood. The presiding Judge granted the motion, and after amendment the action was again defaulted and went to judgment on November 3, 1913. Surace sued out this writ of error on November 28, 1913, the cause alleged being that the amendment was unauthorized by R. S., Chap. 84, Sec. 11, and therefore not allowable.

At common law amendments striking out the names of plaintiffs or inserting the names of additional plaintiffs are not allowable. In other words the parties cannot be changed. A misnomer may be corrected (1 Ch. Pl., Sec. 266) but in such a case the party remains unchanged. This has been well stated as follows: "At common law the power to amend in case of a misnomer depends not upon the

question whether the amendment changes the name but whether or not it changes the party. If it only cures a mistake in the name of the party by or against whom the suit is prosecuted it may be made. But if it introduces a different party it is inadmissible." Ency. Pl. and Pr., Vol. 1, page 535. Instances of the application of this common law rule in this State as to defendants are to be found in *Redington* v. *Farrar*, 5 Maine, 379; and *Winslow* v. *Merrill*, 11 Maine, 127; and as to plaintiffs in *White* v. *Curtis*, 35 Maine, 534; *Ayer* v. *Gleason*, 60 Maine, 207; and *North River Lodge* v. *Inhabitants of Brooks*, 61 Maine, 585.

To obviate this strictness of the common law as to parties defendant the Legislature of Maine by Pub. Laws, 1835, Chap. 178, Secs. 4 and 5 (now R. S., Chap. 84, Sec. 13) provided that amendments might be made by striking out one or more defendants or by inserting additional defendants. This act, being in derogation of the common law, has been strictly construed, and it has been held that a new defendant cannot be substituted for the only one originally named in the writ. *Duly* v. *Hogan Co.*, 60 Maine, 351; *Glover Co.* v. *Rollins*, 87 Maine, 434.

With the like purpose of obviating the rigorous rule of the common law as to parties plaintiff, the legislature of 1874 (Pub. Laws, 1874, Chap. 197, now R. S., Chap. 84, Sec. 11) provided that "In all civil actions the writ may be amended by inserting additional plaintiffs or by striking out one or more plaintiffs when there are two or more and the Court may impose reasonable terms." This act has been construed with equal strictness, and its scope has not been extended beyond the plain and natural meaning of its terms. It has accordingly been held that a writ which contained the name of no plaintiff could not be amended by inserting a name, because the Act of 1874 presupposed a writ with one or more plaintiffs and permitted the number to be increased or diminished but did not sanction an amendment by inserting a plaintiff where none existed before, *Jones* v. *Sunderland*, 73 Maine, 157; that an action brought by the plaintiff in her individual capacity and for her own benefit could not be amended by making her plaintiff as executrix, *Fleming* v. *Courtenay*, 98 Maine, 401; and that a writ brought in the name of Herbert A. Clark, Treasurer of the City of Rockland . . . "for said City of Rockland and duly authorized and empowered thereto by a vote of the City Council of Rockland" was not amendable

either by adding the City of Rockland as a plaintiff and thereby creating a misjoinder, nor by striking out the sole plaintiff and substituting in his place "The City of Rockland." *Clark* v. *Anderson*, 103 Maine, 134.

The amendment in the case at bar came directly within these decisions. No additional plaintiff was inserted and the writ did not contain two or more original plaintiffs from which one could be stricken out. It asked for the substitution of one plaintiff for another and obviously such an amendment cannot be allowed.

But the plaintiff invokes the provisions of another section of the Revised Statutes, and contends that they are applicable here, viz: R. S., Chap. 84, Sec. 10, which reads: "No process or proceeding in courts of justice shall be abated, arrested or reversed, for want of form only or for circumstantial errors or mistakes, which are by law amendable, when the person and case can be rightly understood. Such errors and defects may be amended on motion of either party on such terms as the Court orders."

This statute however was not intended to, and does not, cover a case involving the change of parties. This is shown by the fact that it was enacted in our first body of laws, R. S., 1821, Chap. 59, Sec. 16, having been copied from an earlier Massachusetts Statute to the same effect, and yet, with this statute in force, our Court held, as we have already seen, that no amendment could be allowed changing parties defendant, until the Statute of 1835 was passed especially providing therefor, and none changing parties plaintiff until the enactment of the Statutes of 1874. These enactments were wholly unnecessary if the then existing general provision as to amendments was ample to cover the same ground.

The kind of circumstantial errors and mistakes affecting the names of parties within the provision of Sec. 10 may be determined from the following illustrations: The christian name of the defendant was changed from Augustus to Augustine, in *Fogg* v. *Greene*, 16 Maine, 282; a writ sued out in the name of "Charity Griffin, to wit Charity Pinkham" was amended by striking out the words "to wit Charity Pinkham" in *Griffin* v. *Pinkham*, 60 Maine, 123; striking out the middle letter thereby changing John A. Wentworth to John Wentworth, in *Wentworth* v. *Sawyer*, 76 Maine, 434, and striking out the word Company from the defendant's name in *Berry* v. *Atlantic Railway*, 109 Maine, 330. All these however are cases of misnomer,

while the case at bar is not; and the distinction between the two is that the writs in those cases stated the wrong name of the right party while the writ in the case under consideration states the right name of the wrong party. This distinction is vital.

It is doubtless true, as the defendant in error contends, that the mistake crept in because of clerical carelessness, and that a careful inspection of the declaration would have shown that the creditor, the real plaintiff in interest, was Pio and not Abrams. But Abrams was the plaintiff named and a summons to defendant, following the writ, would have required him to answer to Abrams and not to Pio. In the absence of statutory sanction we are not authorized to permit an amendment under such circumstances. The Massachusetts cases cited by the learned counsel for the defendant in error can hardly be regarded as authorities in this State, because the Massachusetts Statutes permitting amendments are broader than our own,—Rev. L. of Mass., Chap. 173, Secs. 48-51,—and under them the Court has allowed even a substitution of parties. *Winch* v. *Hosmer*, 122 Mass., 438; *Costello* v. *Crowell*, 134 Mass., 280; *Wright* v. *Vt. Life Ins. Co.*, 164 Mass., 302; "but this is contrary to the past and present construction of our statutes upon the subject by this Court." *Fleming* v. *Courtenay*, 98 Maine, 401-414.

Writ or error sustained with costs.
Judgment reversed.

STATE OF MAINE *vs.* WILBUR F. BERRY.

Cumberland. Opinion December 19, 1914.

Criminal Libel. Duplicity. Exceptions. Indictment. Maliciously. Motion in Arrest of Judgment. Publication. Revised Statutes, Chap. 130, Sec. 1. Wilfully.

1. In an indictment founded on a statute which describes the offense, the offense must be charged in the words of the statute, or in words equivalent thereto.
2. Under a statute which makes it a criminal offense to wilfully publish or circulate a libel, an indictment for publishing and circulating a libel which does not charge that it was "wilfully" done is fatally defective.
3. In an indictment charging that the defendant did at "Waterville, in the County of Kennebec, unlawfully, maliciously and wickedly compose, write and print, and did at Portland in the County of Cumberland, publish and circulate and cause to be published and circulated" "a certain libel," the adverb "maliciously" cannot be held to qualify the verbs "publish and circulate."

On exceptions by respondent. Exceptions sustained. Indictment quashed.

This is an indictment in which the respondent is charged with criminal libel. The respondent was tried upon a plea of not guilty, in the Superior Court for Cumberland County, at the January term of said Court, 1914. The jury returned a verdict of guilty. At said term, the respondent filed a motion in arrest of judgment. The presiding Judge overruled said motion, and the respondent excepted.

The case is stated in the opinion.

Samuel L. Bates, County Attorney, for the State.

H. & W. J. Knowlton, and William B. Skelton, for respondent.

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

SAVAGE, C. J. The defendant was indicted for criminal libel, and was tried and convicted. The case comes before the Law Court on the defendant's exceptions to the exclusion of testimony, and to the overruling of a motion in arrest of judgment. We think the latter

exceptions must be sustained, and the indictment quashed. That being so, we have no occasion to consider the other questions. It would be improper to do so.

The definition and prosecution of a criminal libel are in this State matters of statute. The statute defines the crime, declares the responsibility and regulates the proceeding. Section 1 of Chap. 130 of the Revised Statutes, after defining a libel, provides that "nothing shall be deemed a libel unless there is a publication thereof." In Section 2 it is declared that "whoever makes, composes, dictates, writes or prints a libel; directs or procures it to be done; wilfully publishes or circulates it, or knowingly and wilfully aids in doing either shall be punished," etc. No other statutory provisions are material to the present discussion.

It is clear that the language of Section 2 constitutes three separate and independent classes of offenses. To make, compose, dictate, write or print a libel is one offense. To direct or procure the making, composing, dictating, writing or printing a libel is another. Both of these are subject to the limitation in Section 1, that nothing is to be deemed a libel unless published. To wilfully publish or circulate a libel, or to knowingly aid in doing either, is a third offense.

One may be indicted and convicted of making or printing a libel in the county where it was made or printed, though the publication may have been elsewhere. And one may be indicted and convicted of wilfully publishing or circulating a libel in the county where it was published or circulated, though it may have been made or printed elsewhere.

The indictment in this case charges that the defendant "did" . . . . at Waterville in the County of Kennebec "unlawfully, maliciously and wickedly compose, write and print . . . and did . . . at Portland in the County of Cumberland, publish and circulate and cause to be published and circulated . . . a certain false, scandalous, malicious and defamatory libel," etc. Two contentions are made under the motion for arrest of judgment. First, that the indictment is bad for duplicity, because it sets forth one offense for composing, writing and printing a libel in Kennebec County, and another offense for publishing and circulating it in Cumberland County; and, secondly, that it does not charge in the language of the statute that the defendant *wilfully* published and circulated, etc. The statute word "wilfully" is omitted.

It may be that the language in the indictment may be looked at in different ways. It sufficiently avers a composing, writing and printing in Kennebec County. It also avers a publication. It would have been sufficient simply to aver that the libel was published. We do not see that the averment of the particularities of the publication is harmful. So that if this indictment had been returned in Kennebec County instead of in Cumberland, it might have been proof against attack. The defendant says that the indictment sets forth one offense in Kennebec County and attempts to set forth another in Cumberland County. On the other hand the State argues that the averment touching, composing, and so forth, in Kennebec County may be regarded as surplusage, and that the only offense charged is that of publishing and circulating in Cumberland County. We are inclined to this view. Under any other view the indictment seems bad in this respect.

But if this be the proper view, and it is the only view that can avail the State on the question of duplicity, we are brought face to face with the other contention, namely, that it is not alleged that the publishing and circulating were wilfully done. The statute declares that whoever "wilfully publishes or circulates" a libel shall be punished. The statute does not make the publishing and circulating of a libel an offense, unless wilfully done. The word "wilfully" in the statute is descriptive of the offense. In an indictment founded on a statute which describes the offense, the offense should be charged in the words of the statute, or in words equivalent thereto. *State* v. *Hussey*, 60 Maine, 410; *State* v. *Gove*, 34 N. H., 511; *Rex* v. *Cox*, 1 Leach, 71; *Rex* v. *Davis*, 1 Leach, 556; Bishop on Criminal Procedure, 2nd Ed., Sec. 614, 615, 617; same author, Vol. 2, Sec. 917.

We do not, however, understand that the learned attorney for the State seriously questions the correctness of the foregoing statement of the rule. But he does insist that although the word "wilfully" was omitted from the indictment, a word of equivalent signification was used, namely, "maliciously." And he relies upon *State* v. *Robbins*, 66 Maine, 324, in which case it was said that where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, the indictment will be sufficient. And it was further said that in an indictment for libel the word "maliciously" might be substituted for "wilfully." In that case an indictment which charged that the

defendant "unlawfully and maliciously did compose and publish, and cause and procure to be composed and published" a certain libel, was held to be good.

But the case of *State* v. *Robbins* is wholly unlike this. In that case the charge was for maliciously composing and publishing a libel. The word "maliciously" clearly and grammatically qualified both the words "compose" and "publish."

Not so in the case at bar. Here the indictment avers that the defendant did "maliciously compose, write and print" at Waterville. It does not aver that he either maliciously or wilfully published and circulated at Portland. The indictment does not describe the "composing, writing, printing, publishing and circulating as a series of connected acts, but as separate and independent acts, done at different times and places, in fact in different counties. By no stretch of grammatical construction, as we think, can the adverb "maliciously" in this indictment, be properly held to qualify "publish and circulate." Therefore we must hold that no equivalent was used for the word "wilfully," and that the omission of "wilfully" was fatal.

It is suggested that the point should have been raised by demurrer, and not having been so raised, it is not open on a motion in arrest of judgment. In some States such a practice has been fixed by statute. See *State* v. *Monahan*, 170 Mass., 460. Whether such a practice would be advisable here is for the legislature to say. Here at present such a motion lies when all the facts alleged do not constitute an offense. *State* v. *Godfrey*, 24 Maine, 232. Such is the common law practice. 1 Bishop on Criminal Procedure, Sec. 1108; 1 Chitty on Criminal Law, 661-664. We think such a motion is proper in a case like this one.

Exceptions sustained.
Indictment quashed.

INHABITANTS OF BOOTHBAY HARBOR

vs.

CLARA A. MARSON, Admx., et als.

Lincoln. Opinion December 23, 1914.

Action of Debt. Breach. Declaration. Joint Obligors. Penalty. Principal. Sureties. Treasurer's Bond.

1. In suing upon a bond at common law there are two courses open to the plaintiff. The declaration may be framed for the penalty only without mentioning the condition or assigning any breach of it; or the condition may be set out and breaches of it assigned in the declaration.
2. Where the officer to be bound, in the case at bar, failed to sign the bond, such failure does not render the bond void, for the principal was under obligation to perform his official duty, and this he was bound by law to do just as effectually as if he had covenanted to do it by signing the bond.

On report. Judgment for defendants, Clara A. Marson, Hattie B. Moody and Evelyn Sawyer. Judgment for plaintiffs against the other defendants in the sum of $612.09, with interest from the date of the writ.

An action of debt brought by the Inhabitants of Boothbay Harbor against the sureties on the official bond of Fred C. Blake as treasurer of the town of Boothbay Harbor for the year 1907. Pleas, the general issue. At the conclusion of the evidence, the case was reported to the Law Court by agreement of parties, upon so much of the evidence as is legally admissible, the Law Court to render such final judgment therein as the law and the admissible evidence require.

The case is stated in the opinion.

J. B. Perkins, and W. R. Pattangall, for plaintiffs.

C. R. Tupper, and A. S. Littlefield, for defendants.

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

PHILBROOK, J. This is an action of debt brought against sureties on a town treasurer's bond. Three of the sureties, namely Woodbury Marson, Daniel H. Moody and Melvin D. Sawyer, were dead at the date of the writ. The plaintiffs admit failure to prove demand upon the executrices of Marson and Moody, in manner provided by law. They also admit failure to properly present their claim in writing to the administratrix of the estate of Melvin D. Sawyer. Hence judgment is to be rendered in favor of these executrices and this administratrix in any event. As against the other sureties, William E. Sawyer, Hiram T. Thurston, Keyes H. Richards, John A. Maddocks and C. J. Marr, the plaintiffs claim judgment for the full amount due because, as plaintiffs claim, these defendants are joint obligors under the bond which contains the words "we bind ourselves, our heirs, executors and administrators."

Those against whom judgment is thus claimed present a legal defense and a defense upon the facts.

The legal defense is argued by counsel under two heads: (1) that the plaintiff's declaration is not sustained by the bond introduced, because the declaration sets out a bond in which the defendants are principals and not sureties, or, in other words, that the plaintiff's writ declares the defendants to be original and not collateral promisors (2) that there is no liability upon the bond because it does not bear the signature of the principal.

The law regarding the first point raised by the defendants seems to be well settled. In suing upon a bond at common law there are two courses open to the plaintiff. The declaration may be framed for the penalty only without mentioning the condition or assigning any breach of it; or the condition may be set out and breaches of it assigned in the declaration. *Heards Civil Precedents*, page 162, and cases there cited; *Chitty on Pleadings*, Sixteenth American Edition, Vol. II, page 89, and cases there cited. Our own Court, in the somewhat recent case of *Inhabitants of York* v. *Stewart*, 103 Maine, 474, where the declaration was like the one at bar, says "this form of pleading is now too well established to admit of discussion." Mr. Justice Virgin, in *Colton* v. *Stanwood*, 68 Maine, 482, an action on a poor debtor's bond, says "All authorities concur in holding that, in

debt on bond, it is not necessary for the plaintiff, in his declaration, to count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant, if it affords him any defense. For the penal part of the instrument alone constitutes, prima facie, a right of action, the breach being the non-payment of the money."

As to the law regarding the second point raised by the defendant, we regard it settled in this State, however tenaciously some other jurisdictions may differ from us.

In *Deering* v. *Moore*, 86 Maine, 181, the defendant, a collector of taxes, failed to sign the bond which he gave to the plaintiff city and this Court declared that such failure did not render the bond void. The Court there declared that the principle upon which its decision was founded was that the bond was conditioned that the principal should faithfully perform official duty, and this he was bound by law to do just as effectually as if he had covenanted to do it by signing the bond. "The engagement of the surety, therefore, rested upon the legal obligation of the principal already incurred" said the Court in that case. This principle and reasoning, we submit, is equally applicable to the case at bar where the principal was also a public officer, a town treasurer.

We conclude that the legal defenses presented by the defendants cannot prevail.

As to the defense upon the facts we do not think it profitable to discuss the great mass of figures which were presented showing the financial doings of the principal during the time of his treasurership in which it is claimed the shortage occurred. An auditor's report was presented which was corroborated by the findings of an expert accountant. We have examined the same as well as the testimony presented by the defendants in opposition and feel that that burden of proof laid upon the plaintiffs has been fully sustained. The entry must be,

Judgment for defendants Clara A. Marson, Hattie B. Moody and Evelyn Sawyer.

Judgment for plaintiffs against the other defendants in the sum of $612.09 with interest from the date of the writ.

CARRIE B. GRAFFAM, Admx.,

vs.

SACO GRANGE PATRONS OF HUSBANDRY, No. 53.

York. Opinion December 30, 1914.

Damages. Exhibitions. Invitation. Lessee. License. Negligence. Reasonable Care. Revised Statutes, Chap. 89, Secs. 9-10.

1. If the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition so that the person there by his invitation may not be injured by them or in their use for the purposes for which the invitation is extended; that there should be no dangerous plays, sports or exhibitions thereon by which the invited might be injured.
2. Where the proprietors of a fair allow shooting galleries upon their premises, practice in target shooting is a part of the entertainment carried on at the fair, and the managers and controllers of the fair have such target shooting and its safety under their supervision and control as much as any other part of the fair, and are liable for injuries resulting from their negligence in not properly controlling and conducting the management of this part of their exhibition.
3. By inviting persons to their fair, the managers make themselves bound to use reasonable care to see that the fair in all its parts is safe and is conducted safely, whether the various parts of the fair are conducted and managed by the proprietors themselves or with their permission, by license, by independent contractors, or by lessees.
4. In an action brought under this statute, the injury for which damages can be recovered must be whollly to the beneficiaries themselves, and is limited to the pecuniary effect of the death upon them.

On motion and exceptions by defendant. If plaintiff remits all of the verdict in excess of one thousand dollars, the motion is to be overruled; otherwise, a new trial is to be directed. This order disposes also of the exceptions.

This is an action on the case, brought under the provisions of Revised Statutes, Chap. 89, Secs. 9 and 10, to recover damages for the death of the son of the plaintiff, a boy of eleven years of age, occasioned by the negligence of the defendant in the conduct of the

exercises upon the fair grounds, under the management and control of the defendant. Plea, the general issue. At the close of the evidence, the defendant requested the presiding Justice to direct a verdict for the defendant; the presiding Justice refused to so rule and the defendant excepted. The jury returned a verdict for the plaintiff for $1873.33, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

John G. Smith, for plaintiff.

Cleaves, Waterhouse & Emery, for defendant.

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

PHILBROOK, J. This is an action brought by an administratrix under the provisions of R. S., Chap. 89, Secs. 9 and 10, to recover damages resulting from the death of a boy nearly eleven and a half years of age, his heirs being a mother, who is the administratrix, and three sisters. The plaintiff says that the defendant, while conducting an agricultural fair on hired grounds, allowed a person to erect and run a shooting gallery in which a twenty-two calibre repeating rifle was used; that a cartridge got lodged in the working parts of the rifle, and while the person in charge of the gallery was trying to remedy the trouble, the rifle was accidentally and carelessly discharged and the bullet passed through the boy's head resulting in his death.

The defendant offered no evidence, but at the close of the plaintiff's testimony requested the presiding Justice to direct a verdict for the defendant, and upon the refusal of the Justice to so rule the defendant seasonably excepted. The jury returned a verdict for plaintiff in the sum of $1873.33. Defendant then filed a motion for a new trial on the usual grounds. As the exceptions and the motion raise the same questions they will be considered together.

The evidence satisfactorily establishes the proposition that the boy met his death from the accidental discharge of the rifle, but the defendant urges that it should not be held liable for the damages resulting from that death. It says that the evidence does not show that the fair grounds were hired or the fair conducted by this defendant. A detailed discussion of the testimony upon this point would not be profitable, for this question was submitted to the jury under

instructions which we assume were full and correct since the charge of the presiding Justice is not reported, and we are not disposed to disturb this feature of the verdict. It further says that it is not liable because all ordinary care was taken to protect the public, so far as a safe target was concerned, and that the accident was caused by the unfortunate manner in which the owner of the rifle attempted to remedy a trouble in the working of the rifle, and against this accidental result it says it was not bound to provide. We do not think this contention can prevail. The defendant says that the case at bar differs from *Thornton* v. *Agricultural Society*, 97 Maine, 108, and while this is partially true yet certain principles of law expounded in that case are applicable to this one. In that case our Court said, "It is too well settled to need the citation of authorities, that if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended. . . . . It was its (the defendant) duty to use reasonable care that there should be no traps or pit-falls into which the invited might fall, and that there should be no dangerous plays or sports, or exhibitions, by which the invited might be injured." In the case at bar there is no satisfactory evidence that the defendant took sufficient precautionary measures regarding the protection of the public from the careless handling of a dangerous firearm. Apparently it let the ground privilege for the shooting gallery and gave the matter no further attention. It is suggested that on the second day of the fair the target protection was enlarged but it does not appear that even this was the result of careful supervision by the defendant. In *Conradt* v. *Clauve*, 93 Indiana, 476, the Court said, "The practice in target shooting appears to have been a part of the entertainment carried on at the fair, and as the defendants were the owners of the premises, and the managers and controllers of the fair, the practice in target shooting was a part of their exhibition, and under their supervision and control as much as any other part of the fair. And those having charge of it, while perhaps not strictly agents or servants of the defendants, were acting under the license and permission of the defendants; and such a relation existed between them as will hold the defendants liable for injuries resulting from their negligence

in not properly controlling the conduct and management of this part of their exhibition." Upon this principle of law, our own Court, in *Thornton* v. *Agricultural Society*, supra, said, "By inviting patrons to their fair they make themselves bound to use reasonable care to see that the fair in all its parts is safe and is conducted safely, whether the various parts of the fair are conducted and managed by the owners themselves, or with their permission, by license, independent contractors or lessees." In the case at bar the manner and means used by the owner of the shooting gallery to remedy the defective condition of the rifle seem to us to be clearly careless and negligent. To allow such negligence, or to let grounds to such a careless person, with no careful supervision, oversight or precautionary steps having been taken would seem to clearly fix the liability of the defendant so far as this branch of the case goes.

The only remaining point for discussion is the amount of the damages. In construing the act under which this suit is brought this Court has declared that "no damages can be recovered for any grief, distress of mind, loss of companionship or society, or injury to the affections, suffered by the beneficiaries. . . . The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them." *McKay* v. *Dredging Co.*, 92 Maine.

One of the beneficiaries, a sister, is already married and has a husband to support her. The other two sisters, older than the deceased boy, are not likely, in the ordinary course of human probabilities to be much affected pecuniarily by this death. The pecuniary effect upon the mother is the principal question. According to the testimony her expectancy of life is a little over twenty-five years. Had the boy lived, he would have been compelled by the laws of this State to attend school nearly five years longer and in that time at least would hardly be expected to contribute anything to the support of his mother. Assuming that during the next twenty years of his life he had been a dutiful son to his mother, had been industrious and frugal, and had not taken on other domestic burdens by marriage, he would have been of financial aid to his mother. All these elements, however, are more or less speculative. They are in the realm of possibility not the realm of certainty. During the earlier years following the school age the financial benefit must necessarily be small.

After a full consideration of all the situation the Court is of opinion that the verdict should not have been in excess of one thousand dollars. It is therefore ordered that if the plaintiff remit all the verdict in excess of one thousand dollars the motion is to be overruled, otherwise new trial to be directed. This order disposes also of the exceptions.

So ordered.

JULIAN W. SHAW *vs.* OTIS G. OLIVER, et als.

Lincoln. Opinion December 31, 1914.

Acknowledgment. Correspondence. Exceptions. Inferences. Promise. Promissory Note. Statute of Limitations.

The question in this case is whether the letter of defendant, dated April 7, 1909, in which he said; "I have $200.00 to send you as soon as I can get out and more that I can send as soon as the pond swims my logs to the mill," removed the statutory bar.

Held:

1. The theory of the law is; when a debt is barred by the statute, that the promise upon which assumpsit would before lie is not dead, but suspended, and that, by certain things done by the debtor, the suspension may be removed and the promise revived.
2. To remove the bar, under the statute, the debtor must acknowledge the debt, or expressly promise to pay it, in writing.
3. Acknowledgment is not a promise; it is only evidence from which a promise to pay may be implied, and upon which assumpsit may be brought.
4. The paragraph in defendant's letter, in which he expresses his willingness to pay $200.00 when he gets out was an acknowledgment from which an inference of a promise to pay is a necessary conclusion.

On exceptions by plaintiff. Exceptions sustained.

This is an action on a promissory note, dated January 3, 1907, for $753.00, payable in six months. Plea, the general issue and the

Statute of Limitations. The letters of plaintiff to defendant, dated March 25, 1909 and April 6, 1909, and the letter in reply of the defendant to plaintiff dated April 7, 1909, were admitted in evidence, and the presiding Justice ruled as matter of law that these letters were not sufficient to prevent the bar of the Statute of Limitations. To this ruling, the plaintiff excepted. The jury returned a verdict for the defendant.

The case is stated in the opinion.

Pierce & Hall, and A. S. Littlefield, for plaintiff.

George A. Cowan, for defendant.

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

SPEAR, J. On exceptions by plaintiff. This is an action on a promissory note of the following tenor:

"$750.00. Nobleboro, Maine, Jan'y 3, 1907.

Six months after date I promise to pay Julian W. Shaw, or order, Seven hundred and fifty and no 100 dollars, for value received with interest."

The plea was the general issue and Statute of Limitations. The decision of the case depends upon the following correspondence:

"March 25, 1909. Mr. Otis G. Oliver. Friend Oliver: I have not heard from you for a long time and wonder how things are progressing. Did you do any lumber business this winter? I presume you are as busy as ever. The writer is obliged to make out a large sum of money the first of April and shall need to use the amount due me on the note: Can get along without it until about the tenth of April. Trusting that you and your family are well and prospering, with kindest regards, I am, Yours, etc., J. W. Shaw."

"April 6, 1909. Mr. Otis Oliver. Friend Oliver: I have written you twice regarding the note. Up to this time I have received no reply. Did you receive my former letter? Please advise me in regard to this. Yours, etc., J. W. Shaw."

"Nobleboro, Me., April 7, 1909. Mr. J. W. Shaw, Berwick, Me. My dear Mr. Shaw: Your letter came to hand all right, was glad to hear from you." Here follows an immaterial explanation for the

delay in answering. Then the letter proceeds: "I have $200.00 to send you as soon as I can get out and more that I can send as soon as the pond swims my logs to mill. Yours truly, O. G. Oliver."

It is conceded that the case falls within the statute unless the above communication from Oliver removed the bar. We think it did. The inference is so strong that the note in suit was the note referred to in this correspondence that to hold otherwise, would do violence to the rule that authorizes inferences to be drawn from proven facts.

The only question then is: Was the letter such an acknowledgment of the debt, evidenced by the note, as warrants the inference of an implied promise to pay it? The statute reads: "In actions of debt or on the case founded on a contract no acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing and signed by the party chargeable thereby." An erroneous interpretation of this statute seems often to have been made, by assuming that the phrases "acknowledgment" and "express promise" as used in the statute, are interchangeable terms and identical in meaning.

The theory of the law is, where a debt is barred by the statute, that the promise upon which assumpsit would before lie, is not dead, but suspended, and that, by certain things done by the debtor, the suspension may be removed and the promise revived. The things that may be done under the statute, to do this are "acknowledgment" of the debt, and an "express promise" to pay it, each, of course, in writing. And as it is the promise that is renewed, and upon which, only, assumpsit may be brought, the term acknowledgment may quite naturally be construed to mean the same as express promise. But "acknowledgment" is not so interpreted. It is not a promise. Acknowledgment of present indebtedness is but evidence from which a promise to pay may be implied. *Gray* v. *Day*, 109 Maine, at page 498.

For the distinction between "acknowledgment" and "express promise" see *Lord, Administrator*, v. *Jones*, 108 Maine, 381.

Under these decisions, as in construing other contracts, evidence of an acknowledgment or express promise may be sought from all the documents in which the acknowledgment or promise is alleged to be contained. Accordingly if from all the written evidence an acknowledgment can be found of such a character that upon it may be

predicated an implied promise to pay the debt acknowledged, such acknowledgment alone will relieve the debt from the application of the statute. Applying this rule to the paragraph in the defendant's letter in which he expresses his willingness to pay $200.00 when he gets out, we find no difficulty in deciding that it was an acknowledgment from which an inference of a promise to pay is a necessary conclusion. It is a clear, unconditional statement from which but one meaning can be naturally drawn.

Exceptions sustained.

BURTON L. ALDEN

vs.

MAINE CENTRAL RAILROAD COMPANY.

Cumberland. Opinion December 31, 1914.

Engine. Evidence. Inference. Location of Railroad. Origin of Fire. Sparks.

1. The burden was upon the plaintiff to show by competent evidence that the defendant's locomotive caused the fire. In this, the plaintiff has failed.
2. When it is sought to establish a case by an inference drawn from facts, such inference must be drawn from facts proved. It cannot be based upon a probability.
3. There was no positive testimony as to the origin of the fire. The case is silent as to the starting point and no evidence appears as to the location of the railroad, or the location of the burnt area with reference to the right of way, or that sparks were emitted from the smoke-stack which might have been carried beyond the right of way.

On motion by defendant. Motion sustained. Verdict set aside. New trial granted.

This is an action brought by plaintiff under Chap. 52, Sec. 73 of Revised Statutes, to recover for damages to twenty acres of timber and woodland situate in Leeds, in the County of Androscoggin,

alleged to have been caused by sparks from a locomotive engine of the defendant. Plea, the general issue. The jury returned a verdict for the plaintiff of $400. Defendant filed general motion for a new trial.

The case is stated in the opinion.

George C. Webber, for plaintiff.

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

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

HANSON, J. This is an action on the case to recover for damages to twenty acres of timber and wood burned by a fire alleged to have been caused by sparks from a locomotive engine of the defendant. The fire occurred at 10 o'clock A. M., August 19, 1913. The jury returned a verdict for the plaintiff in the sum of $400, and the case is before the Court on defendant's motion for a new trial.

The testimony as to the origin of the fire follows:

John Alden, a brother of the owner, testified as follows:

"Q. I will ask you if on the 19th of August, 1913, there was a fire upon these premises?

A. Yes, sir.

Q. And were you there at that date?

A. I was.

Q. And were you there at your home on this date when the fire started in the land adjoining?

A. I wasn't at home when it started, but I was very near there.

Q. Did you yourself of your own knowledge know anything about the starting of the fire?

A. No."

Maggie Kemp, the principal witness, testified:

"Q. And won't you tell the jury when you first saw the fire and what about it?

A. When I was going to hang out my clothes I turned right around and saw it, and the morning passenger train went down and pretty soon here come the smoke out of the ground, and I went up

there and went into Mrs. Brewster's pasture, the corner of the fence there, and I says to one of my boys 'You better go down and tell Mr.—

(Objected to).

Q. You need not state that. You saw the passenger train go down and then you saw the fire?

A. Yes sir."

The cross-examination developed that this witness saw sparks fall from under the engine on the right of way at 9 o'clock on that morning. One hour later she saw a fire "in Brewster's pasture." This witness lived on the opposite side of the railroad from Brewster's pasture. The distance, and general location of her house and clothesline do not appear.

Guy Burgess, testified:

"Q. And you were there when this fire started that has been testified to by Mr. Alden and Mrs. Kemp?

A. Soon after it was started, yes.

Q. Where were you when you first got information about the fire?

A. I was to the depot.

Q. And who brought that information to you?

A. My brother.

Q. This little boy that is here?

A. Yes, sir.

Q. And about what time was it? That is, when he brought that information to you?

A. It was about quarter to ten.

Q. And what time is it when the train goes by there?

A. It goes by about half-past nine.

Q. Was Mr. Bartlett the station agent there?

A. He was at the station; yes, sir.

Q. And did you and Mr. Bartlett go down to the fire?

A. Yes, sir.

Q. How far had it burned when you got there?

A. I should say it had burned over about half an acre.

Q. And did you undertake to stop it there?

A. We didn't have nothing to stop it with; we didn't take nothing with us.

Q. Were you around there for the next two or three days?
A. Yes, sir."

A careful examination of the record convinces us that the verdict was not justified by the evidence. So far as the case shows, the cause of the fire is still an open question.

There was no positive testimony as to the origin of the fire. The case is silent as to the starting point, and no evidence appears as to the location of the railroad, or the location of the burnt area, with reference to the right of way. It does not appear that the right of way burned at or near the fire, or that sparks were emitted from the smoke-stack which might have been carried beyond the right of way, or that at the time there was sufficient wind blowing in the direction to carry sparks capable of causing such fire. The kind of day, the condition of the grass, the direction of the wind, are matters not found in the record.

The burden was upon the plaintiff to show by competent evidence that the defendant's locomotive caused the fire. In this he has failed. When it is sought to establish a case by an inference drawn from facts, such inference must be drawn from facts proved. It cannot be based upon a probability. *Seavey* v. *Laughlin*, 98 Maine, 517; *Smith* v. *Lawrence*, 98 Maine, 92.

Motion sustained.
Verdict set aside.
New trial granted.

CHARLES JANILUS

vs.

THE INTERNATIONAL PAPER COMPANY.

Androscoggin. Opinion December 31, 1914.

Assumption of Risk. Contract. Exceptions. Foreman. Negligence. Proximate Cause. Reasonably Safe Place. Vice Principal.

Action on the case for damages for personal injuries sustained by the plaintiff while employed as a laborer by the defendant. The verdict was for the defendant, and the case is before the Court on exceptions by the plaintiff to the refusal of the presiding Justice to give certain rulings requested, and to portions of the charge of the presiding Justice.

Held:

1. The question of ordinary care and negligence when the facts are in dispute, or even where they are undisputed, but intelligent and fair minded men may reasonably arrive at different conclusions, is for the jury.
2. When on an issue of assumption of risk by a servant who has sustained injuries, the facts are controverted, or such that different inferences may be drawn therefrom, the question of assumption of risk should be submitted to the jury under proper instructions from the Court. And when the risk to which the servant is exposed is one that arises from the negligent conduct of the master, having imported into the situation a factor of peril not ordinarily incident to the business in which the servant is engaged, it is in legal terminology an extraordinary one. In such cases it is not incumbent upon the plaintiff to either allege or prove want of knowledge and non-assumption.
3. In order to be on his guard, and as surely safe and free from harm, the plaintiff should know the dangers known to the defendant. The plaintiff had the right to assume, in the absence of knowledge to the contrary, that he could work in safety. He had been working but three days, and it cannot be said as matter of law that he assumed the risk. He had the further right to rely upon the belief that the defendant had performed the duty of furnishing him a reasonably safe place in which to perform his work.
4. This obligation of the master continues during the time reasonably occupied by the servant on his premises, in going to and returning from his work. Where the injury is the result of concurring negligence of two parties, one is not exempt from full liability, although the other was equally culpable. And the question must be left to the jury whether the first wrong doer's act was the proximate cause of the injury.

On exceptions by plaintiff. Exceptions sustained. Verdict set aside. New trial granted.

This is an action on the case brought by the plaintiff to recover damages against the defendant for personal injuries, sustained by him while in the employ of the defendant. Plea, the general issue. The plaintiff had exceptions to certain instructions and refusals to instruct the jury by the presiding Justice. The jury returned a verdict for the defendant and the plaintiff filed a motion for a new trial.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Newell & Skelton, for defendant.

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

HANSON, J. Action on the case for damages for personal injuries sustained by the plaintiff while employed as a laborer by the defendant. The verdict was for the defendant, and the case is before the Court on exceptions by the plaintiff to the refusal of the presiding Justice to give certain rulings requested, and to portions of the charge of the presiding Justice.

The case shows that the plaintiff entered the service of the defendant in the town of Rumford, in the County of Oxford, three days before he was injured, and that on the day of the injury he was directed, with others, to unload coal from cars standing on a track in the yard of the defendant. The cars containing the coal had been separated, or kept apart, to make a passageway for the workmen engaged in that work. After completing the work of unloading, the employees returned to their other employment, the plaintiff being the last to leave the car, and in returning was passing between the cars so separated when, as he claims, without any warning or signal, the cars were suddenly forced together by an engine of the Maine Central Railroad Company, and he was caught between them and injured. The cars were located so that the engine could not be seen by the employees.

The plaintiff's counsel in his exceptions states that "the defendant by its foreman notified the Maine Central Railroad about one half hour before the cars were actually ready that they were ready, and thereupon the Maine Central R. R. after having been so notified,

attached its engine and backed the car upon the plaintiff as stated. The cars were not entirely unloaded of the coal as a matter of fact when the defendant's foreman notified the Maine Central R. R. that the cars were ready for the engine to be attached thereto. The plaintiff immediately upon finishing unloading got out of the car with other workmen and followed them through the passageway between the cars. The Maine Central Railroad owned the cars, engine, and track, and employed the entire crew to operate the cars."

The declaration sets out "that the defendant carelessly and negligently caused an engine to be attached to the train, and without any warning or notice of any kind to the plaintiff, pushed the train of cars in and upon the remainder of the train . . . . and caught the plaintiff thereby between the train of cars and severely wounded, lacerated and bruised his person," etc., and in conclusion recites "that the defendant company carelessly and negligently backed a train to which they had attached their engine carelessly and negligently, without any warning to this plaintiff, in and upon his person, doing the damage aforesaid."

The defendant claims "that the defendant had absolutely nothing to do with starting or management of the train beyond the practice of its foreman to notify the train crew when the cars were unloaded. If he was a fellow servant with the plaintiff, his negligence, if any, would not warrant a recovery of the defendant," "and that the proximate cause of the injury complained of was the negligence of the Maine Central Railroad, a third party, for which it is not responsible."

The requested instructions follow:

"1. That the defendant by notifying the Maine Central Railroad that the cars were ready to be hauled out, when in fact they were not ready, and upon such notification the Maine Central Railroad attached its engine to the cars and thereby ran into the plaintiff without any warning either from the defendant or Maine Central Railroad, then the defendant is liable.

2. That if the defendant by its Mr. Wood, who had the sole charge of notifying the Maine Central, carelessly and negligently did not take the means of informing itself whether this car in which the plaintiff was at work unloading was in fact not unloaded when Mr. Wood informed the Maine Central that the car was unloaded, then that is the negligence of the defendant company and for which it is liable.

3. That the defendant owed the duty to the plaintiff of providing a reasonably safe place in which to work, and when it changed that place from reasonably safe by causing the Maine Central to back its train into the plaintiff, then it must have appraised and warned the plaintiff of the change."

The presiding Justice declined to give the first and second requested instructions except as they appear in the charge.

As to the third requested instruction, the presiding Justice in refusing to give the same as requested, said: "I cannot give this instruction. I will instruct the jury, however, that it is the duty of the defendant to provide a reasonably safe place in which to work, a reasonably safe place for its employees in which to work; and when by any act of the defendant, or any of its vice principals, it renders unsafe a place which was formerly safe, it may then be liable in damages, if other conditions of the case do not prevent."

The first two requests were properly refused. They are comprehended in, and the plaintiff was amply protected by the instruction given in response to the third requested instruction, which in connection with the charge states the law applicable to that branch of the case.

The remaining exception is to the following instruction given upon request of the jury for further instruction:

"The Court: I am informed through your foreman that certain members of the panel would like to know if Mr. Wood notified the Maine Central officials to shift the empty cars, would the International Paper Company be responsible? I can only repeat to you in substance my instructions upon that point. I defined what constituted a vice principal, and I think that the definition of that may remain in your memory; and I instruct you that if you find that Mr. Wood was a vice principal, and any act of a vice principal negligently done, the plaintiff being in the exercise of due care, would make the defendant corporation liable. But, the mere notification by Mr. Wood of the Maine Central people that the empty cars were ready to be moved out,—the mere notification of the Maine Central people by Mr. Wood of that fact, would not necessarily make the International Paper Company liable, for the negligence which the plaintiff complains of is that the defendant company negligently attached an engine to the cars. So that it must appear to you from all the evidence in the case, by a fair preponderance of that evidence, that

the International Paper Company was in control of the engine, and that the engine was negligently attached to the cars, and that the plaintiff was in the exercise of due care when the accident occurred. So bearing in mind, as I have said, all the time, that the plaintiff must show that he was in the exercise of due care, it must be shown that the International Paper Company, or some of its vice principals were in actual control of that engine at the time when the accident occurred, in order for the plaintiff to recover. If no vice principal of the International Paper Company was in actual control of the engine, then I instruct you you could not find a verdict for the plaintiff."

This exception should be sustained. The principal claim of the plaintiff raised by the pleadings was that the defendant carelessly and negligently caused an engine to be attached to the train, that a notice given by defendant's foreman when it ought not to have been given was the proximate cause of the injury, and that the defendant is liable because such notice in its effect rendered unsafe the place in which the plaintiff was working. This question as it related to the condition of the place, the question of assumption of risk, with that of due care and negligence, had been properly presented to the jury previously in the charge; but the instruction given was equivalent to directing a verdict for the defendant. It left no other issue than the question of actual control of the engine, which, as has been seen, was not a controverted question. There was no claim on the part of the plaintiff that the defendant, or its vice principal, controlled the engine, but the plaintiff did claim that the defendant by the premature notice to the trainmen caused the trainmen to attach the engine to the train before it was actually ready, thus performing an act which in its effect was the proximate cause of the injury, and in connection with the contention of the plaintiff that the defendant did not provide the plaintiff a safe place in which to work, raised the issue in the case whether the act of the defendant rendered unsafe the place in which the plaintiff was employed.

The defendant was charged with the duty of providing a suitable place for the plaintiff in which to perform his work. In the maintenance of this particular place as a safe place for its employees to work, it had been customary for some employee of the defendant to notify the Railroad employees "when the car was empty." By common consent this notification was a duty, so understood and

used by counsel and Court in the progress of the case and in the charge of the presiding Justice. It was a duty imposed upon the master, which from custom it appears had been performed by some one or more of the servants of the defendant. The case shows that this duty was assigned to or assumed by one Wood, who says he was foreman of the unloading of coal and wood for the defendant. The arrangement with the railroad company was practically a part or department of the defendant's business, and a very important part. It had continued for a series of years, and whatever the terms of the hiring, or freight rates, or charges of any kind, it clearly appears that in the matter of the performance of that part of the contract, the railroad company surrendered its rights and authority to the defendant to fix the time when certain cars should be removed. The case shows this, and enlarges upon the situation of the parties in this connection by showing, to again state it, that it was the duty of the defendant's servant to notify the railroad company when its cars were empty. This was in the first instance the duty of the defendant, and, if not done, or if improperly done by another for the defendant, by its vice principal, or any other servant, and injury results therefrom, the master is liable, as if he had himself acted. Ray on Negligence of Imposed Duties, page 37.

Defendant's counsel cites *Leavitt* v. *Railroad Co.*, 89 Maine, 509, as supporting his claim that the injury was caused by the independent act of the railroad company, and that the defendant is therefore not liable. In *Leavitt* v. *Railroad Co.*, an action on the case against the defendant for burning a mill, it was held that "the independent act of a third person that intervenes between the wrong complained of and the injury sustained is a good test of remoteness that forbids recovery," but it will be seen upon examination that the case is not in point; there the act under discussion was an independent act; the act of the third party complained of here was a concurring act, and the issue involved should have been submitted to the jury with proper instruction.

Defendant's counsel urges that the proximate cause of the injury was the negligence of the railroad company, while the plaintiff insists that the proximate cause of the injury was the negligence of the defendant, which negligence, the premature notice, concurring with that of the railroad company, produced the injury complained of. The issue thus raised, what was the proximate cause of the

injury, was clearly for the jury. *Mullen* v. *Zides*, 216 Mass., 203, citing *Turner* v. *Page*, 186 Mass., 600.

In *Neal* v. *Rendall*, 98 Maine, 69, an action growing out of a collision on a highway, it was held that in an action of negligence "where the injury is the result of two concurring causes, the defendant's negligence may be regarded as the proximate cause of an injury of which it is not the sole and immediate cause," citing *Lake* v. *Milliken*, 62 Maine, 240; and the Court further held that, "if the defendant's negligent, inconsiderate, and wrongful, though not malicious act, concurred with any other thing, person or event, other than the plaintiff's own fault, to produce the injury, so that it clearly appears that but for such negligent act the injury would not have happened, and both circumstances are clearly connected with the injury in the order of events, the defendant is responsible, even though his negligent, wrongful act may not have been the nearest cause in the chain of events or the order of time. *Ricker* v. *Freeman*, 50 N. H., 420, 9 Am. Rep., 267; Sherman & Readfield on Neg., Sec. 10.

There must be a necessary connection between the defendant's act and the plaintiff's injury. It is not necessary that the negligent act should be the efficient cause, *causa causans;* it is sufficient if it is a cause, which, if it had not existed, the injury would not have taken place. *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S., 228. In that case judgment was reversed and a new trial ordered because the question was not submitted to the jury. . . . . Upon the question of causation another important consideration is, whether the injury suffered was one which it was the purpose of the law to prevent when it imposed upon the defendant the duty which he is charged with having violated."

The same opinion, quoting *Hill* v. *Winsor*, 118 Mass., 251, says: "The injury must be the direct result of the misconduct charged, but it is not to be considered too remote if, according to the usual experience of mankind, the result ought to have been reasonably apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise."

Lane v. *Atlantic Works*, 111 Mass., 136, 139; *Marsh* v. *Paper Co.*, 101 Maine, 489.

The defendant claimed as well that, if the injury was caused by premature notice given by Wood, that Wood was a fellow servant and therefore the defendant was not responsible for his negligent act. The nature of the negligent act determines whether it is that of the employee or fellow servant, and, if the negligent servant was at the time performing one of the master's duties, the master is liable for his negligence, but not if the servant was not performing a duty imposed upon the master, though he was the superior of the injured servant. *Duke* v. *Lewiston*, 83 Maine, 211; *Shugrue* v. *Providence Telephone Co.*, Sup. Ct., R. I., Oct. 27, 1913, 88 Atl., 616. In neither case does the fact that the negligent servant is the superior of the injured servant, or vice versa, affect the question of the master's liability. Idem, citing 12 Am. & Eng. Ency. Law, 933; *Hanna* v. *Granger*, 18 R. I., 507, 508, 28 Atl., 659; *Morgridge* v. *Providence Telephone Co.*, 20 R. I., 386, 39 Atl., 328, 78 Am. St. Rep., 879, 52 Atl., 687; *Duke* v. *Lewiston*, 83 Maine, 211, supra.

Ordinary care and negligence are questions of fact, and this is so, even if the circumstances attending it are agreed or admitted, or are undisputed, when reasonable and fair minded men may arrive at different conclusions. *Water Co.* v. *Steam Towage Co.*, 99 Maine, 485.

The question of ordinary care and negligence when the facts are in dispute, or even where they are undisputed, but intelligent and fair minded men may reasonably arrive at different conclusions, is for the jury. *Elwell* v. *Hacker*, 86 Maine, 46; *Haggerty* v. *Granite Co.*, 89 Maine, 118; *Water Co.* v. *Steam Towage Co.*, 99 Maine, 485.

When on an issue of assumption of risk by a servant who has substantial injuries, the facts are controverted, or such that different inferences may be drawn therefrom, the question of assumption of risk should be submitted to the jury under proper instructions from the Court. *Herrera* v. *Manhattan Electric Supply Co.*, N. J. Court of Errors & Appeals, Nov. 17, 1913, 88 Atl., 1082; *Colfer* v. *Best*, 110 Maine, 465. And when the risk to which the servant is exposed is one that arises from the negligent conduct of the master, having imported into the situation a factor of peril not ordinarily incident to the business in which the servant is engaged, it is in legal terminology an extraordinary one. In such cases it is not incumbent upon the plaintiff to either allege or prove want of knowledge and non-assump-

tion. *Vickery* v. *New London Northern R. R. Co.*, Supreme Court of Errors of Connecticut, January 15, 1914, 89 Atl., 277; citing *Worden* v. *Gore-Meenan Co.*, 83 Conn., 642, 78 Atl., 422. See also *Baer* v. *Baird Machine Co.*, 84 Conn., 269, 273, 79 Atl., 673.

In order to be on his guard, and as surely safe and free from harm, the plaintiff should know the dangers known to the defendant. *Wheeler* v. *Wason Mfg. Co.*, 135 Mass., 294; *Ciriack* v. *Woolen Co.*, 146 Mass., 182, and cases cited. The plaintiff had the right to assume, in the absence of knowledge to the contrary, that he could work in safety. He had been working but three days, and it cannot be said as matter of law that he assumed the risk. He had the further right to rely upon the belief that the defendant had performed the duty of furnishing him a reasonably safe place in which to perform his work. *Randall* v. *Abbott Co.*, 111 Maine, 7; And too, this obligation of the master continues during the time reasonably occupied by the servant on his premises, in going to and returning from his work. Bevin on Negligence, Vol. 1, page 77. It has been seen that where the injury is the result of concurring negligence of two parties, one is not exempt from full liability, although the other was equally culpable. *Water Co.* v. *Steam Towage Co.*, 99 Maine, 473. And the question must be left to the jury whether the first wrongdoer's act was the proximate cause of the injury. Bevin on Negligence, Vol. 1, page 77, and cases cited; *Slater* v. *Mersereau*, 64 N. Y., 139, and cases cited.

In the instruction excepted to, all other questions were taken from the jury. Although plainly not intended, such was the effect of the instruction, and the plaintiff was prejudiced thereby.

Exceptions sustained.
Verdict set aside.
New trial granted.

WILL A. GILMAN,

Administrator of the Estate of George E. Gilman,

vs.

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK.

Cumberland. Opinion December 31, 1914.

Arbitration. Cancellation of Policy. Eviction. Foreclosure. Insurance on Dwelling House. Mortgage Clause. Mortgagee. Payable to Mortgagee.

When the policy of insurance in this case was issued to Frank T. Spear, the premises were under mortgage to George F. Gilman. Upon the policy was the indorsement "Payable in case of loss to George F. Gilman, mortgagee, as his interest may appear." At the request of Spear, the defendant company on April 15, 1911, cancelled the policy and notified Spear, and on the 26th day of September, 1911, the buildings insured were destroyed by fire. Spear filed no proof of loss, but Gilman, the mortgagee, filed a proof of loss.

Held:

1. That the policy in suit, by reason of the mortgage clause and by being made payable in case of loss to the mortgagee, as his interest may appear, contained, in addition to the contract with the mortgagor, a separate and independent contract whereby the mortgagee's interest was insured.
2. The defendant had no right to cancel the policy, except by mutual consent of the insured, and the mortgagee, or by giving to the insured and the mortgagee ten days' notice in writing, as specified in the policy.
3. The mortgagee's right to recover for the loss was not affected by the act of the insured and the defendant in its attempted cancellation of the policy.
4. Attached to the policy in suit is a mechanic's permit dated October 15, 1909, giving permission for mechanics to work in and about the premises for two months from date, to make alterations and additions or repairs. It was shown that the mortgagee did work on the house after the time specified in the permit, without increasing the risk to the extent that would avoid the policy.
5. In making the changes and alterations testified to after the time limited in the mechanic's permit, without the assent of the defendant company, left it a question of fact for the jury whether the changes and alterations constituted such change of the situation or circumstances affecting the risk as to so alter the premises as to cause an increase of such risk.

On motion of defendant. Motion overruled.

This is an action of assumpsit brought by Will A. Gilman, Administrator of the Estate of George E. Gilman, late of Scarboro, in the County of Cumberland, upon a policy of insurance issued by the defendant to Frank T. Spear, October 15, 1909, upon a one and one-half story dwelling house, situated in Scarboro aforesaid. George E. Gilman, deceased, held a mortgage on said dwelling house, and the insurance was payable to him in case of loss, as his interest might appear. The defendant, at the request of the insured, Frank T. Spear, cancelled the policy. Plea, the general issue and brief statement.

The case is stated in the opinion.

Foster & Foster, J. S. Thomas, and F. H. Purington, for plaintiff.

Harry L. Cram, for defendant.

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

HALEY, J. An action of assumpsit, upon a policy of insurance, of the Maine Standard form, issued by the defendant to Frank T. Spear, October 15, 1909, whereby the defendant insured the one and one-half story dwelling house situated in Scarboro for the term of three years, against loss or damage by fire to the amount of $800. There was an endorsement upon the policy as follows: "Payable in case of loss to George F. Gilman, mortgagee, as his interest may appear."

When the policy was issued Mr. Spear was in possession of the insured premises, and remained in possession for about one and one-half years, when George F. Gilman, who held a mortgage of the premises to secure a debt of $900, took possession as mortgagee and evicted Mr. Spear. On April 11th Mr. Spear requested the Insurance Company to cancel the policy. On April 15th of that year they gave him written notice that they had cancelled the policy, as requested. September 26th, 1911, the buildings were destroyed by fire. Soon after the fire Mr. Gilman learned that Mr. Spear and the Insurance Company claimed to have cancelled the policy without his, Gilman's, consent. Mr. Spear neglected to furnish the Insurance Company a proof of loss, as called for by the policy, and October 19th, 1911, Mr. Gilman sent to the defendant a proof of loss. Afterwards he served

notice upon the defendant in writing that he desired to have the amount of the loss settled by arbitration. The defendant paid no attention to either the proof of loss or the request for arbitration.

Shortly after the request to the Insurance Company to submit the question to arbitration, Mr. Gilman died and the plaintiff was appointed administrator of his estate and brought this suit upon the policy. The case was tried at the January term in Cumberland County, the verdict was for the plaintiff for the sum of $900.93, and the case is before this Court on a motion for a new trial as against law and evidence.

The defendant urges two reasons in support of its motion:

First,—Because the policy had, before the loss, been cancelled at the request of Mr. Spear.

Second,—Because the risk was increased by changes and alterations made to the buildings without the consent of the defendant.

First: The form of the Maine Standard Insurance policy, now contained in Sec. 4, Chap. 49, Revised Statutes, was prescribed by the legislature of 1895, before which it was held that an endorsement upon the policy of words making it payable in case of loss to a mortgagee, as his interest might appear, was not an insurance of the mortgagee's interest in the property, or an assignment of the policy to the mortgagee; that it was merely a contingent order, a stipulation assented to by the Insurance Company for the payment of the loss to the assured, if any, to the mortgagee; that it gave the mortgagee the same right to recover that the insured would have had if no such clause had been inserted in the policy; that any violation of the stipulations of the policy which would defeat the right of the insured to recover upon it would defeat the right of the mortgagee; that it was simply an order on the company to pay the amount of the loss to the mortgagee; that the insurance was upon the property of the mortgagor and not upon the interest of the mortgagee. *Savings Institution* v. *Insurance Company*, 68 Maine, 313; *Bank* v. *Insurance Company*, 81 Maine, 570.

The policy in suit is of the Maine Standard form and contains the agreements specified by Chap. 49 to be inserted in a fire insurance policy, among which are the following, spoken of in the opinions as the mortgagee clause, the union clause and the loss payable clause: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee

or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate; provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured; and whenever this company shall be liable to the mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage together with the note and debt thereby secured."

It is further provided in the policy that, "This policy may be cancelled at any time at the request of the insured, who shall thereupon be entitled to the return of the portion of the above premium remaining, after deducting the customary monthly short rates for the insured for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks."

The above mortgage clause is the same as the mortgage clause in the Massachusetts Standard Insurance Policy, and the same as was set forth in the policy in the case of *Whiting* v. *Burkhardt et als.*, 178 Mass., 535, which also contains the usual provisions that is should be void "if, without the assent of the company in writing or print, the said property shall be sold, or the policy assigned." One of the owners of the property conveyed his interest before the fire, and the suit was brought upon the policy by the mortgagee, and the Court say, page 539: "A conveyance by Guptil of his interest in the building insured did not affect the right of the plaintiff to recover in case of loss; it is provided in the policy that, 'if the policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate.'" The Court held that, although the conveyance by the owner of his interest would defeat his right to recover,

that it was no defense to a suit by the mortgagee named in the policy, because the policy contained a mortgage clause the same as the mortgage clause in the policy in suit.

In *Morey* v. *Reliance Insurance Company*, 208 Mass., 378, the Court held: "Because of the foreclosure of a later mortgage covering both estates worked a change in the title, all the policies became void in the hands of the original insurer, and the claim of the plaintiffs, as mortgagees under their earlier mortgage, rests upon the clause in the policy under our Massachusetts standard form, which protects the rights of the mortgagees in such cases." The Court held that the mortgagees could recover.

In *Hardy* v. *Lancashire Insurance Company*, 166 Mass., 210, the Court say: "The history of the provisions in the standard policy in favor of a mortgagee is well known. These provisions, in their present form are intended to afford to the mortgagee full indemnity to the extent of the insurance under his interest in the property, unless the policy is avoided by some act of his, or of his agents, or of those claiming under him, and the mortgagee in certain events comes under obligations to the insurance company to pay for any increase of risk and to assign to it his mortgage." . . . . "The policy of the Commonwealth, that such insurance shall not be avoided so as to affect the mortgagee's interest by the act of the mortgagor, is shown by the adoption of a standard form containing such a provision, and this is the form which mortgagees usually demand."

In *Eliot Five Cent Savings Bank* v. *Insurance Company*, 142 Mass., 142, the policy contained the same clause that is contained in the policy in suit; and the insured conveyed the property before the fire, without the assent of the company, and the Court said: "If we assume, as contended by the defendant, that the conveyance by George B. Taylor to Addie E. Taylor, without the assent of the company, avoided the policy as to them, yet, under the first clause (mortgage clause) above cited, it would not affect the right of the mortgagee to recover."

In *Union Institute* v. *Phenix Insurance Co.*, 196 Mass., 230, the mortgagor obtained insurance upon buildings, and there were endorsements making the loss payable to the mortgagee as his interest might appear. The policy was in the standard form, as the policy in this case. The mortgagee did not know of the insurance until after the fire, and the Court say: "The first question is whether the

plaintiff can avail itself of the contract thus made for its benefit? We think it plain that this question should be answered in the affirmative. Surbridge acted in part for himself and in part as an agent and representative of the plaintiff in procuring the policy. He must be held to have acted in same double capacity in receiving and holding it. This policy contained a contract between the defendant and Surbridge, and a somewhat different contract between the defendant and the plaintiff. Both the mortgagor and the mortgagee were protected in their rights under their several contracts contained in the single paper signed by it. *Palmer Savings Bank* v. *Insurance Company*, 166 Mass., 194; *Hastings* v. *Westchester Ins. Co.*, 73 N. Y., 141; *Hartford Ins. Co.* v. *Olcutt*, 97 Ill., 439."

In *Eddy* v. *L. A. Corporation*, 143 N. Y., 311, Peckham, J., says: "The effect of the mortgage clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners. The plain and obvious meaning of the language is that the insurance of the mortgagee shall not be affected or in anywise impaired or lessened by any act or neglect of the owner, although in the same policy issued to the owner, yet the insurer and the mortgagee were entering into a perfectly separate contract of insurance, by which the mortgagee's interest alone was to be insured, and it would be most natural to provide that no act or neglect of the owner should invalidate, that is, impair any portion of the insurance thus separately secured."

In *Hartford Fire Ins. Co.* v. *Williams*, C. C. A. 63, Fed., 925, it was held that, under the provision in the mortgage clause of a fire policy, the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagor or owner, voluntary destruction by the owner would not prevent a recovery by the mortgagee.

In *Phenix Ins. Co.* v. *Omaha Loan & Trust Company*, 25 L. R. A., 679, the policy contained the following clause: "And if the property be sold or transferred in whole or in part without written permission in this policy, then, and in every such case, this policy is void."

It is also provided, in substance, as the Maine Standard form, as follows: "It is hereby agreed that this insurance, as to the interest

of the mortgagor only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured."

The insured conveyed his interest in the property, and the Court held that the mortgagee was entitled to recover upon the policy; that the contract with the trust company (mortgagee) was a separate and independent contract, and the right of the mortgagee to enforce it did not depend upon whether the owner had kept his engagements with the insurance company or not.

The case also cites several opinions holding the same doctrine.

In *Bacot* v. *Phenix Ins. Co.*, 25 L. R. A., (N. S.) 1226, it was held that, where a husband insured property as the owner when it was in fact owned by his wife, the policy as to him or his wife was void, but also held that, by reason of the mortgage clause attached to the insurance policy, under a statute providing that the insurance of the mortgage interest should not be invalidated by any act or neglect of the owner of the property, the mortgagee could recover upon the policy.

In the note to the case of *Bretch* v. *Law Union & Crown Ins. Co.*, reported in 18 L. R. A., (N. S.) 197, the editor, after reviewing many cases, states that the principle that under such a clause as is contained in the policy in suit, the rights of a mortgagee cannot be affected by any act or neglect of the owner, the mortgagor, occurring after the issuing of the policy, and cites many cases to support it, and concludes by stating (page 206), "the only difference of opinion which arises as to the effect of such clause occurs when the act of the mortgagor, which is relied upon to avoid the policy as to the mortgagee is some misrepresentation or concealment at the time of the issuance of the policy. The weight of authority, however, would seem to support the conclusion that the rule is the same under such circumstances."

An examination of the cases where the policies contained an endorsement making them payable in case of loss to the mortgagees, as their interests might appear, clearly shows that the rule of law declared in cases before the adoption of the Maine Standard form of policy does not apply to that form of policy, and that the policy in suit, by reason of the mortgage clause and by being made "payable in case of loss to George S. Gilman, mortgagee, as his interest may appear," contained in addition to the contract with Frank T. Spear a separate and an independent contract whereby the mortgagee's

interest was insured, and the defendant had no right to cancel the policy except by mutual consent of the insured, Mr. Spear, and the mortgagee, or by giving to the insured and the mortgagee ten days notice in writing, as specified in the policy, and that the mortgagee's right to recover for the loss was not affected by the act of the insured and the defendant in their attempted cancellation of the policy.

Second: That changes and alterations were made in and upon the building which were not permitted, and about which the defendant had no notice. Attached to the policy is a mechanic's permit, dated October 15, 1909, giving permission for mechanics to work in and about the premises for two months from date, to make alterations and additions, or repairs. It was shown by the testimony that Mr. Gilman, the mortgagee, did work on the house after the time specified in the permit. He laid new floors, changed the stairs, put up studding in the second floor, etc.

The defendant relies upon *Fire Insurance Co.* v. *Coos County*, 151 U. S., 452, which held that, if mechanics were employed in building, altering or repairing the premises without a building permit, the insurer was relieved from responsibility, although the fire did not occur in consequence of the alterations or repairs. The policy in that case provided that, "This policy shall be void and of no effect if, without notice to this company and permission therefor in writing indorsed hereon . . . , the premises shall be used or occupied so as to increase the risk, . . . or the risk be increased by any means within the knowledge or control of the insured, . . . or if mechanics are employed in building, altering, or repairing premises named therein, excepting in dwelling houses, except not exceeding five days in one year are allowed for repairs." The Court say: "The condition of the policy should be void and of no effect, if 'mechanics are employed in building, altering or repairing the premises named herein,' without notice to or permission of the insurance company, being a separate and a valid stipulation of the parties, its violation by the assured terminated the contract of the insurer, and it could not be thereafter made liable on the contract, without having waived the condition, merely because in the opinion of the court and jury the alterations and repairs of the building did not, in fact, increase the risk." The policy in suit does not contain the clause contained in the above mentioned policy that the policy should be void and of no effect if mechanics are employed in the building,

altering or repairing the premises named herein; but it does provide that "the policy shall be void if, without the assent of the insurer, the property shall be removed, except that if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent after five days thereafter, or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured be so altered as to cause an increase of such risk."

The attaching to the policy of the permit above referred to gave to the assured the right to employ mechanics in and upon the premises as specified in the permit for the period named in the permit without increasing the risk to the extent that would avoid the policy, and the making of the changes and alterations testified to after the time limited in the mechanic's permit, without the assent of the insurance company, left it a question of fact for the jury whether the changes and alterations constituted such a change of the situation or circumstances affecting the risk as to so alter the premises as to cause an increase of such risk. If it did not cause an increase of such risk, then it was not a forfeiture of the policy, and whether it was an increase of risk under the circumstances was a question of fact for the jury, and they were expressly instructed upon that branch of the case, and no exceptions were taken to such instruction, and we cannot say, from an examination of the evidence on this branch of the case, that they were not justified in finding that the alterations and repairs made by the mortgagee did not create an increase of the risk, but that they were such repairs and alterations as would ordinarily be expected to be made upon such premises, and that the Insurance Company so considered it when it issued the policy of insurance.

Motion overruled.

CORNISH, J. Dissenting.

I am unable to concur in this opinion so far as it relates to the question of cancellation. The precise question involved is this: Can a mortgagor who has taken out a policy of insurance upon his own property, in his own name, but payable, in case of loss, to a mortgagee as his interest may appear, and who has paid the premium, cancel the policy upon request made to the company without the assent of the mortgagee. The opinion holds that he has not this power and that notwithstanding his request the company has no right to cancel the policy without the consent of the mortgagee. This seems to me a forced construction of the plain and unambiguous words of a contract made by the parties, and sanctioned by the legislature.

The provision relating to cancellation, which has been a part of the Statutes of our State since the adoption of the standard policy in 1895, reads as follows:

"This policy may be cancelled at any time at the request of the insured, who shall thereupon be entitled to the return of the portion of the above premium remaining, after deducting the customary monthly short rates, for the time said policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks." R. S., Chap. 49, Sec. 4, par. VII. The first part of this provision covers voluntary cancellation by the insured, the second, voluntary cancellation by the company. We are concerned with the first part only. The words are direct and simple. The power of cancellation is given to "the insured." Who then is meant by "the insured," as the term is used in this contract? No room is left for conjecture. It is the party who effects the insurance and pays the premium which is the consideration of the contract in this case Frank T. Spear the mortgagor. The policy at its very inception so specifies: "In consideration of twelve dollars to it paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, does insure Frank T. Spear and his legal

representatives" etc. The policy itself therefore clearly defines the term, and wherever the words recur throughout the policy they have the same meaning and refer to the same person. It is true, as the opinion holds, that the mortgagee has certain rights under the standard policy given him by another provision which we shall discuss later, and in a certain sense his interest may be deemed to be protected or insured, but he is not the party insured designated by the statute as having the right to cancel the policy at any time at his own request. To make him such or to place him beside "the insured" and say that the policy cannot be cancelled without his assent is in effect to give to the statute an interpretation antagonistic to its express language, and to couple with the visible and expressed mortgagor, an invisible and unexpressed mortgagee. Such a result may be equitable and desirable, and therefore a matter for the consideration of the law making branch of the government, but it requires a severe wrenching of the statute to accomplish such a result without legislative amendment.

Further study of this cancellation section confirms our view. "The insured" is the party designated as entitled to a return of the unearned premium reckoned in the manner prescribed. To return is to give back to the party making the original payment. That party is entitled to the return and can sue the Company and recover if the Company should decline to pay. The statute gives him that right and makes the unearned premium a debt which he and he alone can recover. What rights has the mortgagee in that unearned premium? He has paid no part of it. Can he maintain an action for it? Certainly not. What stumbling block can he put in the way of the mortgagor who seeks to recover it? None whatever, because the contract says the insured is "entitled" to it. But if the mortgagee can prevent the cancellation by withholding his assent, he most effectually debars the mortgagor from receiving what is his legal due. For it scarcely could be contended that the mortgagor could receive his premium which was the consideration of the policy, and yet the policy would remain alive and valid as to the mortgagee. If so, at whose expense would it be running? Not at the mortgagor's because his premium has been returned. Not at the mortgagee's, because it is not claimed that he is in any way liable therefor. We should then have the dilemma of a policy existing and in force at no one's expense. Such a situation is impossible. The power of can-

cellation and the right to the return of the unearned premium are inseparable, and they belong to one and the same person, and that person is he who effected the insurance.

That the legislature regarded "the insured" as distinct from the mortgagee, and used the term advisedly in designating him as the party having the power of cancellation is also apparent from the second part of the cancellation provision, permitting cancellation by the company. Here the rights of the mortgagee are recognized and expressly reserved in contradistinction to those of the mortgagor, because the Company can cancel only "after giving written notice to the insured, and to any mortgagee to whom this policy is payable" etc. Here the distinction between the two is sharply drawn. "The insured" is the mortgagor, as distinct from the mortgagee. Written notice must be given to both, but in the next clause it is provided that the Company must at the same time tender "to the *insured* a ratable proportion of the premium" etc. Notice must be given to both, but payment or tender made only to one. We cannot conceive how the English language could have been used with keener discrimination in specifying the rights of both the insured and the mortgagee, and yet the opinion holds that while the contract provides that "the policy may be cancelled at any time at the request of the insured," yet the company has no right to cancel it, notwithstanding this request, except by mutual consent of the insured and the mortgagee. The legislature might have so enacted but clearly it did not. It recognized the rights of the mortgagee in cancellation by the company but not in cancellation by the insured. The line of cleavage is well defined.

Passing now from the particular cancellation clause to the entire policy, and applying the familiar rule as to the force of the context, our construction is further confirmed. The words "the insured" occur twenty-one times in the policy, and confessedly in the other twenty instances they refer to the party effecting the insurance, the mortgagor. On what ground can it be made to apply to another and unnamed party, the mortgagee, in the twenty-first?

The Massachusetts Court, in construing the words "the insured" in connection with the proofs of loss and the provisions for arbitration in a standard policy like our own, note the distinction between "the insured" and the mortgagee in these words:

"It is quite certain that the party referred to as 'the insured' in these provisions is the mortgagor. The contract calls for but one such statement, and if the duty of furnishing it is upon the mortgagee when the loss is payable to him then there is no such duty upon the mortgagor. The paper must be 'signed and sworn to by the *insured*,' it must set forth the 'interest of the *insured* therein,' and various other stipulated facts which are peculiarly within the knowledge of the mortgagor 'so far as known to the *insured*.' The mortgagee is referred to in the policy in contradistinction to the insured, in different parts of the policy. The mortgagee, to secure his rights in that capacity, must pay on demand 'for any increase of risks not paid for by the *insured*.' The Company reserves the right to cancel the policy 'after giving written notice to the insured and to any mortgagee, etc. In the clause reciting the consideration the company 'does insure' . . . . the mortgagor." *Union Inst. for Sav.* v. *Ins. Co.*, 196 Mass., 230-233. To the same effect is *Collinsville Savings Soc.* v. *Ins. Co.*, 17 Conn., 676, where the Court say: "On the other hand it is not easy to discover upon what theory it can reasonably be claimed that a person who has not come into contractual relations with the insurer, who has obtained no insurance protection, and who is only an appointee of the owner as respects whatever may become due under the contract of insurance, to which he is a stranger, acquires the right, even by indirection, to assume the title of 'the insured.' If we look for other provisions which may serve, by way of implication or otherwise, to give him a standing in the adjustment of a loss, we find only that the word "insured" whenever used in the policy should be construed to include the legal representatives of the insured and nothing more. It appears therefore that the right to participate in an adjustment of a loss under this policy and indorsement, has by the parties to the contract been limited to the insurer, the property owner and his legal representatives."

For the reasons thus set forth I am of opinion that the language of the cancellation clause is unambiguous, and the rights thereby conferred upon the insured are not to be challenged unless we judicially amend it by inserting after the words "the insured" the words "with the consent of the mortgagee," so that said clause as amended shall read, "This policy may be cancelled at any time at the request of the insured with the consent of the mortgagee" etc. This I am reluctant to do.

The other section of the policy upon which the reasoning of the opinion rests, if I understand it correctly, is as follows: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate, provided that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured;" etc. The rights of the mortgagee under this clause are protected, as the opinion holds, and no act or default of the mortgagor or of any other person than the mortgagee, either before or after the loss, can abridge or destroy them. That however does not refer to the cancellation of a policy which is expressly permitted under another section. A cancelled policy is one thing, a broken policy quite another. The "act or default" intended by this provision concerns such acts or defaults as would work a breach of the policy as to the mortgagor. It may be some positive act, an act of commission on the part of the mortgagor, as the sale of the premises, or procuring additional insurance, or even the voluntary destruction of the property; or it may be his failure to do something, an act of omission on his part, as the neglect to furnish proof of loss after fire has occurred. All these and similar instances come within the scope of this "act or default" clause, and under one class or the other falls every case cited in the opinion. Thus the conveyance of the property by the mortgagor in *Eliot Sav. Bank* v. *Ins. Co.*, 142 Mass., 142; *Palmer Sav. Bank* v. *Ins. Co.*, 166 Mass., 189; *Whiting* v. *Burkhardt*, 178 Mass., 535; *Union Inst. for Savings* v. *Ins. Co.*, 196 Mass., 230; and *Phoenix Ins. Co.* v. *Omaha Loan & Tr. Co.*, (Neb.) 25 L. R. A., 679; the foreclosure of a later mortgage working a change in the title, *Morey* v. *Ins. Co.*, 208 Mass., 378; the procuring of additional insurance by the mortgagor, *Hardy* v. *Ins. Co.*, 166 Mass., 210; *Hastings* v. *Ins. Co.*, 73 N. Y., 141; *Eddy* v. *Ins. Co.*, 143 N. Y., 311; *Hartford Fire Ins. Co.* v. *Olcott*, 97 Ill., 439; incorrect description of interest or misrepresentations, *Bacot* v. *Phoenix Ins. Co.*, (Miss.) 25 L. R. A., N. S., 1226; the voluntary destruction of the premises by the mortgagor, *Hartford Fire Ins. Co.*, v. *Williams*, 63 Fed., 925; and his failure to furnish proof of loss, *Union Inst. for Savings* v. *Ins. Co.*, 196 Mass., 230. This covers every citation in the opinion on this branch of the case except the Editor's note to *Bretch* v. *Law*

Union & Crown Ins. Co., 18 L. R. A., N. S., 197, and that, like the others, refers only to the "effect or breach of policy of insurance by mortgagor on rights of the mortgagee." From none of these decisions do we dissent; with all of them we agree; but we fail to see their application to the case at bar.

They all refer to the effect on the mortgagee of the breach of the conditions of the policy by the mortgagor, not to the cancellation of a policy, and the gulf between the two is not bridged. The purpose of this "act or default" clause is apparent. Prior to its adoption the Courts held that the clause "payable in case of loss to a mortgagee as his interest may appear" merely constituted the mortgagee an appointee to receive the insurance in case of loss, and a violation of any of the terms of the policy by the mortgagor, such as transfer of title, procuring additional insurance, fraud in proof of loss, etc., avoided the policy not only as to the mortgagor, but also as to the mortgagee. The rights of the mortgagee fell with those of the mortgagor. This Court had so held. *Brunswick Savings Inst.* v. *Ins. Co.*, 68 Maine, 313; *Biddeford Savings Bk.* v. *Ins. Co.*, 81 Maine, 570. To prevent this result, and to remedy this apparent injustice, the "act or default" clause was inserted in the standard policy, and thereby the interest of the mortgagee is protected, notwithstanding the conduct of the mortgagor may have been such as to forfeit his own. No longer can the mortgagor's wrong doing imperil the rights of the mortgagee. In this sense the mortgagee's interest is covered by the policy, but in no other, and all the cases cited in the opinion are but illustrations of the various phases in which this single question has been presented to the Courts. In discussing the scope of this protection the Courts have sometimes used broad language, as the quotations in the opinion show, but in each instance it was used with reference to the "act or default" clause then under consideration, and in no way involved the rights of the parties under the independent clause governing cancellation. No cited case, and no other that we have been able to find, has declared the doctrine sought to be established in the opinion.

If the logic of the opinion on this branch of the case is that no act of the mortgagor can affect the mortgagee's right of recovery, and that the request for cancellation was such an act, the fallacy of the argument is obvious. The act of the mortgagor contemplated by the clause is, as we have seen, such as would constitute a breach of

the contract on his part, a prohibited act, an unauthorized act. But the request for cancellation is a contract right, expressly reserved to the insured by another provision when the policy is issued. It is a statutory right, an authorized privilege of which he cannot be deprived. Under what rule of construction can an act expressly authorized under one provision of a contract be converted into a prohibited act under another provision? How can a contract-authorized act be transformed into a contract-breaking act? Such a position is manifestly untenable.

Our conclusion therefore is, that however desirable it might be to couple the power of cancellation on the part of the mortgagor, with the consent of the mortgagee, the legislature, thus far, has failed to do so, but has left the power in the hands of the mortgagor alone, and his request for cancellation is a contract right which, when exercised by him, ipso facto works a cancellation of the policy. *Lipman* v. *Ins. Co.*, 121 N. Y., 454; *Crown Point Co.* v. *Ins. Co.*, 127 N. Y., 608; *Ins. Com'r.* v. *Ins. Co.*, 68 N. H., 51; *Parsons* v. *Ins. Co.*, 133 Iowa, 532, (110 N. W., 907); Richards Ins., Sec. 287.

STATE OF MAINE

vs.

MICHAEL J. MULKERRIN, alias MICHAEL MULKERN.

Cumberland. Opinion January 12, 1915.

Appeal. Homicide. Imminent Danger. Justifiable Self Defense. Malice. Murder. Revised Statutes, Chap. 135, Sec. 27. Threats.

1. Upon an appeal by one convicted of murder from the overruling of his motion for a new trial, the only question to be determined by the Law Court is whether the jury were warranted by the evidence in believing him guilty, beyond reasonable doubt.
2. In this case, the evidence is ample to warrant the conclusion that the homicide which was admitted, was premeditated and deliberate.

On appeal by respondent. Appeal denied. Judgment on the verdict.

The respondent was tried on an indictment for the murder of Patrick J. Mulkerrin, at the September term of the Superior Court, 1914, for Cumberland County, and was convicted. He filed a motion for a new trial, which was overruled by the presiding Justice, and he thereupon appealed from that decision.

The case is stated in the opinion.

Scott Wilson, Attorney General, *and Samuel L. Bates*, County Attorney, for the State.

Jacob H. Berman, Harry E. Nixon, and Benjamin L. Berman, for the respondent.

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

SAVAGE, C. J. The defendant was convicted of murder. His motion for a new trial was overruled by the presiding Justice, and the case comes before us on appeal from that decision. R. S., Chap. 135, Sec. 27.

The defendant admitted the killing, and interposed the defense of self defense. And in addition he now contends that if he was guilty of anything, it was only manslaughter. No exceptions have been reserved, and the only question now before us is whether, in view of all the testimony in the case, the jury were warranted in believing beyond a reasonable doubt, and therefore in finding, that the defendant committed the homicide with malice aforethought express or implied. *State* v. *Lambert*, 97 Maine, 51; *State* v. *Albanes*, 109 Maine, 199.

We think the jury might well have found the following facts:—The defendant and the deceased were brothers. On the evening of the homicide, the defendant approached a police officer on the street and said his brother, the deceased, had been chasing him with bricks, and that he wanted protection; that the officer told him to go to the police station and swear out a warrant, and that the brother should then be arrested; that the defendant replied, "I don't care anything about the station or court; I want protection;" that he refused to swear out a warrant; that he was very much excited; that a few moments later he said to the officer "I will get a gun and I will shoot the son of a bitch;" that he then went to his sister's house, where he was living, changed his clothes, took a revolver from a drawer in his sister's room, put it in his hip pocket, and went to his brother's stable, arriving there not more than fifteen or twenty minutes after he left the officer. All of this, except the threat to shoot, is admitted by the defendant. There was also believable evidence that after the homicide he said to the same officer in effect "I told you I would shoot him and I did."

What actually took place in the stable is in dispute. The dying declaration of the deceased was admitted in evidence. And since its admission was hotly contested, we will add that it was properly admitted. The dying declaration was in these words:—"I was standing in the stall, facing the manger. I was shot from the back. I looked around; I see Mikey (the defendant) and he fired five or six more shots, and he says 'I will kill you, you bastard.'"

The defendant's story, so far as it is material to the vital issue, is in these words:—"I went into the barn, and Pat, (the deceased) was standing right up near the door, and I says to him 'Pat, if you don't leave me alone I am going up to swear out a warrant for you and protect myself, and I will carry a gun to protect myself.' I walked

in the barn, and he walked way back in the barn kind of like in the stall, and he hit me with a broom, and then he run out to the door, and he shut the door, and he hugged for me. I said 'If you don't let me go, I will shoot you,' and so he kept hugging, and I fired the gun and shot him. I knew he would kill me if he got the gun. He told me 'I will kill you Mikey.' I knew he would kill me. After that he dropped on the floor." On cross-examination the defendant testified that he went to the stable looking for his brother, that the brother saw him before he went in, but said nothing; that the brother went to the back of the stable as soon as he saw him come in, and still said nothing; that he, the deceased, walked into the last stall, "kind of hid in the last stall," that after he, the defendant, said he would make complaint and get a gun, the brother came running out and shut the stable door quick and hit him with a broom; that the brother said "I have got you now where I want you, I will kill you;" that the defendant showed him the revolver, and said "If you try any funny work, I will use it;" that "he came up to me, started to hug me, and I let the shots go off;" that the brother had grabbed him, was holding his arms to his side and was trying to take the revolver; that he got his hand free and fired three shots at his brother. He says "I had it right up close to him." Being asked, "Bodies close together? He was hugging you right up tightly?" he answered "Yes, sir, tight."

The defendant introduced a great mass of evidence tending to show that the deceased was a quarrelsome, violent, dangerous man, that he had chased the defendant with bricks that very evening, that on previous occasions he had chased him with bricks, cobble stones and knives, that he had threatened his life, and once had fired a revolver at him.

If the defendant's story of the homicide is a true one, the previous conduct of the deceased, if the testimony is true, would go far to show that the defendant had reason to believe that he was in imminent danger of great physical harm, or even of loss of life, at the hands of the deceased. And this is one important element of justifiable self defense. If on the other hand, as the State contends, the defendant challenged the fight and provoked the deceased to it, by the handling of the revolver, he cannot claim the benefit of this defense. Wharton on Homicide, Sec. 482; Wharton on Criminal Law, Sec. 485; Roscoe's Criminal Evidence, Sec. 768; 21 Cyc., 800.

But the difficulty with this part of the defense is that we think the jury were warranted in believing that the defendant's story was not true. Besides the fact that the defendant in anger or resentment had armed himself with a revolver, and had followed the deceased to his stable,—strong evidence of premeditation and design,—there is credible evidence, aside from the dying declaration of the deceased, that at the time the shots were fired, the men were not in any such death-grapple as the defendant describes, nor even near each other. An examination of the body of the deceased showed that three shots took effect. One passed through the flesh in the region of the hip. Another penetrated the left breast. A third penetrated the abdomen eight inches to the left of the navel. And the evidence is undisputed that neither upon the clothing of the deceased where the bullets passed through, nor upon or about the wounds on the body, was there any mark or indication of powder or burning. An expert witness introduced by the State, apparently competent and well qualified, testified in effect that such marks and indications would necessarily appear in case of a revolver discharged at no greater distance from the body than that described by the defendant. This witness said that in his opinion, to produce the characteristics of the holes in the clothing, the revolver, when discharged, could not have been less than five feet from the body. This testimony was in no way rebutted, and it does not seem unreasonable. Moreover, we may add, the wound in the left breast is not accounted for by any movement or position that the defendant describes.

Accordingly, we conclude that the jury were justified in rejecting the claim of self defense set up by the defendant. And the defendant's story being discredited, as well it might be, the evidence, beginning with his threats, followed by his procuring the revolver, his following the deceased to the stable, and his shooting him almost immediately afterwards, is ample to warrant the conclusion that the homicide was premeditated and deliberate.

Appeal denied.
Judgment on the verdict.

MORRIS I. SALTER, et als.

vs.

CHARLES A. GREENWOOD, et als.

Penobscot. Opinion January 12, 1915.

Check. Denial of Partnership. Evidence. Exceptions. Partnership. Report of Evidence must be made a part of Exceptions.

1. If a bill of exceptions does not contain enough to show that the point raised was material, and that the ruling complained of was both erroneous and prejudicial, the exceptions cannot be sustained.
2. In considering exceptions, neither the evidence nor the charge of the presiding Justice can be examined, except so far as they are made a part of the bill of exceptions.
3. It lies clearly within the discretion of the presiding Justice to submit special questions to the jury, and to require them to return special verdicts.

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

In this action of assumpsit, the plaintiffs seek to recover of Charles A. Greenwood, Edward H. Greenwood and Grace A. Greenwood, copartners doing business under the firm name of Greenwood Woolen Company, the amount of three checks, given to the plaintiff by said Company. The defendant, Charles A. Greenwood, filed a denial of partnership under Rule X. The only question submitted to the jury was whether he was a copartner. The jury found that he was a member of said firm, and the defendant filed a motion for a new trial and had exceptions to certain rulings of the presiding Justice, which are considered in the opinion.

The case is stated in the opinion.

F. D. Dearth, and Hudson & Hudson, for plaintiffs.

George E. Thompson, and W. M. Warren, for defendants.

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

SAVAGE, C. J. This is an action on a check and is brought against the defendants as copartners, doing business under the name of Greenwood Woolen Company. The only question at issue is whether Charles A. Greenwood was a member of the firm at the time the check was given. He seasonably filed a denial of partnership under Rule X. The jury found that he was a member, and the case comes before us on his motion for a new trial and exceptions.

The bill of exceptions is in these words:—"During the trial, subject to the objection of the defendant, the court allowed in testimony evidence tending to show:—

First. Conversation with Charles A. Greenwood in regard to partnership without definitely fixing the time of conversation.

Second. Evidence in regard to another and sêparate transaction, to wit, with one Flanders, who was not a party to this writ.

Third. Evidence in regard to claims against Greenwood Woolen Company held by an attorney named Crosby.

Fourth. Evidence admitting so much of letter heads without showing knowledge of Charles A. Greenwood as to their existence.

Fifth. Evidence admitted in regard to who constituted Greenwood Woolen Company when first started.

Sixth. Also to instructions asking jury to answer certain questions framed by Court."

It has been held many times that a bill of exceptions must contain enough to show that the point raised was material, and that the ruling complained of was both erroneous and prejudicial, or nothing can be taken by the exceptions. Error must appear affirmatively. *Darling* v. *Dodge*, 36 Maine, 370; *Webster* v. *Calden*, 55 Maine, 165; *Allen* v. *Lawrence*, 64 Maine, 175; *Noyes* v. *Gilman*, 71 Maine, 394; *Smith* v. *Smith*, 93 Maine, 253; *Neal* v. *Rendall*, 100 Maine, 574; *Jones* v. *Jones*, 101 Maine, 447; *Doylestown Ag. Co.* v. *Brackett*, 109 Maine, 301, and many others. The bill must show what the issue was. 67 Maine, 70. It must show the facts concerning which the ruling was made. *Nutter* v. *Taylor*, 78 Maine, 424; *Penley, Compl't*, 89 Maine, 313. It must contain enough to show that the points raised are material. *Jones* v. *Jones*, 101 Maine, 447. "It is not enough that the court can find all of these characteristics by studying the report of the evidence in support of a motion for a new trial,

when it accompanies a bill of exceptions. The bill must be strong enough to stand alone. In considering the exceptions the court cannot travel outside of the bill itself. In this respect the court cannot consider the report of the evidence, nor the charge of the presiding Justice, unless they are made a part of the bill of exceptions." *Jones* v. *Jones*, supra.

Tested by these well established rules, it is manifest that the exceptions, except possibly the last one, are not well presented. They do not state what the testimony was which was admitted. They do not contain enough to show whether the testimony was relevant and material or not, or whether it was admissible, or if not, whether it was prejudicial. For aught that appears in the bill, each class of testimony objected to may have been admissible upon some issue.

As to the last exception, if it be granted that it was definite enough to raise the point, it is only necessary to say that it is clearly within the discretion of the presiding Justice to submit special questions to the jury, and require them to return special verdicts. The practice is ancient and general, and often serves a very useful purpose.

It follows that the defendant can take nothing by his exceptions.

Nor can he stand any better under his motion. It will serve no good purpose to analyze the evidence in this opinion. It consisted of the conduct and declarations of the defendant, and was ample to sustain the finding of the jury that he was a partner, especially in view of the fact that it was uncontradicted. The defendant did not testify.

Motion and exceptions overruled.

HAROLD D. LITTLEFIELD *vs.* H. M. COOK, et al., Admrs.

Penobscot. Opinion January 12, 1915.

Administration. Claim. Evidence. Exceptions. Filing of Claims. Limitation. Payment. Receipts. Revised Statutes, Chap. 89, Sec. 14. Waiver.

1. An administrator or executor may waive the presentment or filing of claims against the estate under oath, while the claim is not yet barred by limitation.
2. Whether an administrator or executor can waive the statute bar upon claims, already barred by limitation, *quaere.*
3. An agreement in writing signed by the administrators and the heirs, who are also the claimants, "that the claims have been duly presented to said administrators and payment demanded," is a waiver by the administrators of the presentment or filing of the claims, even though in fact the statement was not true.
4. An item in an account annexed, "to paid town of Newport, taxes, 1902 to 1910, inclusive, $232.80," may be supported by evidence of payments of smaller sums at different times, to different collectors, all tending to make up the sum sued for.
5. Receipts given by a person not a party to the suit are merely unsworn declarations and hearsay, and are not admissible against either party. But when the person who gave the receipts was a witness and testified that he gave the receipts for the money paid, the amount stated in the receipts is prima facie evidence of the amount paid.
6. The conduct of a party, the statements made by him, and the letters written by him, tending to show improper motives, or improper practices, with reference to a suit, are always admissible against him at the trial of the suit. It is reversible error to exclude the evidence of them.

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

This is an action of assumpsit upon an account annexed, brought by Harold D. Littlefield against H. M. Cook and F. Wade Halliday, administrators of the Estate of Margaret A. Littlefield, late of Newport, deceased, to recover for services rendered to, and disbursements made for, the defendant's intestate. Plea, the general issue, with brief statement, in which it is claimed that plaintiff never presented the claim to the administrators, as required by law. In

the course of the trial, the defendant had several exceptions to the rulings of the presiding Justice. The jury returned a verdict for the plaintiff for $1119.19, and the defendants filed a motion for a new trial.

The case is stated in the opinion.

W. H. Mitchell, and B. W. Blanchard, for plaintiff.

Edgar M. Simpson, and F. Wade Halliday, for defendants.

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

SAVAGE, C. J. This is a suit to recover for services rendered to, and disbursements made for, the defendant's intestate. The plaintiff recovered a verdict, and the case comes before this Court on the defendant's motion for a new trial, and exceptions.

1. One of the exceptions was to the refusal of the presiding Justice to direct a verdict for the defendants, particularly on the ground that the claim had not been presented to the administrators in writing, or filed in the Probate Court, supported by an affidavit of the claimant, or of some other person cognizant thereof before or within eighteen months after the filing by the administrators in Probate Court of an affidavit that notice had been given of their appointment, as required by Revised Statutes, Chap. 89, Sec. 14.

It appears that in fact the claim was neither presented nor filed, as required by the statute. But it also appears that two days before the eighteen months would have expired, the plaintiff and his brother, the only heirs, and the administrators agreed in writing that in case there was not sufficient property in the estate to pay all claims in full, that the heirs would accept in full a percentage of their claims, after all other claims and expenses of administration were fully paid. And the agreement contained the following language:— "It is hereby agreed by all the parties hereto that the claim of U. S. Littlefield for $1631.46 and the claims of H. D. Littlefield for $2009.61 and $102.35 respectively have been duly presented to said administrators and payment demanded."

The plaintiff contends that this agreement was a waiver of the statutory requirement of presentment. The defendants reply that executors have no power to waive the requirement. We think the plaintiff's contention must be sustained, and that administrators, before a claim is barred by the statutory limitation, may waive

presentment in writing under oath. It was so stated, though in a dictum, in *Mitchell* v. *Dockray*, 63 Maine, 82. It was expressly so held in *Rawson* v. *Knight*, 71 Maine, 99, and *Marshall* v. *Perkins*, 72 Maine, 343. In *Rawson* v. *Knight*, the Court said,—"The statute, though of a public nature, has for its object the protection of the rights of estates and individuals. Its provisions therefore may be waived by those for whose benefit it was passed, and who represent the interests involved." In *Marshall* v. *Perkins*, the Court used this language:—This statute "was enacted for the benefit of estates, and of those who take upon themselves the important trust of administering on them; and any party may waive the provisions of a statute made for his benefit."

The statute as it stood at the time these cases were decided provided that "no action against an executor or administrator . . . on a claim against an estate shall be maintained . . . unless such claim is first presented in writing and payment demanded at least thirty days before the action is commenced, and within two years after notice is given by him of his appointment." R. S., 1871, Chap. 87, Sec. 11, as amended by Laws of 1872, Chap. 85. By the amendment of 1872, Sec. 11 of Chap. 87, R. S., became Sec. 12. Sec. 12 was amended by Laws of 1883, Chap. 243, by which the absolute limitation was removed, and provision made that if action should be commenced without the claim "being first presented in writing and payment demanded, or the claim being filed in the probate office, supported by the affidavit of the claimant or of some other person cognizant thereof, at least thirty days before commencement of suit and within two years after notice is given by him of his appointment, . . . such action shall be continued." This statute remained without material modification until Laws of 1899, Chap. 120, which amended Sec. 12 so as to eliminate the requirements for presenting or filing claims. But Sec. 12 was again amended by Laws of 1903, Chap. 198, (now R. S., 1903, Chap. 89, Sec. 14), which is now in force. This statute provides that "all claims against deceased persons . . . . shall be presented to the executor or administrator in writing, or filed in the probate court, supported by an affidavit of the claimant . . . within eighteen months after affidavit has been filed in the probate court that notice has been given by said executor or administrator of his appointment. . . . Any claim not so presented or filed shall be forever barred."

It would seem that when a claim has become barred by the limitation provided in this section, the executor cannot waive the statute. *Wadleigh* v. *Jordan*, 74 Maine, 483. But so far as the precise question now being considered is concerned, the present statute is on all fours with the statute in force when *Rawson* v. *Knight* and *Marshall* v. *Perkins* were decided. And upon the authority of those cases we hold that an administrator or executor may waive the presentment or filing of claims, under oath, while the claim is not yet barred. And we think the administrators did so in this case.

2. To support an item in the writ, "To paid Town of Newport, taxes, 1902 to 1910, inclusive, $232.80," the plaintiff offered evidence of payments of smaller sums at different times to different collectors, all tending to make up the amount sued for. The defendants objected, on the ground that "the plaintiff was limited by the form of his statement of the item to proof of one single and entire charge for taxes so paid on a single occasion." The evidence was admitted, and we think properly. The item itself indicated that the total sum was made up of smaller payments. If the defendants desired further light, they should have prayed for specifications. It was entirely proper to permit proof of the aggregate by evidence of the smaller payments which went to make up the aggregate.

3. To prove the payment of certain water rates the plaintiff called the collector who testified that the plaintiff paid him some water rates for the premises where he and the intestate lived, and that he gave the plaintiff receipts for the rates he paid. The witness identified the receipts. They were then offered and admitted in evidence, against the defendant's objection and exception. No evidence other than that contained in the receipts was offered as to the amount of the payments. The objection made was that the receipts were merely hearsay evidence. While receipts given by parties to a suit are admissions and are admissible in evidence as such, it is doubtless true that receipts given by third parties are merely unsworn declarations and hearsay, and hence not admissible. *Silverstein* v. *O'Brien*, 165 Mass., 512. See *Kaliamotes* v. *Wardwell*, 11 Maine, 401. But in this case, the person who gave the receipts was a witness, and testified that he gave the receipts for the money paid. Under these circumstances, we think the amount stated in the receipts is prima facie evidence of the amount paid.

4. The defendants offered in evidence a letter written just prior to the trial of this case by the plaintiff to his uncle, who was one of the defendants' witnesses. The letter contained the following language: "We just rec'd Aunt Josie's letter and are both disgusted with same, not because you can do us any hurt for you don't know anything that would hurt us, but it shows that you are not our friends and if you do come it will be the last time we want you to ever look at us say nothing of speaking. Sid and I are enemies forever and if you want to be the same come on as we know you are doing it on your own free will." The letter was excluded, and the defendants excepted.

We think the letter was clearly admissible. It was a part of the conduct of the plaintiff relative to this suit. It was evidently an attempt on his part to dissuade one of the defendants' witnesses living in another State from attending the trial. It showed a willingness to use unfair means. A jury might regard it as evidence of a consciousness on his part that his case was weak. The conduct of parties, tending to show improper motives, or improper practices, with respect to a suit, is always admissible against them. And this letter throws so much light upon the plaintiff that we cannot say that its exclusion was not prejudicial to the defendants. This exception must be sustained.

The motion for a new trial is not considered.

Exceptions sustained.

MEMORANDUM DECISIONS

CASES WITHOUT OPINIONS

HENRY E. COOLIDGE, Admr., *vs.* REUEL SMITH, Admr.

Androscoggin County. Decided June 24, 1914. This is an action of trover to recover the value of certain personal property which plaintiff claims belonged to the estate of William C. Coombs and which the defendant claims belongs to the estate of Marcia G. Coombs. Plea, general issue. The jury returned a verdict for the defendant and the plaintiff filed a general motion for a new trial and also a motion for a new trial on newly discovered evidence. Both motions overruled. *Oakes, Pulsifer & Ludden,* for plaintiff. *Ralph W. Crockett,* for defendant.

JOHN STAPLETON *vs.* WILLIAM F. CURRAN.

Penobscot County. Decided July 1, 1914. Action to recover $500 which the plaintiff claims he loaned to defendant May 23, 1910. The jury returned a verdict for the plaintiff for $581.20, and the defendant filed a motion for a new trial. Motion sustained. *Fellows & Fellows,* for plaintiff. *J. F. Gould,* for defendant.

WENTWORTH J. R. EDDY *vs.* ARA WARREN.

Penobscot County. Decided July 7, 1914. An action of assumpsit on an account annexed for labor performed and materials furnished by plaintiff in repairing and overhauling an automobile. The verdict was for plaintiff, and defendant filed a motion for a new trial. Motion overruled. *Blanchard & Adams*, for plaintiff. *W. B. Peirce*, for defendant.

GEORGE KALIAMOTES *vs.* S. P. WARDWELL.

Androscoggin County. Decided July 24, 1914. This case has been twice tried. The verdict rendered in the earlier trial was set aside upon defendant's exceptions. Both verdicts for the plaintiff are substantially the same. A careful reading of the testimony presented in the record of the second trial shows, we think, sufficient evidence to sustain the verdict and to negative the presence of bias, prejudice or improper motive upon the part of the jury. This Court is compelled to overrule the motion for a new trial. Motion overruled. *McGillicuddy & Morey*, for plaintiff. *Tileston E. Woodside*, for defendant.

THE NATIONAL FURNITURE COMPANY

vs.

PRUSSIAN NATIONAL INSURANCE COMPANY.

Cumberland County. Decided August 27, 1914. Action upon a policy of insurance against loss by fire. Plea, general issue with

brief statement. The jury found for the defendant, and the plaintiff filed exceptions to certain rulings of the Court and a general motion for a new trial. Exceptions and motion overruled. *Jacob H. Berman, Woodman & Whitehouse and Hinckley & Hinckley,* for plaintiff. *William H. Gulliver,* for defendant.

JOHN C. WOODROW *vs.* FITZ BROTHERS CO.

Androscoggin County. Decided August 28, 1914. No exceptions to the admission or exclusion of evidence or to any part of the charge of the presiding Justice are presented, and the parties do not disagree as to the principles of law which obtain in the case. The verdict rests upon questions of pure fact and of such a nature as to be peculiarly within the province of the jury to finally decide. We discover no error in the result reached by that branch of the Court. Motion overruled. *Oakes, Pulsifer & Ludden,* for plaintiff. *John A. Morrill,* for defendant.

STATE *vs.* ALVIN S. GRAY.

Waldo County. Decided September 1, 1914. The respondent was tried and found guilty of keeping a liquor nuisance. Thereupon he filed a motion in arrest of judgment which was overruled, and he now comes before the Law Court seeking to have that ruling reversed. But he has presented to this Court no bill of exceptions of any kind as required by statute, and therefore, his case is not properly before the Law Court, and cannot be considered by it. Dismissed from the law docket. *Eben F. Littlefield,* County Attorney, for the State. *H. C. Buzzell,* for the respondent.

GEORGE M. QUINT, et al., *vs.* GEORGE L. FOSS & Tr.

Penobscot County. Decided September 1, 1914. An action of assumpsit to recover upon an account annexed, a balance claimed to be due for potatoes. Plea, general issue. The jury returned a verdict for plaintiffs for $662.90, and defendant filed a general motion for new trial. Motion overruled. *George E. Thompson,* for plaintiffs. *A. Weatherbee,* for defendant. *John Wilson,* for trustee.

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

Kennebec County. Decided September 7, 1914. An action of deceit in sale of farm by defendant to the plaintiff. The jury returned a verdict for the plaintiff, and the defendant filed a motion for a new trial. Motion sustained. New trial granted. *Williamson, Burleigh & McLean,* for plaintiff. *George W. Heselton,* for defendant.

J. B. DORNBERGER *vs.* MAINE CENTRAL RAILROAD COMPANY.

Somerset County. Decided September 14, 1914. This is an action on the case to recover for personal injuries alleged to have been sustained March 2, 1912, by the negligence of the defendant. Plea, general issue. The jury returned a verdict at the September term, 1913, for plaintiff, of $894.35. The defendant filed a general motion for a new trial. Motion sustained. New trial granted. *Merrill & Merrill,* for plaintiff. *Johnson & Perkins,* for defendant.

VINTON A. HOGAN *vs.* THE GREAT NORTHERN PAPER COMPANY.

Androscoggin County. Decided September 29, 1914. We have examined the entire evidence in this case with great care and are unable to discover sufficient testimony to warrant a finding that the defendant was negligent in the performance or non-performance of any duty which it owed the plaintiff. The jury must have been influenced by sympathy or misconceived the force and application of the evidence. It is the opinion of this Court that the verdict was manifestly wrong. Plea, general issue. Verdict for plaintiff for $3750. Defendant filed motion for new trial. Motion sustained. New trial granted. *W. H. Judkins,* for plaintiff. *Newell & Skelton,* for defendant.

CHARLES E. BICKNELL

vs.

JOHN A. MORSE and CLARENCE W. MORSE.

Knox County. Decided October 5, 1914. This is an action of assumpsit on an account annexed to recover for use of Schooner Mary Brewer, from October 31, 1913 to December 1, 1913, at $10 per day, amounting to $300.00. Plea, general issue. The jury returned a verdict for plaintiff for $305.55. The defendants filed exceptions to certain instructions of the presiding Justice, and also a general motion for a new trial. Motion and exceptions overruled. *M. A. Johnson,* for plaintiff. *Reuel Robinson,* for defendants.

GEORGE CUOZZO *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot County. Decided October 21, 1914. Action on case to recover damages for alleged breach of contract by defendant to

transport from Portland to Bangor, Maine, seventeen men, alleged to have been engaged by plaintiff to enter his employ in the City of Bangor. Case reported to Law Court for determination. Judgment for defendant. *George E. Thompson, and James D. Rice,* for plaintiff. *Fellows & Fellows,* for defendant.

GEORGE H. EVERETT *vs.* JAMES R. HOPKINS, et als.

Aroostook County. Decided December 11, 1914. This is an action on the case wherein the plaintiff seeks the recovery of damages for the destruction of property alleged to have been caused by the negligent setting and management of fire by defendants upon their land. A verdict was rendered for the plaintiff for the sum of four hundred dollars, and the case is before us upon the general motion of defendants for a new trial.

Practically the sole issue submitted to the jury was the responsibility of the defendants for the setting of the fire. It is the only question raised and argued by the parties upon the motion. Motion overruled. *Shaw, Burleigh & Shaw,* for plaintiff. *H. W. Trafton, and Hersey & Barnes,* for defendant.

GEORGE W. EARLE *vs.* FRED KING, Jr., and FRED KING.

Androscoggin County. Decided December 14, 1914. Action on promissory note for $350, dated June 7, 1913. Fred King, Jr., was defaulted. The jury returned a verdict for the defendant, Fred King, and the plaintiff filed a motion for a new trial. Motion overruled. *Oakes, Pulsifer & Ludden,* for plaintiff. *McGillicuddy & Morey,* for defendant.

FRANK H. DUDLEY

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Androscoggin County. Decided December 17, 1914. Action on the case to recover for personal injuries sustained while a passenger for hire in defendant's street car, which collided with another car of defendant. Plea, general issue. Verdict for plaintiff in sum of $725.50. Defendant filed motion for new trial. Motion overruled. *Oakes, Pulsifer & Ludden,* for plaintiff. *Newell & Skelton,* for defendant.

ENOCH FOSTER

IN MEMORIAM

SERVICES AND EXERCISES BEFORE THE LAW COURT, AT PORTLAND, JULY 23, 1914, IN MEMORY OF THE

HONORABLE ENOCH FOSTER,

A FORMER JUSTICE OF THE SUPREME JUDICIAL COURT OF MAINE.

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

The exercises were opened by the presentation of the following resolutions:

Resolved: That the members of this Bar desire to express their appreciation of the character and public services of our late associate, Judge ENOCH FOSTER, and to place upon the records of the Court which he served so faithfully their tribute to his memory.

In his early years he served his country with patriotic devotion in camp and field when the nation's life hung in the balance, and amid the stress and activities of civic life he was always keenly interested in the public welfare and the cause of good government.

As a judge, filling a long term of service upon the Bench, he was painstaking, serious, conscientious and able in his decisions, and his opinions have added weight to the high reputation of our Maine Reports.

As a member of the Bar he was one of the masters of his profession in all its principles and details. In the preparation of his cases he was untiring, and in the trial of a cause his grasp of the material and vital points and his skill in marshalling the evidence, combined with his full knowledge of the law and his familiarity with the rules of the Court and practice, made him one of the most formidable of opponents.

With his brethren of the Bar he was always genial, kindly and helpful. There was about him something of the simple tastes and manner of the old school, and he has left a memory in which affection and respect are both combined, which will long endure with the members of the great profession which he loved and adorned.

Resolved: That these resolutions be spread upon the records of the Supreme Judicial Court within and for the County of Cumberland, and that a copy thereof be sent to the family of the deceased.

ADDISON E. HERRICK
FRANK H. HASKELL
WILLIAM LYONS

FRANK H. HASKELL, Esq., on the behalf of the Cumberland association, addressed the Court as follows:

May it please the Court:

It is with profound sadness that I attempt to speak at this time of Judge FOSTER, who for the last ten years of his life, was my closest friend and associate at this Bar.

Ordinarily the disparity of our ages and the comparative briefness of our association would require that I should respect his memory in silence while others spoke. But there were ties which bound him to me in life, and the memory of them impel me to speak in this presence of my regard for and appreciation of him now.

It was my good fortune, very soon after my admission to the Bar, to become associated with him in the first case ever tried in this State for the recovery of damages for personal injuries resulting from the alleged negligent operation of an automobile upon the highway.

From that time until his death, I do not recall a single period when we were not associated in some litigation before the Courts. During that time also we were frequently employed on opposite sides of a controversy.

Through such association, I acquired a personal knowledge of the thoroughness with which he studied every detail of a case with which he was connected, his careful preparation of both the law and the facts for the trial and his systematic and forceful presentation to the jury before which he seldom failed to secure a verdict.

His strict integrity in his business relations, his loyalty to his clients, his zeal in their behalf and his untiring industry in the preparation of their causes justly earned for him a reputation as a capable lawyer, and one that was by no means confined to the locality in which he practised.

He possessed a remarkable power of stating clearly and concisely any proposition he sought to present, often using illustrations which, though familiar, were drawn and applied in such a manner as to be unique and strikingly appropriate.

His opinions delivered while a member of this Court, speak for themselves. They cover a time when many novel and important questions were presented and determined, and are illustrative of the careful research, discriminating logic and apt expression which characterized him and greatly enrich the jurisprudence of this State.

The thought is consoling when we reflect that the silver cord of memory will not be broken, because we no longer see his majestic figure as it was wont to move among us. He will live forever in the help which we and unnumbered members of the profession shall receive through his contribution of enunciated and applied legal principles in his reported cases, and his influence will find expression always through the Courts.

"Were a star quenched on high,
For ages would its light
Still traveling downward from the sky
Shine on our mortal sight.
So when a great man dies,
For years beyond our ken,
The light he leaves behind him lies
Upon the paths of men."

In the economy of nature, death never robs life of things worth living. The good is always permanent. Life is richer because all which ends in self dies with the body while "thoughts sublime pierce the night like stars" and persist—

"To make undying music in the world
Breathing as beauteous order that controls
With growing sway the growing life of man."

While the name of Judge FOSTER is written in the imperishable records of the law as a Justice of the highest Court of this State, so also is it written as a man and as a friend, and his memory is enshrined in the hearts of all who knew him.

His quaint wit and inexhaustible fund of humorous anecdotes which he was accustomed to weave into his private conversation made him a most interesting companion. He attached himself to his friends with hooks of steel, and no man would fight harder to promote the welfare of any one in whose cause he enlisted. His nature was such as to inspire a kindly feeling among those who knew him only slightly. To such he was always courteous in manner and considerate and thoughtful in speech and action. He was always willing to assist in redressing a wrong, and the poor and weak received the same consideration from him as did the rich and the strong. His remarkable success never caused him to forget that he was of the people, and he was always a willing champion of the people's cause, which cause always lies within the strength of the law.

The final summons came to our brother when the twilight shades of life were well lengthened toward the east, and surrounded by those who were near and dear to him, he fearlessly, calmly and peacefully passed to the great beyond "Like one who wraps the drapery of his couch about him and lies down to pleasant dreams." The State, his family and his friends have suffered an irreparable loss; the Bench and Bar will long miss and lament the absence of his distinguished form, his cordial greeting and his wise counsel, but "through the gloomy portals of death, Judge ENOCH FOSTER has entered the radiant temple of enduring fame."

In seconding the resolutions which have just been presented, I offer this simple tribute, inadequate though I know it to be, to the memory of my dear and faithful friend, but as—

"There are waves far out in the ocean
That never will break on the beach"

So—

"There are hearts filled full of emotion
That find no expression in speech."

Hon. ADDISON E. HERRICK, of the Oxford Bar, addressed the Court as follows:

May it please the Court:

I wish to speak of Judge FOSTER as I knew him in the years preceding his appointment to a position on the Bench. I read law with him and in 1881 became his law partner, remaining with him until his appointment as Judge. Those were his years of preparation, of strenuous effort and untiring labor. It was during those years that he laid the foundation of that great knowledge of reported cases for which he became distinguished. Every day that he was in his office, he found some time to study the reports. If, as has been said, the law is a jealous mistress who tolerates no rival, she found in ENOCH FOSTER an ardent and devoted suitor.

He had such habits of work as few men of this generation can comprehend—work so persistent, so concentrated, so prolonged as would have been possible only to a man of his strong physique, indomitable will and intense ambition. Long before the publication of any lists of citations, such as Mr. Hazen of the Oxford Bar has made, Judge FOSTER had been through his Maine, New Hamsphire and Massachusetts Reports and had minuted on the margin of each case where that case was subsequently cited by the Court. With him this was more than mere clerical work. He examined all cases carefully and when he found any statement of law or practice with which he was not familiar and which he thought might be useful, he made a note of it in a Common Place Book. This book was always with him at Court and some of the older members of the Oxford Bar have reason to remember it. Probably no book in Maine represents as much labor.

The fruit of his study of adjudicated cases was a discriminating mind. He always had a precedent at hand and so great was his memory that he could recall not only the number of the Report but the page also where the desired authority could be found.

In those early days of Judge FOSTER's practice, more attention was given to getting cases into Court and securing verdicts than in trying to adjust the differences of parties along equitable lines.

Whatever may be said of the benefit of this practice to clients, it developed strong, aggressive and resourceful lawyers.

Judge FOSTER from both instinct and habit was a fighting lawyer of the old school. But his love for a legal battle did not often induce him to lead a forlorn hope. He was free to take the initiative but he never began an action till he had mastered the facts and discovered the law; and when hard pushed, you would find him intrenched behind some material fact or some vital principle of law which he would defend with the greatest skill and vigor. In developing the testimony and in argument everything was made to focus upon the point in question. If he digressed, it was only to bring back some new cumulative evidence or argument. He iterated and reiterated until the jury might well think the whole case turned on his point.

In those early years, the Courts of this State had just begun to feel the effect produced by opening the doors to full Equity Jurisdiction. The broadening influence of this practice had not been felt by Bench or Bar. When Judge FOSTER was appointed to the Bench, he had never drawn a bill or invoked the aid of equity in any of his cases.

His strength was in the law. He had no time or liking for business and did not readily approach a case from a business standpoint.

With him a case was a game to be played with all the power and skill that he possessed—and it was to be played to a finish.

In the stress of conflict he knew only the cause for which he fought. He would use every weapon and when aroused, he chose the battle ax of Richard rather than the scimeter of Saladin.

If in the treatment of adversaries he was at times severe and merciless, and pushed an advantage beyond the limits of fairness, when the heat of conflict was over, he would come with the oil of kindness as balm for the wounds he had inflicted.

Apart from his professional work, Judge FOSTER took a deep interest in the revolution then going on in religious thought. His keen mind found play for its faculties in the philosophical inquiry ushered in by Darwin's "Origin of the Species." He read with delight the sermons of James Martineau and was wont to quote from Draper's "History of Intellectual Development of Europe." But his mind was essentially conservative. His God had been "a God of Might," the Jehovah of the Old Testament, and we doubt if the newer conceptions of truth ever replaced for him in any intimate and inspiring way the old faiths.

When we think of our friends that are gone, we cherish most of all the memories of pleasant companionship. We, who are older at the Oxford Bar, recall with pleasure the days when Judge FOSTER was one of us.

He was a genial companion. He had a keen sense of humor and always had in readiness a fund of stories and incidents which he had gathered in his early intercourse with people in his native town of Newry.

They were quaint, half humorous and had their origin in the simple life of the farm and the shop; and like Abraham Lincoln, he used them to clinch an argument or to point a moral.

Those of us who knew him intimately feel that however wide and distinguished his subsequent career has been, his happiest days, his golden days, were those early ones of ambition, aspiration, struggle and hope in Bethel, crowned by his appointment to the Bench.

The man whose cause Judge FOSTER espoused in the very last years of his life, has spoken these memorable words:

"I wish to preach, not the doctrine of ignoble ease, but the doctrine of the strenuous life, the life of toil and effort, of labor and strife; to preach that higher form of success which comes, not to the man who desires mere easy peace, but to the man who does not shrink from danger, from hardship, or from bitter toil and who out of these wins the ultimate triumph."

Such a life had an exemplar in Judge FOSTER and the ultimate triumph was his.

But he was more than a great lawyer; he was a genial, likeable, kind hearted man, always ready to help those of less experience and ready to share in the joys and in the sorrows of the common lot.

In his feelings and sympathy, he was with the people and they always recognized these bonds of unity.

Judge FOSTER is dead. To us who are older and fast approaching life's boundary line the question comes: Is that the end? When Brutus took leave of Cassius, about to die, he said:

> "Whether we shall meet again I know not,
> Therefore our everlasting farewell take:
> For ever, and for ever, farewell, Cassius."

That was the farewell of a man without faith in the future life.

Groping blindly after the truth, Job asked:

"If a man die, shall he live again?"

All the world has heard the answer: "Because I live, Ye shall live also."

All of us may not have faith to lay hold upon this promise; but we all have a hope that somewhere, in some form, we may renew our association with our friends who have gone before.

Judge FOSTER's old associates at the Oxford Bar, we, who have shared in the pleasures of his companionship, gladly leave this tribute.

Hon. ALBERT R. SAVAGE, Chief Justice, responded for the Court as follows:

The Justices of the Court have listened with deep appreciation to the memorial resolutions presented by the Bar as a tribute to the memory of Judge FOSTER, and to the fitting words of eulogy, so feelingly spoken by his brethren at the Bar.

It might seem sufficient to say that we heartily concur in the sentiments which have been expressed. But Judge FOSTER was a notable man, lawyer and jurist, and it is appropriate that the Court place upon record their own tribute to his worth as a man, lawyer and a magistrate.

He entered our profession under some severe handicaps. He entered Bowdoin College in 1860 with the purpose of laying broad and deep the foundations of learning and culture upon which he proposed afterwards to build a professional career in the study and practice of the law. But in 1861 he heard his country's call, went to the front, and for nearly four years served faithfully and bravely in the war for the preservation of the Union. In the Spring of 1865, his term of service having expired, he returned to College, and received his diploma. And in September of that same year he was admitted to the Bar and began his professional life. Thus it is seen that his preparatory studies in the law must have been of the scantiest, even for those days, when requirements for admission to the Bar were in many respects little more than nominal.

But ENOCH FOSTER was not a man to be daunted. His industry was untiring. He possessed the genius of labor, slow, plodding successful labor. When I say slow, plodding labor I do not mean that his was a slow plodding mind. He was indeed quick in apprehension and extremely ready in application of the principles of law, whatever might be the exigency which confronted him. But he builded methodically and carefully, and laid his foundation securely. He read deeply, and his retentive memory brought to him the fruits of his reading, whenever required. Correct legal principles, and the cases which expressed them, were his familiar tools, arranged so orderly in his mind that he never seemed at loss where to find them.

His professional career before he came to the Bench, though begun under what would seem to us untoward conditions, was a brilliant one. In 1866, one year after admission to the Bar, he was elected County Attorney of Oxford County, and was re-elected two years later. In the conduct of that office he was able to show what manner of man he was. Then clients came to him in great numbers. To relate the history of his professional work would be to recount the phases of most of the important litigation which occupied the attention of the Court in Oxford County for nearly twenty years. He was matched against the great leaders in and out of his own Bar. He was the peer of any. He feared no foe. He shrank from no encounter. He hurled his lance with the doughty prowess of a paladin of old.

But it is the fate of lawyers, even of many of the most successful, that their fame ultimately lives only in the traditions of their brethren, and for a while in the admiring memories of the people who were their contemporaries. The flight of fancy, the swell of oratory, the touch of pathos, the exuberance of wit, the sting of sarcasm, the compelling force of argument, the words of a tongue tipped in golden fire and inspired by masterly reason, all these lapse into silence. No enduring record is made, and the fame of the good lawyer fades into ashes as his body moulders into dust. But of ENOCH FOSTER it may safely be said that his fame will endure in Oxford County for generations yet to come.

Of the professional labors of Judge FOSTER after he left the Bench it is difficult to speak within the limits suggested by this occasion. He came to Portland and until disease compelled his reluctant retire-

ment from practice his labors were incessant. His clients were numbered by hundreds. He was retained in all kinds of cases. His advice and assistance was particularly sought by the man who had a hard case. No one was too poor or too weak to gain his ear. And many was the client for whom he did the utmost he could when he could have had no real expectation of pecuniary reward. Notwithstanding the multitudinous cares that rested upon him, notwithstanding the great number of cases in which he was engaged, his preparedness for trial or argument has been particularly noted. He rarely or never asked for a continuance on personal grounds. Judge FOSTER was always ready. His own conception of his life's work was a true one. To a life long friend who called upon him not long before his death he said, "You and I have always been on the firing line. They have known where to find us."

Of Judge FOSTER'S work for fourteen years as a member of this Court the permanent record will be found in his written opinions, about two hundred and fifty in number, printed in the series of Maine Reports. They begin with *Wentworth* v. *Sawyer*, 76 Maine, and end with *Wing* v. *Milliken*, 91 Maine. His opinions touched a great variety of legal inquiries. He wrought with great care, and conscientiously sought to express the legal truth. His views were well buttressed with the citation of authorities. His arguments were convincing. His expressions were forceful. And no one who reads his opinions can hesitate to say that he was a strong judge. Some of his opinions are notable ones. Such a one is that in the much cited case of *Lockwood Company* v. *Lawrence*, 77 Maine, touching the rights of riparian proprietors, and the equitable jurisdiction of the Court in cases of diversion, obstruction and pollution of streams. Another is *Washburn* v. *Allen*, 77 Maine, in which he stated the result of an examination of all English and American authorities concerning the right to become nonsuit after trial is begun. Others are *Wormell* v. *Railroad Company*, 79 Maine, concerning the care which should be exercised by master and servant respectively, and *French* v. *Cowan*, 79 Maine, holding that mandamus is not the appropriate remedy to try title to office against one in possession under color of law. These cases will serve well to illustrate the character and quality of his judicial labor.

At nisi prius Judge FOSTER was dignified in his bearing. He was courteous and patient with practitioners. He manifested a keen,

shrewd intelligence. He was independent in judgment and firm in the administration of justice.

As a man, Judge FOSTER was striking in appearance. His tall, lithe figure, his grave demeanor, his clear, sparkling eyes, his pale face, his firm lips, his wealth of hair, his intellectual countenance, made him a marked personage wherever he went. And his mind was quite as unique as his body. He was the strong defender, and the compassionate friend. He was keenly appreciative of good wit. With him it was but a step from the stern flash of his eyes at the recalcitrant witness to the merry twinkle induced by some humorous incident in the trial. If he could seem icily cold, he could also be as tender as a woman. He delighted in good fellowship.

The storm and the stress are past. The peace and the rest are come. The angel of the hereafter has touched him, and he sleeps. In appreciation of his great service to the State as a member of this Court, and of his faithful professional labors for more than a third of a century as a member of the Bar, the Court gladly pays this tribute to the memory of Judge ENOCH FOSTER.

And as a further mark of respect for our deceased friend, it is ordered that the Resolutions of the Bar be spread in perpetual memory, upon the records of the Court, and that the Court do now adjourn.

The response of Mr. Chief Justice SAVAGE concluded the exercises, and the Law Court adjourned for the day.

INDEX

AGENCY.

Where a person who indorsed a note requested the maker to get someone else to go on the note, he made the maker his agent for that purpose, and was bound by the maker's representation to the person procured that the latter was signing for the accommodation of the other indorser as well as for the maker.
Lausier v. *Hooper*, 333.

AMENDMENTS.

See LIMITATION OF ACTIONS.

To allow or refuse leave to a defendant to amend his pleadings so as to set up a justification by license is a matter of discretion, to the exercise of which exceptions do not lie. *Hall* v. *Hall*, 234.

In an action for breach of promise of marriage, an amendment to the declaration alleging a promise at an earlier date than those already alleged, followed by seduction, does not introduce a new cause of action.
Garmong v. *Henderson*, 383.

An amendment to a declaration that is itself demurrable cannot be allowed.
Garmong v. *Henderson*, 383.

A new count in a declaration in an action for breach of promise of marriage, which alleges a promise and breach only inferentially and argumentatively is demurrable and not allowable as an amendment.
Garmong v. *Henderson*, 383.

At common law amendments adding or striking out the names of plaintiffs were not allowable, but a misnomer might be corrected. *Surace* v. *Pio*, 496.

Revised Statutes, Chap. 84, Sec. 13, providing that amendments may be made by striking out defendants, or by inserting additional defendants, has been strictly construed, and a new defendant cannot be substituted for the only one originally named in the writ. *Surace* v. *Pio*, 496.

ANIMALS.

See NEGLIGENCE.

The rule that a land owner is bound to keep his animals within his own close and is liable for their trespasses, if they escape, does not apply to the escape of a harnessed team from the owner's land into the street, where it injured the plaintiff. *Briggs* v. *Crystal Ice Co.*, 344.

ARREST.

See INTOXICATING LIQUORS.

The law is well settled in this State that an officer may not arrest without a warrant for a misdemeanor, on information or suspicion, unless it was actually committed in his presence. *Caffinni* v. *Hermann*, 282.

ASSIGNMENT.

See EQUITY.

An assignment of a part only of an entire demand or chose in action, though invalid in law except as between the parties, is valid and may be enforced in equity. *Palmer* v. *Palmer*, 149.

After notice of an assignment, the debtor cannot lawfully pay the amount assigned, save to the assignee. *Palmer* v. *Palmer*, 149.

Where a trustee of a fund, after notice of a prior assignment of part of the fund to plaintiff, paid the whole fund to a subsequent creditor under an equitable trustee process, without disclosing the prior assignment, he was personally liable to plaintiff. *Palmer* v. *Palmer*, 149.

An entire demand or chose in action may be assigned, and the assignment is binding upon the debtor after notice, whether he accepts it or not, and the assignee may sue at law against the debtor upon the acceptance, if accepted; otherwise upon the original claim itself. *Palmer* v. *Palmer*, 149.

A delay of three years by an assignee of a part, of a fund before suing, after the fund had been wrongfully exhausted by the trustee, held not such laches as to preclude recovery. *Palmer* v. *Palmer*, 149.

An assignee suing on choses in action assigned to him has the burden of proving that he is the bona fide owner thereof for his own benefit, as alleged in his complaint. *Palmer* v. *Palmer*, 149.

A statement in an assignment that it was "for value received" was sufficient prima facie evidence of consideration. *Palmer* v. *Palmer*, 149.

ASSUMPTION OF RISK.

See NEGLIGENCE. MASTER AND SERVANT.

The defense of contributory negligence is predicated on the carelessness of the employee, in the employment he has undertaken, which carelessness contributed to his injury, while assumption of risk involves the idea that he voluntarily entered on, or continued in, the employment, knowing and appreciating the risk and danger of being injured. *Reid* v. *Steamship Co.*, 34.

An employee who knows of a danger from the negligence of the employer, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, assumes the risk as a matter of law, and may not recover for an injury resulting therefrom. *Reid* v. *Steamship Co.*, 34.

The doctrine of assumption of risk is based on the fact that the employee knew of the risk and voluntarily assumed it. *Reid* v. *Steamship Co.*, 34.

The employee presumptively assumes ordinary, obvious and apparent risks naturally incident to the service, and this presumption arises out of the contractual relation of the parties. *Reid* v. *Steamship Co.*, 34.

To charge an employee with assumption of risk, it must be shown that he knew of the risk and appreciated the danger therefrom, or that such danger was so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. *Reid* v. *Steamship Co.*, 34.

Whether an employee, who becomes aware of and appreciates a risk arising from his employer's negligence, and which is not covered by implication in his contract of service, but who continues to work, voluntarily assumes the risk or endures it because constrained to do so, under the exigencies of the situation, is a question of fact. *Reid* v. *Steamship Co.*, 34.

Where a servant has been subjected to risk owing to a breach of duty of master, the mere fact that he continues his work, though he knew of the risk, and does

not remonstrate, does not necessarily, as a matter of law, preclude a recovery for injuries sustained, under the doctrine of voluntary assumption of risk, but the question is for the jury. *Reid* v. *Steamship Co.*, 34.

A servant assumes the risks which are ordinarily incident to his employment, and such other risks as are known to him, or which by the exercise of reasonable care he ought to know. He assumes the obvious risks.
Lindsey v. *Spear*, 230.

Assumption of risk is voluntary. But when nothing appears to the contrary, an employee is deemed to have agreed to take upon himself the risk of injury from dangers visible and appreciated. He may terminate the agreement by giving notice to the employer that he will no longer bear the risk.
Cooney v. *Portland Terminal Co.*, 329.

BILLS AND NOTES.

See EXCEPTIONS. AGENT.

In an action for contribution based on plaintiff's payment of a note given in renewal of a note signed by W., and indorsed by plaintiff and defendant, defendant's testimony that he indorsed the original note on W's representation that he was doing so for the plaintiff, as well as for W., was material evidence of the nature of the contract. *Lausier* v. *Hooper*, 333.

The relation of the makers of a promissory note, inter sese, is a matter of contract, and the terms of the request to sign made by one to another is material evidence.
Lausier v. *Hooper*, 333.

BROKERS.

Laws of 1911, Chap. 157, providing that contracts making one an agent for the sale of real estate shall become void after one year, unless the time of termination is fixed, rendered a contract that one should plot a tract and have the exclusive sale of the lots, without limitations as to time, absolutely void after one year, though the owner was not aware of the invalidity until later.
Odlin v. *McAllaster*, 89.

The owner of real estate, who contracted that another should plot it and have the exclusive sale of the lots, was not estopped from setting up Laws of 1911, Chap. 157, as avoiding it after one year, simply because the agent incurred a small expense in surveying the tract in ignorance of the fact that the contract had become void, without any inducement on the part of the owner.
Odlin v. *McAllaster*, 89.

BURDEN OF PROOF.

See EXCEPTIONS. RAILROADS.

In an action for personal injuries caused by plaintiff's wagon striking a guy wire alleged to be so attached to a telephone pole of the defendant as to constitute a dangerous obstruction to travel upon a public road, the burden is upon the plaintiff to show that the guy wire was within the limits of the road.
Shackford v. *Telephone Co.*, 204.

In an action for damages to timber and wood burned by fire caused by sparks from defendant's locomotive, the burden is upon the plaintiff to show, by competent evidence, that the defendant's locomotive caused the fire, and to establish a case by inference from facts, such inference must be drawn from the facts proved, and cannot be based upon probability.
Allen v. *M. C. R. R. Co.*, 480.

In an action under R. S., Chap. 89, Secs. 9 and 10, giving a cause of action for death by wrongful act, brought by the widow and administratrix of the deceased for the exclusive benefit of herself and his children, the plaintiff had the burden of proving the defendant's negligence by a fair preponderance of all the evidence. *Monk* v. *Bangor Power Co.*, 492.

CARRIERS.

A railroad company furnishing heated cars for through shipment, held to have made an implied agreement to heat the cars to their destination, with no such agreement by a connecting electric company which loaded and started the cars. *Ross* v. *M. C. R. R. Co.*, 63.

An electric railway company loading goods on cars for an interstate shipment over a railroad furnishing the cars, held the initial carrier within the scope of the Carmack Amendment to the Interstate Commerce Act, for the ordinary defaults of connecting carriers. *Ross* v. *M. C. R. R. Co.*, 63.

But that the defendant, having assumed the obligation of heating, after the potatoes had left the possession of the Bangor Railway and Electric Company, is to be deemed the initial carrier as to defaults in heating during the course of transportation. *Ross* v. *M. C. R. R. Co.*, 63.

CASES CITED, EXAMINED, ETC.

Cummings v. *Everett*, 82 Maine, 260, modified, 371

COMMERCE.

See LICENSE. PEDLER.

The words "in stock," as used in the Statute, Chap. 45, means on hand for sale. The Statute means that whenever a stock of goods is moved into a town for the purpose of being put upon sale and sold in the town, the owner or person having them in possession for that purpose must obtain the license specified in Chap. 45 of R. S., before he engages in the business of selling them.
State v. *Littlefield*, 214.

The soliciting of orders for goods to be shipped from another State, their shipment from another State to this State and the delivery of the goods to the person who ordered them was interstate commerce, and the State cannot burden interstate commerce by compelling persons engaged in that commerce to pay a special tax for the privilege of engaging in such commerce. *State* v. *Littlefield*, 214.

In order to constitute a person a pedler, he must not only be an itinerant person, but must be engaged in vending or selling the articles mentioned in the prohibitory statute as a business or occupation. It is not necessary that it should be his sole, or even his principal business, but it must be a considerable part of his occupation, business or vocation. *State* v. *Littlefield*, 214.

COMPLAINT AND WARRANT.

See DEMURRER. PLEADING.

A complaint that defendant "did wantonly and indecently expose his person by then and there openly, and in the presence of Complainant, expose to view his private parts," was sufficient to charge that the act was intentional and not accidental. *State* v. *Cole*, 56.

CONSTITUTIONAL LAW.

See POLICE POWER. DAMAGES.

The Constitution of Maine confers upon the Legislature power to make and establish all reasonable laws and regulations for the defense and benefit of the people of the State. *State* v. *Starkey*, 8.

The right to pass inspection laws belongs to the police power of the government and laws to prevent fraud, imposition and extortion in quality and quantity in sales, and the power to provide for them has been uniformly recognized as the subject of delegation to municipal corporations. *State* v. *Starkey*, 8.

Revised Statutes, Chap. 79, Sec. 90, as amended by Laws of 1913, Chap. 220, Secs. 3-4, vesting jurisdiction of prosecutions for murder in the Superior Court relate to the remedy only, and not objectionable as an ex post facto law. *State* v. *Vannah*, 248.

The right to have a jury selected from another county or district is not one of the rights guaranteed by the Constitution prohibiting the passage of ex post facto laws. *State* v. *Vannah*, 248.

A statute merely changing the constitution of the trial Court, which leaves unchanged all the substantial protections which the law threw about the accused, is not ex post facto. *State* v. *Vannah*, 248.

The right to a change of venue is not a common law right. It is created and regulated by statute, and is also a matter of procedure authorized by the Legislature under its sole and plenary power to determine what course shall be pursued in the administration of justice. *State* v. *Vannah*, 248.

The Legislature may abolish Courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully dispense with any substantial protection with which the existing law surrounds the person accused of crime. *State* v. *Vannah*, 248.

Under Constitution, Art. I, Sec. 21, just compensation for land taken for public use guarantees not only the value of the land taken, but the damages accruing to the residue from the improvement. *Peaks* v. *Co. Commissioners*, 318.

Under the Constitution, Art. I, Sec. 21, the measure of damages to the residue of land not condemned is the difference in the value of the whole tract immediately before and after the taking. *Peaks* v. *Co. Commissioners*, 318.

CONTRACTS.

See SALES. STATUTE OF FRAUDS.

A purchaser, who, after knowledge of the vendor's false representations inducing the purchase, does not notify the vendor of his election to rescind within a reasonable time, but retains the property, thereby elects to abide by the contract, which becomes irrevokable, except by mutual consent. *Estey* v. *Whitney*, 131.

Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damages to the other contracting

party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.
Colbath v. *Clark Seed Co.*, 277.

When a benefit, legal or pecuniary, to the promisor, is the inducement for a promise for indemnity, such promise is not within the Statute of Frauds, as being a special promise to answer for the debt or default of another, but is an original promise binding upon the promisor. *Colbath* v. *Clark Seed Co.*, 277.

CONTRACT TO MARRY.

See AMENDMENT.

A contract to marry, though evidenced by promises at different times, is but a single contract, and a breach thereof is but one breach of one contract.
Garmong v. *Henderson*, 383.

An averment that the promise was mutual is material and necessary.
Garmong v. *Henderson*, 383.

An averment in the declaration that plaintiff was ready to perform the contract on her part is material, where no time of performance is alleged.
Garmong v. *Henderson*, 383.

CORPORATIONS.

See TAXES.

Warrants for calling corporation meetings may be signed and directed either in accordance with the Charter requirements, or as provided by R. S., Chap. 4, Sec. 9, if the corporation has designated at what and how many places the notices shall be posted. The corporation is not required to use the statutory method alone. *Paul* v. *Huse*, 449.

COVENANTS.

See REAL ACTION.

An heir is liable for breach of her ancestor's warranty of title to land conveyed, to the extent of the property and assets which came to her as heir.
Farnsworth v. *Kimball*, 238.

CRIMINAL CONVERSATION.

See HUSBAND AND WIFE.

In actions for criminal conversation, plaintiff must prove a legal marriage in fact and carnal intercourse between his wife and the defendant.
Jowett v. *Wallace*, 389.

To support an action for criminal conversation, there must have been a marriage ceremony performed by a person authorized by law to solemnize marriages.
Jowett v. *Wallace*, 389.

CRIMINAL LAW.

Under the common law practice, on a conviction for criminal libel, a motion in arrest of judgment is proper, when the facts alleged do not constitute an offense, even though this point is not raised by demurrer. *State* v. *Berry*, 501.

Where, in a criminal case, the exception to a refusal to arrest judgment is sustained, and the indictment quashed, it is improper to consider other exceptions to rulings on evidence. *State* v. *Berry*, 501.

Under R. S., Chap. 130, Sec. 2, providing that one who "wilfully" publishes or circulates a libel shall be punished, an indictment which omits the word "wilfully" and does not substitute its equivalent is insufficient.
State v. *Berry*, 501.

Upon an appeal by one convicted of murder from the overruling of his motion for a new trial, the only question to be determined by the Law Court is whether the jury were warranted by the evidence in believing him guilty, beyond reasonable doubt. *State* v. *Mulkerrin*, 544.

DAMAGES.

See NEGLIGENCE. CONSTITUTIONAL LAW.

Under R. S., Chap. 89, Sec. 10, prescribing the measure of damages in actions for wrongful death as a fair and just compensation to the person for whom the action is brought, the measure of damages in an action for the death of an eight year old child, brought for the benefit of its parents, must be based entirely upon the prospective pecuniary benefit to the parents, and a verdict of $1811 is excessive. *Curran* v. *L. A. & W. St. Ry.*, 97.

Under Constitution, Art. I, Sec. 21, the measure of damages to the residue of land not condemned is the difference in the value of the whole tract immediately before and after the taking. *Peaks* v. *County Comm'rs*, 318.

In an action to recover for personal injuries while in the defendant's employ in its shoe factory at Gardiner, the jury rendered a verdict for the plaintiff for $6500. *Dudley* v. *Hazzard Co.*, 453.

That upon the question of defendant's legal liability, and the plaintiff's right of recovery, the record fails to convince the Court that the verdict was manifestly wrong. *Dudley* v. *Hazzard Co.*, 453.

That upon the question of damages, the verdict is so extravagantly large as to warrant its diminution or the granting of a new trial, and the conclusion is that the sum of $3500 would be full and fair compensation for the injuries received. *Dudley* v. *Hazzard Co.*, 453.

Under R. S., Chap. 89, Secs. 9 and 10, giving a right of action for wrongful death to the personal representatives of the deceased, for the benefit of the heirs, the only damages recoverable are the actual pecuniary losses suffered by the heirs. *Graffam* v. *Saco Grange*, 508.

DEEDS.

See MORTGAGES. NEW TRIAL.

Courts are reluctant to declare a forfeiture, and will not construe the language in a deed into a condition subsequent, unless the language, construed strictly against the grantor, will admit of no other reasonable interpretation. *Frenchville* v. *Gagnon*, 245.

When a deed stated that, in addition to the cash consideration, the conveyance was made on condition and in consideration of the promise of the grantee to keep the lot fenced, the language, being doubtful, will be construed to create a covenant. *Frenchville* v. *Gagnon*, 245.

The use of apt words to create a condition subsequent will not be construed to do so, if the whole instrument shows a contrary intent. *Frenchville* v. *Gagnon*, 245.

A condition subsequent may be created in a deed without the use of either a forfeiture clause or a clause of re-entry. *Frenchville* v. *Gagnon*, 245.

A deed by a mortgagee, containing also an assignment of the mortgage debt, conveys the mortgagee's title. *Smith* v. *Booth Brothers*, 297.

A deed by a mortgagee out of possession, not accompanied by a transfer or assignment of the mortgage debt, conveys no title. *Smith* v. *Booth Brothers*, 297.

DEMURRER.

See COMPLAINT AND WARRANT.

The right to plead over after overruling a demurrer to a criminal complaint cannot be had by "reserving" it, but can only be granted by the presiding Justice and when not granted, judgment goes automatically for the State. *State* v. *Cole*, 56.

Demurrer based on the ground that the declaration did not aver that the recognizance was returned to the Supreme Judicial Court and entered of record. Under R. S., Chap. 134, Sec. 27, this lack of averment is not ground for demurrer. *State* v. *McCauley*, 103.

DIVORCE.

See HUSBAND AND WIFE.

An attorney cannot maintain an independent action against the husband for legal services rendered and disbursements made in connection with a divorce proceeding instituted by the husband, even though the wife prevails, because of the statutory means otherwise provided for their remuneration. *Meaher* v. *Mitchell*, 416.

That under R. S., Chap. 62, Sec. 6, providing that pending a libel the Court, or any Justice thereof in vacation, may order the husband to pay to the clerk, for the wife, sufficient money for her defense or prosecution thereof, and enforce obedience by appropriate process, the wife is guaranteed full and complete relief, is under no necessity of pledging her husband's credit for such expenses, and therefore has no implied power to do so. *Meaher* v. *Mitchell*, 416.

An order setting aside a decree of divorce for libelant and granting a new trial, in an action involving property rights, is valid, notwithstanding libelant, the wife, had died in the meantime. *Gato* v. *Christian*, 427.

The Court on motion of libelee ex parte, or of its own inherent power is authorized during the same term, to vacate a decree of divorce on the ground that libelee had not had his day in Court. *Gato* v. *Christian*, 427.

An order vacating a decree granting a divorce to libelant wife related to the date of the decree itself, so that she remained a married woman, subject to the restrictions of coverture as to her property. *Gato* v. *Christian*, 427.

DOMESTIC ANIMALS.

A cat is a domestic animal, within Public Laws 1909, Chap. 222, Sec. 17, authorizing the killing of dogs found worrying, wounding or killing any domestic animal. *Thurston* v. *Carter*, 361.

While cats are not enumerated by name as subjects of taxation in the statutes, the general language of the statutes is sufficient to include them, even though the owner has but a qualified property. *Thurston* v. *Carter*, 361.

EASEMENTS.

For an easement or quasi easement to pass by implication upon conveyance of property, it must appear that the easement is one of strict necessity; mere convenience, however great, not being sufficient. *Watson* v. *French*, 371.

The test whether an easement claimed is one of necessity is whether the party claiming the right can at reasonable cost on his own estate, and without trespassing on his neighbors', create a substitute. *Watson* v. *French*, 371.

An easement of necessity, entitling the grantee of the rear portion of a lot used for a stable to continued use of water pipes running over the land of his grantor and supplying the stable, held to pass by implication. *Watson* v. *French*, 371.

Where it did not appear that a water company would attempt to condemn a way for its pipes to plaintiff's property, even though it had the legal right to do so, the plaintiff's easement of necessity in a pipe running through defendant's land and supplying him with water, cannot be defeated on the ground that it was unnecessary. *Watson* v. *French*, 371.

Where plaintiff purchased a parcel of land from defendant's grantor, and such parcel was supplied with water by a pipe running over the land retained by defendant's grantor, defendant took the property subject to plaintiff's easement of necessity, where the pipe was visible. *Watson* v. *French*, 371.

Where the owner of land abutting on a street and supplied with water from the general mains sold the rear portion, which had access to the street only by a right of way over the lands of another, the purchaser's easement of necessity in a water pipe running across the grantor's land cannot be defeated because the water was supplied by a third person. *Watson* v. *French*, 371.

Acquiescence for over 19 years in plaintiff's enjoyment of an easement, claimed to be an easement of necessity, corroborates the claim of a grant by implication. *Watson* v. *French*, 371.

An easement to take water from a well of another is created by prescription only by an adverse use of the privilege with the knowledge of the person against whom it is claimed, only a use so open, notorious, visible and uninterrupted that knowledge will be presumed and exercised under a claim of right, adverse to the owner acquiesced in by him for at least twenty years. *Rollins* v. *Blackden*, 459.

If the adverse use of a privilege continues for twenty years without interruption, or denial on the part of the owner having knowledge of it, it is conclusively presumed to have been with his acquiescence. *Rollins* v. *Blackden*, 459.

The grant of an easement to take water from a well interrupts an inchoate easement claimed by another by prescription. It disproves acquiescence. *Rollins* v. *Blackden*, 459.

An inchoate easement to take water from a well is interrupted by an actual disturbance of, and interference in, the exercise of the claimed right. *Rollins* v. *Blackden*, 459.

In a suit to recover damages for the taking water from a well, when it appears that the plaintiff is entitled only to so much water as is needed for the lot on which the well stands, the burden is on the plaintiff to show how much was needed. *Rollins* v. *Blackden*, 459.

EQUITY.

See ASSIGNMENTS. EXECUTORS AND ADMINISTRATORS.

An assignment of a part only of an entire demand or chose in action, though invalid in law except as between the parties, is valid and may be enforced in equity. *Palmer* v. *Palmer*, 149.

An action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been determined in the Probate Court, and the same rule prevails in equity, in the absence of other and compelling reasons. *Palmer* v. *Palmer*, 156.

EVIDENCE.

See INTOXICATING LIQUORS. SEARCH AND SEIZURE. LANDLORD AND TENANT.

Evidence to prove trouble, which enforcement officers had previously suffered on account of illegal transportation of intoxicating liquors in hand bags and suit cases, is not admissible to show justification of an assault by an officer upon one whom he suspects may be thus illegally transporting such liquors; nor to justify such assault may evidence be introduced to show that the officer had made previous seizures of such liquors while being thus transported.
Caffinni v. *Hermann*, 282.

When a lease required the tenant to surrender the premises in good order at the end of the term and provided for repairs in case of loss by fire, an oral agreement that the landlord shall reimburse the tenant for repairs outside the building is not collateral, but varies the terms of the lease and parol evidence is, therefore, inadmissible to establish such agreement.
Sanders v. *Middleton*, 433.

When a lease gave the tenant the option to renew upon the same terms and conditions, a holding over by the tenant, without the execution of a new lease was an election to continue the tenancy, and the terms thereof are governed by the provisions of the lease. *Sanders* v. *Middleton*, 433.

EXCEPTIONS.

See INTOXICATING LIQUORS. DEMURRER. BURDEN OF PROOF. FRAUD. LANDLORD AND TENANT. DEEDS. BILLS AND NOTES.

It is a fundamental rule that exceptions will not be sustained, unless the excepting party shows affirmatively that he is aggrieved, and he cannot be aggrieved unless he has a legal interest in the subject matter of controversy.
State v. *Intoxicating Liquors*, 138.

At common law, when exceptions to the overruling of a demurrer are overruled judgment on demurrer, or that plaintiff recover, follows and is final.
Rollins v. *Central Power Co.*, 175.

By R. S., Chap. 84, Sec. 35, the severity of the common law was relaxed, wherein it was provided that if the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs, from the time when it was filed, unless adjudged frivolous and intended for delay.
Rollins v. *Central Power Co.*, 175.

In considering exceptions to the direction of a verdict for the defendant, the Court is not to weigh conflicting evidence, but only to determine whether the evidence considered most favorably for the plaintiff would have warranted a verdict in his favor. *Shackford* v. *Telephone Co.*, 204.

When a permit, given pursuant to Laws of 1885, Chap. 378, for placing of telephone poles and wires along a highway, did not fix specifically the location of the poles, the company is bound to exercise reasonable care in selecting locations for them within the limits of the road, so as not unreasonably to interfere with travel, and whether it had exercised such care or not is a question for the jury. *Shackford* v. *Telephone Co.*, 204.

To secure the reversal of a ruling, on exceptions, it is necessary to show not only that the ruling was erroneous, but that it was prejudicial. *Ross* v. *Reynolds*, 223.

When exceptions are taken to an order of nonsuit, or to the direction of a verdict, all the evidence necessarily becomes a part of the case, and all of it must be taken to the Law Court; and if not so taken, the exceptions may be dismissed. *Austin* v. *Baker*, 267.

Exceptions to the admission of irrevelant, but harmless, testimony will not be sustained. *Smith* v. *Booth Bros.*, 297.

Exceptions to refusals to instruct, except as given in the charge, cannot be sustained, unless the charge is made a part of the bill of exceptions. In such case, it must be presumed that the instructions given were adequate and correct. *Smith* v. *Booth Bros.*, 297.

If testimony is material and admissible on one ground, it is not reversable error to admit on another and untenable ground. *Lausier* v. *Hooper*, 333.

If a bill of exceptions does not contain enough to show that the point raised was material, and that the ruling complained of was both erroneous and prejudicial, the exceptions cannot be sustained. *Salter* v. *Greenwood*, 548.

In considering exceptions, neither the evidence nor the charge of the presiding Justice can be examined, except so far as they are made a part of the bill of exceptions. *Salter* v. *Greenwood*, 548.

It lies clearly within the discretion of the presiding Justice to submit special questions to the jury, and to require them to return special verdicts. *Salter* v. *Greenwood*, 548.

EXECUTORS AND ADMINISTRATORS.

See EQUITY. WAIVER.

Next of kin, who had released all their interest in decedent's estate, held without capacity to file a petition to compel the administratrix to file an inventory.
Simpson, Appellant, 69.

It is not every person that is dissatisfied with a decree of Probate Court who is "aggrieved" within the meaning of the statute. *Simpson, Appellant*, 69.

Only those who have rights which may be enforced at law and whose pecuniary interest might be established in whole, or in part, by a decree, are thus interested in the estate. *Simpson, Appellant*, 69.

The rule that an action at law does not lie to recover a distributive share of an estate before the amount to be distributed had been ascertained in the Probate Court also prevails in equity, in the absence of other and compelling reasons.
Palmer v. *Palmer*, 156.

In an action on a treasurer's bond, no recovery can be had against the executrices of sureties, where the demand required by law was not made upon them.
Inh. of Boothbay Harbor v. *Marson*, 505.

No recovery can be had against the administratrix of a surety on a town officer's bond, where the claim was not presented in writing to the administratrix.
Inh. of Boothbay Harbor v. *Marson*, 505.

In suing upon a bond at common law, there are two courses open to plaintiff. The declaration may be framed for the penalty only without mentioning the condition, or assigning any breach of it; or the condition may be set out and breaches of it assigned in the declaration.
Inh. of Boothbay Harbor v. *Marson*, 505.

An administrator or executor may waive the presentment or filing of claims against the estate under oath, while the claim is not yet barred by limitation.
Littlefield v. *Cook, et al., Admrs.*, 551.

Whether an administrator or executor can waive the statute bar upon claims, already barred by limitation, quaere. *Littlefield* v. *Cook*, 551.

An agreement in writing signed by the administrators and the heirs, who are also the claimants, "that the claims have been duly presented to said adminis-

trators and payment demanded," is a waiver by the administrators of the presentment or filing of the claims, even though in fact the statement was not true. *Littlefield* v. *Cook*, 551.

EXPERT TESTIMONY.

See TROVER.

An expert witness was asked by the plaintiff, "What do you see under the microscope as indicating the age of ink?" and the question was admitted against the objection of defendant. *Williams* v. *Williams*, 21.

FENCES.

At common law, an adjoining owner could not be compelled to build any part of a division fence, though he was bound to keep his cattle upon his own land at his peril. *Megquire* v. *Bachelder*, 340.

Under R. S., Chap. 26, Secs. 2-5, one adjoining owner cannot, when there has been no division of a partition fence, build the whole fence and compel the other owner to pay his share. *Megquire* v. *Bachelder*, 340.

Revised Statutes, Chap. 26, Sec. 5, changed this so that if one owner refused or neglected to build his share of the fence, he could be made to do so, or have it built for him. *Megquire* v. *Bachelder*, 340.

By this statute, a tribunal, known as "fence viewers" was given jurisdiction over the division of fences of adjoining owners to the extent of compelling the delinquent owner, either to build his part of the fence or pay his neighbor for building it for him. *Megquire* v. *Bachelder*, 340.

The jurisdiction of fence viewers depends upon certain preliminary requirements, among which is proof of a division fence in controversy, by an assignment made by fence viewers, by agreement of parties, or by prescription, based upon the presumption of a division, the evidence of which is lost. *Megquire* v. *Bachelder*, 340.

Every person who may, by law, be required to build a part of a division fence should first be given an opportunity to build it himself. That such opportunity cannot be given, until by some division he is informed of what his part is. *Megquire* v. *Bachelder*, 340.

FRANCHISES.

See JUDGMENT.

The seizure and sale of all the franchises, privileges, plant and property of the York Water Company, under R. S., Chap. 56, Sec. 6, as personal property, instead of under R. S., Chap. 47, Sec. 71, applicable to corporations, were invalid. *Vermeule* v. *York Water Co.*, 437.

Revised Statutes, Chap. 56, Sec. 6, provides for the seizure and sale on execution as personal property of franchises, etc., and R. S., Chap. 47, Sec. 71, provides for the seizure and sale of the real estate of corporations.
Vermeule v. *York Water Co.*, 437.

FRAUD.

See MASTER AND SERVANT. EXCEPTIONS.

Where fraud is set up by the defendants, it must be material, relate distinctly to the contract and effect its very essence and substance. *Lane* v. *Harmony*, 25.

While there is no standard by which to determine whether the fraud be material or not, the accepted rule is that if the fraud be such that, had it not been practiced, the contract would not have been made, or the transaction completed, then it is material to it. *Lane* v. *Harmony*, 25.

It must appear that the defendant not only did in fact rely upon the fraudulent statement, but had a right to rely upon it, in full belief of its truth.
Lane v. *Harmony*, 25.

Fraud may be committed by the artful and intentional concealment of facts exclusively within the knowledge of one party and known by him to be material, and when the other party had not equal means of information.
Lane v. *Harmony*, 25.

A representation made as an inducement to the sale of a second-hand automobile, that it was in good running order, if fairly susceptible of being understood as a statement of fact and so understood by the buyer, the misrepresentation is actionable. *Ross* v. *Reynolds*, 223.

In an action for deceit in the sale of a second-hand automobile the buyer cannot recover for a breach by the seller of his agreement to overhaul the car and put it in first class shape. *Ross* v. *Reynolds*, 223.

A representation as an inducement to the sale of a second-hand automobile, as to its age, or the length of time it had been used, is material, and if false is actionable. *Ross* v. *Reynolds*, 223.

In an action for fraud in the sale of an automobile which the seller agreed to put in first class condition, testimony that plaintiff took the car to defendant's garage for some newly discovered defect was relevant to show that the representation that it was in good running order was false. *Ross* v. *Reynolds*, 223.

A statement by the defendant that he would sell the copies of plaintiff's song which he procured from her, in a certain city, is a promise for the future and not a mispresentation, and plaintiff's remedy is by action on the contract, and not in tort for deceit. *Carter* v. *Orne*, 365.

There is a fatal variance between an allegation that defendant falsely represented to plaintiff that his agent had sold 100 copies of plaintiff's song in a certain city and proof that defendant stated that he had received a letter from his agent to that effect, unaccompanied by proof that defendant had received no such letter. *Carter* v. *Orne*, 365.

GUARDIAN AND WARD.

A guardian, who invests guardianship funds without security is liable for losses arising therefrom. *Moore, Appellant*, 119.

A guardian who makes investments beyond the jurisdiction of the Court, is, except under peculiar circumstances, responsible for the safety of the funds invested. *Moore, Appellant*, 119.

A sum applied by a guardian to preserve investments without security and beyond the jurisdiction of the Court cannot be allowed to him on his final account. *Moore, Appellant*, 119.

A guardian, in settling with his ward and in accounting to the Court, must make full disclosure of all facts necessary to a complete understanding of the transactions, and a failure to do so is a breach of trust. *Moore, Appellant*, 119.

Where a guardian has been guilty of wrong doing in the management of his ward's estate, or the ward has suffered by reason of the guardian's neglect of duty, commissions to the guardian will be refused. *Moore, Appellant*, 119.

Though a guardian at the time of the settlement of his account represented the face value of securities to be the cash value, the Probate Court may investigate the character of the investments and determine the liability of the guardian. *Moore, Appellant*, 119.

HEIRS.

See WILLS. HUSBAND AND WIFE.

Prior to the date of the will, and after the existing statute of distribution went into effect, it was held that the widow was not an heir of her husband, and if the widow is not an heir of her husband, of course a husband cannot be the heir of his wife, for they both take under the same statute. *Morse* v. *Ballou*, 124.

HIGHWAYS.

See NEGLIGENCE.

A town is not an insurer of the safety of a highway, but is only bound to make it reasonably safe. *Crocker* v. *Orono*, 116.

A depression in a highway, beginning not more than ten inches from the fence and deepening to not more than five to seven inches under the fence is not an actionable defect which would create liability for injuries to a traveler stepping therein. *Crocker* v. *Orono*, 116.

Where plaintiff, after alighting from an electric railway car, turned to speak to another, and stepped backward into a slight depression under the highway fence, she was guilty of contributory negligence. *Crocker* v. *Orono*, 116.

In case a way becomes blocked, or encumbered with snow, the Road Commissioner shall forthwith cause so much of it to be removed, or trodden down, as will render it passable. *Lunney* v. *Shapleigh*, 172.

Any person sustaining damages in his business, or property, through neglect of such Road Commissioner, or the Municipal Officers of such town, to so render passable ways that are blocked or encumbered with snow, within a reasonable time, may recover therefor of such town, by a special action on the case. *Lunney* v. *Shapleigh*, 172.

HUSBAND AND WIFE.

See WILLS. HEIRS. CRIMINAL CONVERSATION. DIVORCE. MORTGAGE.

Husbands and wives, though they may be entitled under our statutes to certain interests in the estate of each other, are not heirs of each other. These rights, which the statutes give them respectively, they do not take as heirs. *Morse* v. *Ballou*, 124.

A married woman, who is living with her husband, is not entitled, in an action to recover for personal injuries, to recover for loss of ability to do domestic labor in their home. *Felker* v. *Railway Co.*, 255.

A married woman, who is living with her husband, is not entitled, in an action to recover for personal injuries, to recover for the expenses for medical and surgical treatment, unless she has herself paid, or has expressly undertaken to be personally responsible, for them. *Felker* v. *Railway Co.*, 255.

A married woman, living with her husband or not, is entitled, in an action to recover for personal injuries, to recover for the loss of her health and strength, and for all of her sufferings, mental and physical. *Felker* v. *Railway Co.*, 255.

In an action for criminal conversation plaintiff must prove a legal marriage, and carnal intercourse between his wife and defendant. *Jowett* v. *Wallace*, 389.

To support an action for criminal conversation, there must have been a marriage ceremony performed by a person authorized by law to solemnize marriages. *Jowett* v. *Wallace*, 389.

In actions for criminal conversation, the production of record proof of the marriage from the proper public records, with proof of the identity of the parties, is sufficient prima facie proof of the authority of the person officiating to solemnize marriages. *Jowett* v. *Wallace*, 389.

In actions for criminal conversation, the husband is a competent witness as to the performance of a marriage ceremony. *Jowett* v. *Wallace*, 389.

In the absence of proof to the contrary, the law of another State or country is presumed to be like the common law, but it is not presumed to be like the statutory law. *Jowett* v. *Wallace*, 389.

In actions for criminal conversation, the jury, in their discretion, may award punitive or exemplary damages. *Jowett* v. *Wallace*, 389.

The plaintiff cannot recover for services in consultations with merchants relating to supplies to be furnished to the wife during separation. The wife's implied agency, or authority to pledge her husband's credit, arising from the marital relation alone, might have covered the supplies furnished, but not the apparently unnecessary services of an attorney for consultations with the parties furnishing them. *Meaher* v. *Mitchell*, 416.

A wife's mortgage is in the same category as her deed, as to which R. S., Chap. 63, Sec. 1, provides that realty directly conveyed to her by her husband cannot be conveyed by her without his joinder. *Gato* v. *Christian*, 427.

One taking a mortgage and loaning money when the records of the Court showed that mortgagor had been divorced from her husband was in effect a purchase pendente lite, with the risk that the decree might be vacated before the adjournment of the term in which it was entered. *Gato* v. *Christian*, 427.

INDICTMENT.

An indictment under R. S., Chap. 22, Sec. 1, declaring that certain places shall be common nuisances is not bad for duplicity, because alleging that the place maintained by accused was a nuisance for many reasons; only one offense being charged, that of maintaining a nuisance.
State v. *Trowbridge*, 16.

When two or more independent offenses are joined in same count, it will be bad for duplicity. *State* v. *Trowbridge*, 16.

When several acts relate to the same transaction and together constitute but one offense, they may be charged in the same count.
State v. *Trowbridge*, 16.

A conviction for one kind of illegal keeping of the premises as a nuisance would be a bar to any other indictment for any or all the other kind described in the statute for the period of time covered by both indictments.
State v. *Trowbridge*, 16.

INFANTS.

In all civil actions, an infant must be represented by a guardian or next friend, and whenever a party to an action is an infant who has no guardian, the Court should appoint a guardian ad litem, and, unless the infant is so protected, a judgment against him will be reversed. *Easton* v. *Eaton*, 106.

Bastardy proceedings, under R. S., Chap. 99, being civil actions, an infant against whom such proceedings are brought must defend by guardian and not by attorney, and where no guardian was appointed, a judgment against him must be reversed. *Easton* v. *Eaton*, 106.

INSURANCE.

See PARTNERSHIP.

An insurance company can waive the right to an arbitration, provided by policy in other ways than under R. S., Chap. 49, Sec. 5, providing that if the Company shall not, within ten days after request, appoint arbitrators, it shall be deemed to have waived the right to arbitration.

Oakes v. *Insurance Co.*, 52.

A letter from an insurance company denying all liability for a fire loss was a waiver of a provision for an arbitration as to the amount of the loss as a condition precedent to a right of action. *Oakes* v. *Insurance Co.*, 52.

The law will not require the useless and expensive formality of an arbitration, when the insurer, for whose benefit it was provided, has rendered it superfluous. *Oakes* v. *Insurance Co.*, 52.

Under R. S., Chap. 52, Sec. 73, a railroad company's rights to the benefit of insurance on property destroyed by fire exists, irrespective of negligence, and hence, an insurance company which has paid a loss is not subrogated to the owner's right against the railroad company, though the fire was due to negligence. *Farren* v. *M. C. R. R. Co.*, 81.

Revised Statutes, Chap. 49, Sec. 93, providing that insurance agents shall be regarded as in place of the company, and that the company shall be bound by their knowledge of the risk and of all matters connected therewith, applies to a health policy. *Strickland* v. *Casualty Co.*, 100.

Statements in the application for a policy, which are untrue in fact, vitiate the policy. *Strickland* v. *Casualty Co.*, 100.

A clause in a health policy, limiting the company's liability in the event of disability or illness resulting wholly, or in part from chronic diseases, referred to chronic diseases arising after the application was made.

Strickland v. *Casualty Co.*, 100.

In an action upon a health policy, defended on the ground that the insured made false statements in his application as to not having received medical treatment within five years, evidence held to warrant a finding that the agent had full knowledge of prior sickness of insured.

Strickland v. *Casualty Co.*, 100.

Omissions and misdescriptions known to the agent shall be regarded as known to the company and waived by it as if noted in the policy.
Strickland v. *Casualty Co.*, 100.

That the plaintiff's son-in-law attempted, without his knowledge, to smoke hams in a shed, fire resulting, was no such alteration or increase of the risk with plaintiff's consent, as would avoid the policy.
Andrews v. *Insurance Co.*, 258.

When a fire occurred May 2, 1913, and on June 18th the insurer notified plaintiff that it could not legally pay the loss, such letter constituted a waiver of proofs of loss. *Andrews* v. *Insurance Co.*, 258.

In an action on a fire policy, evidence held to support a finding that a written statement of loss had been rendered within a reasonable time.
Andrews v. *Insurance Co.*, 258.

Where land was conveyed to plaintiff's father, because plaintiff was a minor and could not execute a valid mortgage thereon, but the father held in trust for plaintiff, the latter had an insurable interest.
Cummings v. *Fire Ins. Co.*, 379.

Where a deed was actually delivered to plaintiff, but to obtain a mortgage thereon, which he could not give because a minor, he procured a new deed to his father, plaintiff's representation to defendant insurance company that he was the owner was true in fact. *Cummings* v. *Ins. Co.*, 379.

Where land was conveyed to plaintiff's father, because plaintiff was a minor, and could not execute a valid mortgage thereon, but the father held in trust for plaintiff a statement in an application for insurance that he was the owner was true. *Cummings* v. *Ins. Co.*, 379.

In an action to recover insurance premiums advanced by plaintiff for the benefit of defendant, plaintiff has the burden of proving authority to procure the policy for the defendant. *Lord* v. *Downes*, 396.

That the policy in suit, by reason of the mortgage clause and being made payable in case of loss to the mortgagee as his interest may appear, contained, in addition to the contract with the mortgagor, a separate and independent contract whereby the mortgagee's interest was insured.
Gilman v. *Commonwealth Ins. Co.*, 528.

The defendant had no right to cancel the policy, except by mutual consent of the insured and the mortgagee, or by giving to the insured and the mortgagee ten days' notice in writing, as specified in the policy.
Gilman v. *Commonwealth Ins. Co.*, 528.

The mortgagee's right to recover for the loss was not affected by the act of the insured and the defendant in its attempted cancellation of the policy.
Gilman v. *Commonwealth Ins. Co.*, 528.

INTOXICATING LIQUORS.

See EXCEPTIONS. SEARCH AND SEIZURE. ARREST. EVIDENCE.

Under R. S., Chap. 29, Sec. 51, the claimant of intoxicating liquors seized by the State is bound to show, not only that the liquors were not kept or deposited for unlawful sale, but that he was entitled to their custody; the burden of proving that issue being on the claimant.
State v. *Intoxicating Liquors*, 138.

In proceeding for the forfeiture of intoxicating liquors seized by the State, evidence held insufficient to show that the claimant was entitled to a return of the liquors, or any part thereof. *State* v. *Intoxicating Liquors*, 138.

In a proceeding for the forfeiture of intoxicating liquors, libeled by the State and claimed by the carrier in whose possession they were found, specific findings of fact are unnecessary to support a judgment of forfeiture; such judgment being a finding for the State upon all the issues of fact necessary to support the libel. *State* v. *Intoxicating Liquors*, 138.

A club-house, open only to members and their guests, who could and did resort there to drink their own liquor, kept in lockers belonging to them, is a place of resort within R. S., Chap. 22, Sec. 1, declaring that places of resort where intoxicating liquors are kept are nuisances.
State v. *Cumberland Club*, 196.

A club-house where members resorted to drink their own liquors, kept in their own lockers, is a common nuisance within R. S., Chap. 22, Sec. 1.
State v. *Cumberland Club*, 196.

To constitute a "place of resort" within the meaning of R. S., Chap. 22, Sec. 1, it is not necessary that the place be open to every one. It is enough if it be commonly and habitually resorted to by a limited class, as members of a club, or by individuals not constituting a class. *State* v. *Cumberland Club*, 196.

A club-house, where intoxicating liquors are given away, or drank by individual members of the club, and which is commonly and habitually resorted to by the members for drinking or giving away such liquors is a liquor nuisance, within the meaning of R. S., Chap. 22, Sec. 1, notwithstanding it is not unlawful to drink intoxicating liquors, or to give them away.
State v. *Cumberland Club*, 196.

The statute establishing the right of an owner to make claim for liquors under seizure and secure their release, contemplated a case where the real owner should appear, either personally or by properly authorized representatives and make claim and produce proof sufficient to satisfy the Court having jurisdiction, of the justice of his claim, and of his lawful possession and ownership in fact. *State* v. *Intoxicating Liquors*, 220.

Intoxicating liquors may be seized without a warrant, under the provisions of R. S., Chap. 29, Sec. 48, but this section does not empower the officer to search without a warrant. *Caffinni* v. *Hermann*, 282.

On a libel for the forfeiture of intoxicating liquors, evidence held insufficient to overcome the positive testimony of claimant, the owner of the boat in which the liquors were being transported, that they were intended for a point outside the State. *State* v. *Intoxicating Liquors*, 393.

A private carrier who is bailee for hire of intoxicating liquors has a special title thereto which entitles him to the possession of the liquors against a wrongful seizure. *State* v. *Intoxicating Liquors*, 393.

JUDGMENT.

See FRANCHISES.

The seizure and sale of all the franchises, privileges, plant and property of the York Water Company on execution, under R. S., Chap. 56, Sec. 6, as personal property, instead of under R. S., Chap. 47, Sec. 71, applicable to corporations being invalid, the plaintiff's judgment has therefore been in no part satisfied, and she is entitled to an alias execution therefor.
Vermeule v. *York Water Co.*, 437.

JURISDICTION.

See DIVORCE.

Since the jurisdiction of the Law Court is statutory only, the taking and allowing of exceptions and their certification to the Law Court or to the Chief Justice thereof are wholly matters of statutory regulation.
Cole v. *Cole*, 315.

Revised Statutes, Chap. 79, Sec. 55, authorizing the certification for immediate termination of frivolous exceptions, does not apply to a civil case tried before the Superior Court of Kennebec County. *Cole* v. *Cole*, 315.

The Justices of the Superior Courts have no jurisdiction under R. S., Chap. 79, Sec. 55, to certify to the Chief Justice of the Supreme Judicial Court exceptions adjudged to be frivolous and intended for delay, except in criminal cases.
Cole v. *Cole*, 315.

Under R. S., Chap. 79, Sec. 85, exceptions may be so certified only in cases within the exclusive jurisdiction of the Superior Courts.
Cole v. *Cole*, 315.

LANDLORD AND TENANT.

See EXCEPTIONS. EVIDENCE.

It is the duty of the owner of a building, having it in charge, to be careful in keeping it safe for all persons who come there by his invitation, express or implied; but he owes no such duty to those who come there for their own convenience. *Austin* v. *Baker*, 267.

Toward a mere licensee, the owner of a building owes no such duty, except that he shall not wantonly injure him. *Austin* v. *Baker*, 267.

When a lease gave the tenant the option to renew upon the same terms and conditions, a holding over by the tenant, without the execution of a new lease, was an election to continue the tenancy, and the terms thereof are governed by the provisions of the lease. *Sanders* v. *Middleton*, 433.

LICENSE.

The statute means that whenever a stock of goods is moved into a town for the purpose of being put upon sale and sold in the town, the owner or person having them in possession for that purpose must obtain the license specified in Chap. 45, of R. S., before he engages in the business of selling them.
State v. *Littlefield*, 214.

LIMITATION OF ACTIONS.

Revised Statutes, Chap. 97, Sec. 5, which provides that if a tenant in common cuts down wood, without first giving thirty days' notice to his co-tenants, he shall forfeit three times the amount of damages, is not a penal action within the meaning of R. S., Chap. 83, Sec. 97, which requires that actions for any penalty or forfeiture on a penal statute shall be brought within one year after the commission of the offense. *Hall* v. *Hall*, 234.

MALICIOUS PROSECUTION.

While the advice of counsel may be shown in an action for malicious prosecution, the fact that the defendant, before instituting the prosecution, consulted a magistrate, or a magistrate's clerk, who was an attorney at law, is admissible.
Morin v. *Moreau*, 471.

When the defendant, in an action for malicious prosecution, desires to show that he acted upon the advice of counsel to negative malice and show probable cause, the details of the statement he made to his counsel before instituting the prosecution are admissible. *Morin* v. *Moreau*, 471.

Defendant, who was sued for malicious prosecution, cannot testify that he was not actuated by malice, when he did not consult an attorney, but merely submitted the facts to a magistrate's clerk, who was an attorney at law, and the representations to the clerk were not shown, for there is no foundation for the testimony. *Morin* v. *Moreau*, 471.

MARRIED WOMEN.

Revised Statutes, Chap. 63, Sec. 1, providing that "a married woman of any age may own, in her own right, real and personal estate acquired by descent, gift or purchase, and may manage, sell, convey and devise the same by will, without

joinder or assent of her husband," applies to a married woman under the age of twenty-one years, as well as to one who has attained her majority.
Fields v. *Mitchell*, 368.

A conveyance of real estate made by a married woman under the age of twenty-one years cannot be disaffirmed by her after arriving at her majority, nor the property recovered back. *Field* v. *Mitchell*, 368.

MASTER AND SERVANT.

See FRAUD. ASSUMPTION OF RISK. NEGLIGENCE.

An architect engaging to do work is bound to bring to the performance of the contract reasonable care, an intelligence befitting his profession, and a proper investigation and knowledge of the business in hand, in all its details.
Lane v. *Harmony*, 25.

A master is only bound to use reasonable care to have the place where the servant works in a reasonably safe condition.
Bak v. *Lewiston Bleachery & Dye Works*, 270.

Employer held to owe employee in bleachery working near a starching machine no duty to guard the machinery more than it was guarded.
Bak v. *Bleachery & Dye Works*, 270.

A servant is not entitled to instructions about dangers which he already knows and appreciates. *Bak* v. *Bleachery & Dye Works*, 270.

Assuming that the place where an employee was working near a starching machine in the rolls of which he caught his hand was unsafe, held, that he could not recover because of his knowledge of the danger.
Bak v. *Bleachery & Dye Works*, 270.

Where an experienced carpenter was struck in the eye by a piece of steel which was broken from the head of a chisel held by him, the master was not liable for failure to inspect the chisel and discover its condition.
Cooney v. *Portland Terminal Co.*, 329.

The duty of inspection by an employer of the appliances used by his employee does not extend to the small and common tools in every day use, of the fitness of which the employee using them may reasonably be supposed to be a competent judge. *Cooney* v. *Portland Terminal Co.*, 329.

In an action against a railroad company for personal injuries, evidence of the custom of others to go between moving cars and replace or remove coupling pins and that plaintiff had done so before is inadmissible.
Swasey v. *Railroad Co.*, 399.

A master, as to a servant employed in the most perilous places and in the use of the most dangerous agencies, is required to exercise ordinary care for his safety, ordinary care being synonomous with reasonable care and reasonable care meaning such care as ordinarily reasonable and prudent men exercise with respect to their own affairs, under like circumstances.
Monk v. *Bangor Power Co.*, 492.

MECHANIC'S LIENS.

When all the materials are furnished under one contract, though not ordered at the same time, or when the quantity or prices are not agreed upon at the time of the order, the contract is a "continuing contract" covering such materials.
Van Wart v. *Rees*, 404.

The statute regarding liens on buildings and lots does not confine the right to any particular species of contract. It extends to and includes implied as well as express contracts, and those which are entire, as well as those which are devisible. *Van Wart* v. *Rees*, 404.

Under R. S., Chap. 93, Sec. 29, giving a lien for materials furnished, plaintiff, who on October 1 agreed with the defendant to furnish materials for his house, was entitled to a lien for all materials furnished, though the work was interrupted for a period and resumed under the original contract.
Van Wart v. *Rees*, 404.

When all materials are furnished under one continuing contract, although at different times, a statement filed within the time fixed by statute after the last item is furnished is effective as to all other items. *Van Wart* v. *Rees*, 404.

MORTGAGES.

See REAL ACTION. COVENANT. DEEDS. NEW TRIAL. SEIZIN. DIVORCE. WAIVER. SALE.

Where mortgagor was to support mortgagee, and mortgagee, in consideration thereof was to indorse $1000 a year on the note, and the mortgagor performed, there could be no recovery under the mortgagee, though the mortgagee left the mortgagor's house. *Waldron* v. *Moore*, 146.

Two contemporaneous writings between the same parties, upon the same subject matter, may be read and construed as one paper.
Waldron v. *Moore*, 146.

The rule applies, notwithstanding one of the papers is a promissory note, when the action is between the parties to it, or their representatives.
Waldron v. *Moore*, 146.

Where a mortgagee in possession conveys the property by deed, the deed will operate as an assignment of the mortgage the same as if the mortgage debt was assigned or transferred with the deed. *Farnsworth* v. *Kimball*, 238.

A deed by a mortgagee, not having made entry and being out of possession, conveys no legal title to the land, unless accompanied by a transfer of the mortgage indebtedness. *Farnsworth* v. *Kimball*, 238.

A mortgagee by taking possession under his mortgage acquires a seizin in fact and an interest in the land itself, which he can convey if he continues in possession.
Smith v. *Booth Brothers*, 297.

A seizin once acquired is presumed to continue, until it is shown that there has been an ouster or disseizin or an abandonment.
Smith v. *Booth Brothers*, 297.

The rights of all parties depend upon the language used in a mortgage in reference to after acquired property, and the acts of the parties as declared by the record.
Williams v. *Noyes & Nutter Mfg. Co.*, 408.

At common law, a mortgage of chattels not then in existence was invalid, but it has now become a settled principle in this State that a person may mortgage after acquired property. *Williams* v. *Noyes & Nutter*, 408.

As between the parties, a mortgage upon goods, which authorizes the mortgagor to sell them and with the proceeds of such sale to purchase other goods to take their place will be upheld. *Williams* v. *Noyes & Nutter*, 408.

The intention of the parties as gathered from the language of all parts of the agreement considered in relation to each other, and interpreted with reference to the situation of the parties, and the manifest object they had in view, must always be allowed to prevail, unless some principle of law or sound public policy would thereby be violated. *Williams* v. *Noyes & Nutter*, 408.

When the trustee took possession, the property was then in the custody of the law and could not be removed from that custody by any private person, or by any process issuing out of this Court. *Williams* v. *Noyes & Nutter*, 408.

A mortgage of real estate given by the libelant, the wife, without the joinder of her husband, the libelee, is void, because contrary to R. S., Chap. 63, Sec. 1, when the property had been conveyed to her by her husband during coverture. *Gato* v. *Christian*, 427.

The plaintiff's rights remain unaffected by the mortgage held by the defendant mortgagee, and he is entitled to equitable relief enjoining the foreclosure of same. *Gato* v. *Christian*, 427.

The defendant held note of plaintiff for borrowed money, secured by chattel mortgage which had been foreclosed and he time of redemption had expired. The defendant demanded and received the amount due on the note and endorsed upon the mortgage that, "the within mortgage and the note which it secures having been paid in full, it is hereby discharged," held that this transaction did not constitute a sale of the goods mortgaged to plaintiff, but constituted payment of the amount due on the note, and a waiver by defendants of the rights by reason of the foreclosure. *Perow Co.* v. *Security Co.*, 443.

MUNICIPAL CORPORATIONS.

Where plaintiff was validly employed for a specified term as City Liquor Agent with authority to dispense liquor under existing laws, but pending his term the statute authorizing cities to maintain dispensaries was repealed and plaintiff's employment became unlawful, his contract was thereby terminated and he could not recover salary from the city for the balance of his term. *Dingley* v. *Bath*, 93.

Under ordinances specifying duties of City Solicitor, he was not entitled to compensation in addition to his salary, for preparing a bill and presenting it on behalf of the city before a committee of the legislature pursuant to a vote of the council. *May* v. *Auburn*, 143.

When an office is created by statute which provides that it shall be filled by election, or appointment, for a term of years, and is silent in regard to the time when the term shall commence, and there are no special provisions for filling the vacancy in the office, it must be held that the term of the office begins when the appointee is appointed and qualified. *Wilson* v. *McCarron*, 181.

Provisions of the Lewiston City Charter as to election and term of office of subordinate officer was repealed as to City Marshal by Special Laws, 1878-1880, Chap. 293. *Wilson* v. *McCarron*, 181.

Under Special Laws of 1878-80, Chap. 293, Sec. 1, City Marshal of Lewiston held to hold office for the full term of two years, though appointed to succeed one who did not serve out his full term. *Wilson* v. *McCarron*, 181.

NEGLIGENCE.

See RAILROADS. ASSUMPTION OF RISK. NEW TRIAL. DAMAGES. HIGHWAYS. FENCES. BURDEN OF PROOF. MASTER AND SERVANT.

It is negligence per se for a person to cross a railroad track without first looking and listening for a coming train. And if one is injured at a railroad crossing by a passing locomotive, which might have been seen, if he had looked, or heard, if he had listened, he is guilty, presumptively, of contributory negligence. *McCarthy* v. *B. & A. R. R. Co.*, 1.

Evidence in an action for collision with a train at a crossing claimed to be dangerous, and with which plaintiff was perfectly familiar, and to which he knew a train about due, held to show contributory negligence, even if no crossing signal was given, and though he and another testified he twice stopped, looked and listened, and neither saw nor heard anything. *McCarthy* v. *B. & A. R. R. Co.*, 1.

In an action for an injury caused by plaintiff's bicycle colliding with defendant's automobile, evidence held to show contributory negligence of plaintiff, in attempting to cross in front of automobile, instead of passing behind it. *Robichaud* v. *Spence*, 13.

Where the officers of a steamship, who had supervision of the fire room and its appliances, and whose duty it was to see that the same was maintained in a reasonably safe condition knew that great quantities of sea water would come through the ash ejector, unless the hopper cover was securely held down, and also knew the condition of the cover, and that the holding-down bolts had rusted away and that no other appliance had been provided, the employer was, as a matter of law, negligent in maintaining the ash ejector in a defective condition, and liable to a fireman sustaining injury by sea water flowing into his place of work through the ejector. *Reid* v. *Eastern Steamship Co.*, 34.

In an action for the death of an eight year old girl run over by a street car, evidence held to warrant a finding by the jury that the motorman was negligent in not stopping the car. *Curran* v. *L. A. & W. St. Ry.*, 96.

Under the express provisions of Laws of 1913, Chap. 27, in actions for wrongful death, contributory negligence must be pleaded and proven by defendant. *Curran* v. *L. A. & W. St. Ry.*, 96.

Where plaintiff, after alighting from an electric railway car, turned to speak to another, and stepped backward into a slight depression under the highway fence, she was guilty of contributory negligence. *Crocker* v. *Orono*, 116.

To come under an implied invitation as distinguished from mere license, the visitor must come for a business connected with the business in which the occupant is engaged, or which he permits to be carried on there. *Elie* v. *Street Railway*, 178.

There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant. *Elie* v. *Street Railway*, 178.

In the absence of wanton, or recklessly careless conduct on the part of the defendant, the plaintiff, although a child of tender years, if a trespasser, occupied no better position and has no greater rights than an adult. *Elie* v. *Street Railway*, 178.

If a child trespass on the premises of the defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly influenced by, or was due to, the recklessly careless conduct of the defendant. *Elie* v. *Street Railway*, 178.

For a person to be an invitee under an implied invitation, there must be some mutuality of interests between the occupant and the person entering his premises. *Elie* v. *Street Railway*, 178.

It is the duty of a master to use reasonable care to provide a reasonably safe place for his servant to work in. *Lindsey* v. *Spear*, 230.

The servant assumes risks which are ordinarily incident to his employment, and such other risks as are known to him, or which by the exercise of reasonable care he ought to know. He assumes the obvious risks. *Lindsey* v. *Spear*, 230.

When the evidence of negligence in an action to recover for personal injuries is of such a character that only one conclusion can be drawn by reasoning and reasonable men, its effect becomes a matter of law. *Lindsey* v. *Spear*, 230.

In the plaintiff's evidence in an action for personal injuries caused by the alleged negligence of the defendant would not warrant a finding by the jury that the defendant had been negligent, it was the duty of the Court to direct a verdict for the defendant. *Lindsey* v. *Spear*, 230.

When the owner of a team left it unguarded on his own land, and it ran away into a highway and against plaintiff, a traveler, the owner was not absolutely liable to plaintiff, on the theory that the team was unlawfully in the highway, but plaintiff could recover only on proof of negligence.
Briggs v. *Crystal Ice Co.*, 344.

Violation of a city ordinance, providing for the driving and control of teams in the streets, even though resulting in injury to a traveler by the escape of a team, did not constitute negligence per se, but was mere evidence of negligence.
Briggs v. *Crystal Ice Co.*, 344.

The liability of defendant depends, as in other cases of negligence, upon the degree of care exercised by it, and not upon the mere fact that the runaway team escaped from the private land of the defendant.
Briggs v. *Crystal Ice Co.*, 344.

In an action under R. S., Chap. 89, Secs. 9 and 10, for death by wrongful act, the administratrix of deceased, suing for the exclusive benefit of herself and children, has the burden of proving negligence by a fair preponderance of all the evidence. *Monk* v. *Bangor Power Co.*, 492.

If the owner or occupier of land, either directly or by implication, induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition so that the person there by his invitation may not be injured by them or in their use for the purposes for which the invitation is extended; that there should be no dangerous plays, sports or exhibitions thereon by which the invited might be injured.
Graffam v. *Saco Grange*, 508.

Where the proprietors of a fair allow shooting galleries upon their premises, practice in target shooting is a part of the entertainment carried on at the fair, and the managers and controllers of the fair have such target shooting and its

safety under their supervision and control as much as any other part of the fair, and are liable for injuries resulting from their negligence in not properly controlling and conducting the management of this part of their exhibition.
Graffam v. *Saco Grange*, 508.

Where a negligent employee was, at the time of his injury, performing his employer's duties, the latter was liable for the negligence causing injury to a co-employee, but was not liable if the employee was not performing a duty imposed on the employer, though he was the superior of the employee.
Janilus v. *International Paper Co.*, 519.

Ordinary care and negligence are questions of fact, though the circumstances are admitted or undisputed, where reasonable men may arrive at different conclusions. *Janilus* v. *International Paper Co.*, 519.

It is the duty of an employer to furnish a reasonably safe place for his employee to work in during the time reasonably occupied by the employee on the premises in going and returning from work.
Janilus v. *International Paper Co.*, 519.

Where an injury to an employee is the result of concurring negligence of the employer and another, the employer is not exempt from liability.
Janilus v. *International Paper Co.*, 519.

Where, on the issue of assumption of risk, the facts are controverted, or such that different inferences may be drawn therefrom, the question must be submitted to the jury under proper instructions.
Janilus v. *International Paper Co.*, 519.

A risk arising from the negligence of the employer is an extraordinary one, and an employee suing for a personal injury need not allege or prove want of knowledge and non-assumption of risk.
Janilus v. *International Paper Co.*, 519.

NEW TRIAL.

See ASSUMPTION OF RISK.

A verdict on conflicting evidence and not erroneous to a reasonable certainty will not be disturbed by the Court. *Reid* v. *Steamship Co.*, 34.

A motion for a new trial on the ground of newly discovered evidence will be granted, if the moving party is otherwise entitled to it, when it seems probable to the Court that the verdict will be different when the case is submitted anew with the additional evidence.
Southard v. *B. & A. R. R. Co.*, 227.

Newly discovered evidence as to plaintiff's condition after he had recovered a verdict for alleged incurable injuries, which practically disabled him, held to require a new trial. *Southard* v. *B. & A. R. R. Co.*, 227.

In replevin for a calf, where evidence of comparison of the calf and its alleged dam had been excluded, the action of a juror in independently comparing the animals warrants a new trial. *Driscoll* v. *Gatcomb*, 289.

A juryman may testify to any facts bearing upon the question of the existence of the distrubing influence, but cannot be permitted to testify how far that influence operated upon his mind. *Driscoll* v. *Gatcomb*, 289.

The question of fact is not whether the mind of the juror was influenced, but whether his act might have influenced his mind was of such a nature as to have any tendency to influence it. *Driscoll* v. *Gatcomb*, 289.

It is not a violent presumption that evidence by jurors or remarks made to them out of Court, or views without order of Court, more or less affect jurors.
Driscoll v. *Gatcomb*, 289.

PARTNERSHIP.

See INSURANCE.

Where, upon dissolution, one of two partners orally assigned his interest in an account due the firm to plaintiff, receiving his due share of the account, this constituted an equitable assignment, authorizing suit in name of assignor, but not in name of assignee. *Lord* v. *Downs*, 396.

A partnership is regarded as continuing after dissolution for the settlement of its affairs, and each partner retains full possession of his firm powers and may sue for the collection of debts due the firm. *Lord* v. *Downs*, 396.

PAUPERS.

In order for the plaintiff to recover for supplies furnished to his father, under R. S. Chap. 27, Sec. 45, he must prove that his father was destitute and in need of immediate relief; that he, himself, was not financially able to take care of his father and mother; and that the notice given was such as the statute requires. *Allen* v. *Lubec*, 273.

PLEADING.

See AMENDMENT.

Every traversable fact must be alleged as of a definite day, month and year. *Garmong* v. *Henderson*, 383.

Declaration alleging that defendant did certain things on or about certain dates, and at divers other days and times from such dates to the date of the writ, is demurrable for not naming a certain day, whether correctly named or not. *Fuller* v. *Gage*, 447.

POLICE POWER AND REGULATIONS.

See CONSTITUTIONAL LAW.

An ordinance of a town, providing that no carcasses of neat cattle, sheep or swine wherever slaughtered, shall be sold or offered for sale in the town, unless inspected at the time of the slaughter by an official inspector, was a proper exercise of the police power of the State, as delegated by R. S., Chap. 4, Sec. 93, providing that towns, cities and villages may make and enforce ordinances respecting infectious diseases and health. *State* v. *Starkey*, 8.

The right to pass inspection laws belongs to the police power of government. *State* v. *Starkey*, 8.

Though all by-laws made in restraint of trade, or which tend to create a monopoly are void, yet a city or town, by reasonable general provisions, by ordinance, may regulate and restrain all noxious and injurious callings within its limits. *State* v. *Starkey*, 8.

A municipality can enact reasonable ordinances only, and the Court will annul ordinances which are unreasonable, illegal or repugnant to law.
State v. *Starkey*, 8.

Any regulation, whatsoever its character, which is instituted for the purpose of preventing injury to the public, and which tends to furnish the desired protection is constitutional. *State* v. *Starkey*, 8.

The police power of the State is co-extensive with self protection, and is not inaptly termed "the law of overruling necessity." *State* v. *Starkey*, 8.

PRESCRIPTION.

See EXCEPTIONS.

While a highway may be established or widened by prescription, the rights of the public therein are limited to the land used prescriptively, and a telephone guy wire two feet outside the traveled way cannot be upon a prescriptive highway.
Shackford v. *Telephone Co.*, 204.

PRINCIPAL AND AGENT.

The rule that a principal cannot affirm an unauthorized act of his agent in part. and repudiate it in part, but must accept all or none, is not applicable to a case where the principal is legally entitled in any event to what he received.
Goss v. *Kilby*, 323.

When certain money due plaintiff was paid to M. without any authority to receive it, that plaintiff, after ascertaining the fact, did not disavow M's act for three months did not constitute a ratification of the payment as matter of law. *Goss* v. *Kilby*, 323.

A presumption of ratification arising from silence is a presumption of fact, and is ordinarily rebuttable. The question of ratification in this case should be submitted to a jury. *Goss* v. *Kilby*, 323.

PROCESS.

See WRIT.

A writ made returnable at the October term, after the enactment of Laws of 1913, Chap. 95, Sec. 1, establishing that term and abolishing an intervening term, but before it became effective under Art. 4, Part 3, Sec. 17 of Constitution, is returnable at the time when there is no Court term.
Kehail v. *Tarbox*, 327.

A writ returnable on a day out of term is voidable and may be abated on motion.
Kehail v. *Tarbox*, 327.

PUBLIC LANDS.

See DEED.

The failure of the State Land Agent to institute proceedings authorized by R. S., Chap. 7, Sec. 20, to locate lots received for public purposes, is not laches which will bar a bill by the State for an accounting of the proceeds of lumber cut from the lots, where the owner of the tract was required by his grant to set the lots apart. *Mace* v. *Ship Pond Co.*, 420.

Revised Statutes, Chap. 7, Sec. 11, providing that there should be reserved in every township 1000 acres to be appropriated to public uses is a general law of reservation, of which a grantee is bound to take notice, although no special reservation is made in the grant and is not a mere declaration of policy.
Mace v. *Ship Pond Co.*, 420.

A lumber company, which had cut lumber from State lands before they had been located by the State Land Agent could set off against its liability for stumpage, the proportionate of amounts paid for expenses incurred for the preservation of the common property and for the benefit of all.
Mace v. *Ship Pond Co.*, 420.

That under the deed from the Commonwealth of Massachusetts to the trustees of the Saco Free Bridge Fund, dated October 28, 1892, conveying the Saco Tract, so called, the fee vested in the trustees with a condition subsequent annexed to the grant. *Mace* v. *Ship Pond Co.*, 420.

This condition imposed upon the grantees, their successors and assigns the duty of causing the public lots therein mentioned to be set out.
Mace v. *Ship Pond Co.*, 420.

The defendant, having entered upon the entire and undivided tract and cut and carried away timber therefrom, regardless of the imposed condition, cannot now successfully set up laches on the part of the State as a defense to the repayment of the amount due. The defendant does not come into Court with clean hands. *Mace* v. *Ship Pond Co.*, 420.

RAILROADS.

See NEGLIGENCE. TITLE. WAIVER. BURDEN OF PROOF.

It is negligence per se for a person to cross a railroad track without first looking and listening for a coming train. And if one is injured at a railroad crossing by a passing locomotive, which might have been seen if he had looked, or heard if he had listened, he is guilty, presumptively, of contributory negligence.
McCarthy v. *B. & A. R. R. Co.*, 72.

In an action for the value of buildings and their contents destroyed by fire, evidence held sufficient to support a jury finding that the fire was caused by sparks from a railroad locomotive. *Duplissy* v. *Railroad*, 263.

In an action against a railroad company for the value of a hotel and outbuildings and their contents destroyed by fire, when the evidence shows the fair value of the buildings to be from $3000 to $3500, while the schedule of personal property amounted to $3000 and the furniture had been purchased within a year, a verdict for $5341.67 was not so excessive as to require interference.
Duplissy v. *Railroad*, 263.

In an action against a railroad company for the destruction of a hotel and its contents by fire, when the company showed that its engine was equipped with a spark arrester in good condition, and called witnesses who expressed the opinion that sparks could not have been emitted that would have set the fire, a person living five houses from the hotel was properly permitted to testify as to finding a large quantity of cinders on her piazza the morning after the fire.
Duplissy v. *Railroad Co.*, 263.

An instruction prescribing in detail the character of the evidence required, and which would have necessitated the Court passing upon matters clearly within the province of the jury, was properly refused. *Duplissy* v. *Railroad Co.*, 263.

In such a case as the one at bar, care in the highest degree was not required of the defendant, nor was the same degree of care required as that owed to a passenger in a moving train. *Polland* v. *Railway Co.*, 286.

The defendant was not required to maintain absolutely safe conditions, but its only duty was to exercise ordinary care and to maintain its platforms in such reasonably safe and suitable condition that passengers, who were themselves in the exercise of ordinary care, could safely alight from the train. *Polland* v. *Railway Co.*, 286.

Where the defendant railroad in an action under R. S., Chap. 52, Sec. 73, for the burning of woodland, did not, at the trial, object to plaintiff's proof of title, or to any variance between pleading and proof, it waived any variance, when the evidence made out a prima facie case of plaintiff's title. *Shepherd* v. *M. C. R. R. Co.*, 350.

A motorman, whose car was approaching a street crossing, and whose vision was obscured by an arc light, is bound to have his car under his control until it passes the zone of the light and can see travelers. *Glidden* v. *B. R. & E. Co.*, 354.

A traveler lawfully on the highway has the right to cross a street railroad track regardless of the length of his vehicle. *Glidden* v. *B. R. & E. Co.*, 354.

The most favorable construction to be put upon the plaintiff's testimony is the deduction of the witness that fires one and three were set by a passing engine, because a train was due to pass about the time when the fire started. *Britt* v. *M. C. R. R.*, 401.

With such insufficient evidence, the jury must have reached a verdict by conjecture, instead of proof, or that they substituted guess work for proof. *Britt* v. *M. C. R. R.*, 401.

Evidence of the passing of an engine shortly before the fire, and that other engines of the defendant had previously set fires in the vicinity, held insufficient proof, other causes not being eliminated, but evidence also showing a possibility that a boy set the fire. *Allen* v. *M. C. R. R. Co.*, 480.

In an action for damages to timber and wood burned by fire caused by sparks from defendant's locomotive, evidence held insufficient to sustain a verdict for plaintiff. *Alden* v. *M. C. R. R. Co.*, 515.

In such action, the burden was upon the plaintiff to show by competent evidence that the defendant's locomotive caused the fire, and to establish a case by inference from the facts, such inference must be drawn from facts proved, and cannot be based upon a probability. *Alden* v. *M. C. R. R. Co.*, 515.

REAL ACTION.

See COVENANTS. REVIEW. MORTGAGE.

Where a real action was brought as to real property which had been conveyed to the defendant therein by petitioner's ancestor, whose property and assets she had inherited, and she was vouched in to defend the suit by reason of her ancestor's warranty of title, but failed to do so, she was bound by the judgment. *Farnsworth* v. *Kimball*, 238.

In a real action by the owner of the equity of redemption in mortgaged premises against a grantee of the mortgagee before entry and while out of possession, such grantee for that reason being a mere stranger to the title, it was no defense that he had a claim against petitioner for breach of his grantor's covenant of warranty. *Farnsworth* v. *Kimball*, 238.

REFERENCE.

It is well settled law that the referee has full power to decide all questions arising, both of law and fact, and in the absence of fraud, prejudice or mistake, on the part of the referee, his decision is final. *Hovey* v. *Bell*, 192.

Objection to the report should be made when the report is offered for acceptance. *Hovey* v. *Bell*, 192.

When there is evidence to support the findings of fact of a referee, and his findings of fact support his conclusion of law, neither are subject to exceptions. *Hovey* v. *Bell*, 192.

In the absence of fraud, prejudice or mistake on the part of the referee, appointed under Rule of Court, his findings are conclusive on questions, both of law and fact. *Perry* v. *Ames*, 202.

The fact that the referee states in his report findings of law which, upon examination by the Court, might be deemed unsound, is immaterial. The determination of the referee is final. *Perry* v. *Ames*, 202.

When the parties, by agreement, submitted the case to a referee after the adoption of Supreme Judicial Court, Rule XLV, 1908, prohibiting stipulations for review of the referee's decision, an award cannot be reviewed for errors of law shown by the terms of the report itself. *Perry* v. *Ames*, 202.

REVIEW.

A petition for review will be denied when it appears that the petitioner's predicament is due to his own fault and want of reasonable diligence.
Farnsworth v. *Kimball*, 238.

SALES.

See FRAUD. CONTRACTS.

Where a seller of personal property delivers an amount in excess of that bought or contracted for, the seller, if he accepts the excess, must pay its reasonable value.
Mercier v. *Murchie's Sons Co.*, 72.

The delivery of personal property at the stipulated place of delivery largely in excess of the amount bought or contracted for raises no presumption of acceptance as to the excess. *Mercier* v. *Murchie's Son Co.*, 72.

Where personal property is sold deliverable to a particular person, or at a particular place for the buyer, a delivery to such person, or at such place, is a completed delivery to the buyer, and raises a presumption of acceptance by the buyer. *Mercier* v. *Murchie's Son Co.*, 72.

Where, under contract of sale of "about" 500,000 feet of logs, the seller claimed to have delivered over 1,000,000 feet, and the buyer admitted delivery of 690,000 feet, no presumption of acceptance arose from delivery at the stipulated place, and the burden was on the seller to prove delivery and acceptance.
Mercier v. *Murchie's Sons Co.*, 72.

In an action for the price of over 1,000,000 feet of logs claimed to have been delivered under a contract for about 500,000 feet, in which defendant admitted delivery of 690,000 feet, evidence held insufficient to show a delivery and acceptance of the logs which defendant denied receiving.
Mercier v. *Murchie's Sons Co.*, 72.

A purchaser, who is defrauded by false representations of the vendor inducing the purchase, may rescind on the discovery of the fraud, but to do so he must act within a reasonable time after discovery. *Estey* v. *Whitney*, 131.

A purchaser, who after knowledge of the vendor's false representations, does not notify the vendor of his election to rescind within a reasonable time, but retains the property, thereby elects to abide by the contract which becomes irrevocable, except by mutual consent. *Estey* v. *Whitney*, 131.

Parties to a contract for the sale and purchase of real estate may, by mutual consent, rescind and, when they do so, they are bound by their agreement.
Estey v. *Whitney*, 131.

When defendants purchased lumber to be shipped within six months, shipment was at defendants' option; they being bound to furnish orders, so that it could all be shipped within the time specified, unless extended.
Russell v. *Clark*, 160.

When defendants purchased lumber of different grades to be shipped at their order, within a specified time, they had an option as to the order of shipments in respect to the kinds and quantities of lumber, and could refuse shipments of a heavier grade, while unfilled orders for lighter grades which were pending.
Russell v. *Clark*, 160.

Where defendants contracted to purchase lumber from plaintiff, who was to sort, grade and load it on cars, title did not pass as to the lumber not loaded, for which plaintiff could not recover the price as for goods sold and delivered.
Russell v. *Clark*, 160.

In an action for breach of a contract of sale, the burden is on the plaintiff to establish by a preponderance of the evidence that he had performed his part of the agreement, and that defendants had repudiated the contract without justification. *Russell* v. *Clark*, 160.

The question whether a sale of personal property is completed, or only executory, in cases between buyer and seller, and where neither the Statute of Frauds, nor the rights of third parties are involved, depends upon whether it was the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer.
Russell v. *Clark*, 160.

Where there is a breach of warranty of quality, the buyer may rescind and return the goods within a reasonable time.
Tank & Tower Co. v. *Mills Co.*, 336.

A buyer entitled to rescind for breach of warranty of quality must put the seller in substantially the same position that he occupied before the contract, and it is not sufficient for the buyer to offer to return goods or to notify the seller that he holds them subject to his order.
Tank & Tower Co. v. *Mills Co.*, 336.

One ordering a certain article by description from a manufacturer or dealer in that class of goods, without opportunity for inspection, held entitled to receive a salable and merchantable article under that name or description.
Tank & Tower Co. v. *Mills Co.*, 336.

In an action for the price of a tank sold defendant, evidence as to manner in which it was put up by the man furnished by the seller under a contract, subsequent to and independent of the contract of sale, held inadmissible.
Tank & Tower Co. v. *Mills Co.*, 336.

SEARCH AND SEIZURE.

See INTOXICATING LIQUORS.

Intoxicating liquors may be seized without a warrant, under the provisions of R. S., Chap. 29, Sec. 48, but this section does not empower the officer to search without a warrant. *Caffinni* v. *Hermann*, 282.

SEIZIN.

See MORTGAGE. DEEDS.

A seizin once acquired is presumed to continue until it is shown there has been an ouster, or disseizin, or an abandonment. *Smith* v. *Booth Bros.*, 297.

Non-user is not enough to warrant a finding of abandonment.
Smith v. *Booth Bros.*, 297.

The owner of land may retain legal possession thereof, though he does not remain upon it, and such possession may be regarded as actual, as distinguished from constructive. *Smith* v. *Booth Bros.*, 297.

STATUTE OF FRAUDS.

See CONTRACTS. TENANCY FOR LIFE.

When a benefit, legal or pecuniary, to the promisor, is the inducement for a promise of indemnity, such promise is not within the Statute of Frauds as being a special promise to answer for the debt or default of another, but is an original promise, binding upon the promisor.
Colbath v. *Clark Seed Co.*, 277.

A tenancy which operates as an estate for life, being a freehold, can only be passed by deed, that is, a writing under seal. *Calkins* v. *Pierce*, 475.

A lease of land for life, in consideration of support of lessor, not under seal and therefore creating an estate for life, may not be repudiated by the lessor, by bringing a real action for possession, where the lessee has not breached the contract on her part, as the lease, which was not required to be under seal, creates an estoppel against the lessor. *Calkins* v. *Pierce*, 475.

STATUTE OF LIMITATIONS.

The theory of the law is, when a debt is barred by the statute, that the promise upon which assumpsit would before lie is not dead, but suspended, and that by certain things done by the debtor, the suspension may be removed and the promise revived. *Shaw* v. *Oliver*, 512.

To remove the bar, under the statute, the debtor must acknowledge the debt, or expressly promise to pay it, in writing. *Shaw* v. *Oliver*, 512.

Acknowledgment is not a promise; it is only evidence from which a promise to pay may be implied, and upon which assumpsit may be brought. *Shaw* v. *Oliver*, 512.

A letter by maker of a note to payee saying that he had part of the amount to send soon, and more later, in such an acknowledgment as warrants the inference of an implied promise to pay and removing the bar of the statute. *Shaw* v. *Oliver*, 512.

SURVIVAL OF ACTIONS.

Under R. S., Chap. 89, Sec. 8, an action for deceit does not survive the death of the person injured. *Ahern* v. *McGlinchy*, 58.

Under Statute 4, Edward III, Chap. 7, and Statute 31, Edward III, Chap. 11, defining the actions which survive the death of either party, forming a part of the common law, a cause of action for deceit does not survive the death of the person defrauded. *Ahern* v. *McGlinchy*, 58.

TAXES.

See CORPORATIONS.

Where a municipality is granted the power to create a municipal debt and no other provision is made for its payment, it has the implied power to levy the necessary taxes to pay it. The one is the complement of the other. *Paul* v. *Huse*, 449.

The right to borrow carries with it the obligation to pay, and as a municipality has no means of paying its indebtedness, except through taxation, it necessarily has this power. *Paul* v. *Huse*, 449.

The assessments were not rendered invalid by the fact that the assessors did not make up an original and independent assessment, but simply copied the valuation as made by the assessors of the town. *Paul* v. *Huse*, 449.

The error of the assessors, in so doing, was not such an omission or defect as went to their jurisdiction or deprived the defendant of any substantial right, and, therefore, did not defeat his liability in this form of action.
Paul v. *Huse*, 449.

TENANCY FOR LIFE.

See STATUTE OF FRAUDS.

A tenancy which operates as an estate for life, being a freehold, can only be passed by deed, that is, a writing under seal. *Calkins* v. *Pierce*, 475.

It does not follow that such a writing, not under seal, is invalid to create any estate, or right by possession of the property described, in the defendant.
Calkins v. *Pierce*, 475.

TENANTS IN COMMON.

See AMENDMENTS.

In an action by tenants in common against a co-tenant for cutting wood without giving written notice, justification by permission must be pleaded.
Hall v. *Hall*, 234.

An assignee of a chose in action may bring suit thereon in the assignor's name without filing with the writ a copy of the assignment.
Hall v. *Hall*, 234.

TITLE.

See WATERS.

The title to land under the waters of a stream may be acquired by prescription, together with the right to diminish the flow or change the character of the water in so far as the right of lower proprietors are concerned.
Carleton v. *Cleveland*, 310.

The owner of upland, extending to the thread of a river, may sever and convey the upland, or the land under the water, or any part thereof separately.
Carleton v. *Cleveland*, 310.

TROVER.

See EXPERT WITNESS.

Money may be the subject of an action of trover, and in the declaration it is not necessary to set out the money verbatim, a description of it in general terms being sufficient. *Williams* v. *Williams*, 21.

All that is required is that the property should be described with as much reasonable certainty as the nature of the case will permit, so that it may be known what property is meant, and that the defendant may be protected against another suit for the same cause of action. *Williams* v. *Williams*, 21.

TRUSTS.

See WILLS.

It is settled law that, if the trust fail, as it would by the death of a beneficiary, the devise being to the trustees for a specific purpose only, they hold the property for the testator's heirs at law, as a resulting trust, and are answerable to them for it. *Dodge* v. *Dodge*, 291.

There is no authority of law for mingling of trust funds; certainly it could not be considered if the two trusts were to be administered by distinct trustees. *Moore* v. *McKenzie*, 356.

That the trustees were, or are, the same, or that the corpus of each fund is finally to be paid to or held for the same person can make no difference; each trust must stand alone. *Moore* v. *McKenzie*, 356.

WAIVER.

See RAILROADS. TITLE.

Where the defendant railroad, in an action under R. S., Chap. 52, Sec. 73, for the burning of woodland did not, at the trial, object to plaintiff's proof of title or to any variance between pleading and proof, it waived any variance when the evidence made out a prima facie case of plaintiff's title. *Shepherd* v. *M. C. R. R. Co.*, 350.

It is well settled that a party who would have the advantage of an oversight, if he wins, must take the disadvantage of the same oversight if he loses. He must be deemed to have waived the deficiencies, under the circumstances, if there is sufficient in all the testimony to make a prima facie case.
Shepherd v. *M. C. R. R. Co.*, 350.

WATERS.

See TITLE.

An owner may erect and maintain buildings or other structures on piles driven into the bed of the stream, provided he does not dam up the water or interfere with the flow of upper proprietors, or erect the buildings so that they will be washed away. *Carleton* v. *Cleveland*, 310.

The owner of the bed of a stream may construct a building on piles driven into the bed, so long as the quantity and flow of the water is not materially diminished, nor does the length of time an adjoining owner has stored water over that part of the land occupied by him effect the right so to use the bed of the stream.
Carleton v. *Cleveland*, 310.

Where a building constructed on the bank of a stream was conveyed to defendant, his act in moving it on to piles outside the limits of his conveyance was not the act of the owner of the bed of the stream, but of a trespasser.
Carleton v. *Cleveland*, 310.

The restriction on the amount of water the grantor may use when it falls below a certain level, following a grant of right to use "at all times" 100 square inches of water, does not affect the grantees' rights to use the full 100 inches when the water is below said level. *Wilton Woolen Co.* v. *Bass & Co.*, 483.

Though the grant of specified real estate and right to draw water, sufficient to furnish 40 horse power, includes all the grantor's real estate, except the dam, all head gates and the land on which they rest, all water rights in excess of 40 horse power remain in the grantor.
Wilton Woolen Co. v. *Bass & Co.*, 483.

No limitation as to time being stated in a grant of right to draw water sufficient to furnish 40 horse power, the grantees may use the water as many hours a day as they deem proper. *Wilton Woolen Co.* v. *Bass & Co.*, 483.

Under the grant of right to draw water sufficient to furnish 40 horse power, with limitation of the grantee's right to 100 square inches, when the water falls to a certain point below the top of the dam, the dam is the place of measurement of the 100 square inches, as well as the 40 horse power.
Wilton Woolen Co. v. *Bass & Co.*, 483.

WILLS.

See Heirs. Husband and Wife. Trust.

The Court, in construing a will, must ascertain and give effect to the intention of testator, as gathered from the language of the will, the relations of testator to the objects of his bounty, and the circumstances surrounding him at the time of making the will. *Crosby* v. *Cornforth*, 109.

Where specific things are enumerated in a will, and a more general description is coupled with the enumeration, the general description is commonly understood to cover only things of like kind with those specifically enumerated.
Crosby v. *Cornforth*, 109.

Where testatrix gave specific tangible personal property to legatees named, and then gave the remainder of her personal property to another legatee, the latter, in view of the circumstances, held entitled to the rights and credits of testatrix, not merely to tangible property. *Crosby* v. *Cornforth*, 109.

In construing a clause of a will, the Court must presume that the testator used the technical words "legal heirs" in the sense ascribed to them by usage and judicial decision, unless a clear intention to use them in another sense appears in the context. *Morse* v. *Ballou*, 124.

A testamentary trust may be terminated when all the beneficiaries release their rights thereunder. *Dodge* v. *Dodge*, 291.

An agreement by all the beneficiaries under a testamentary trust, releasing all rights thereunder and discharging the trustees from all responsibility, authorized a decree at the instance of all parties interested, terminating the trust, and a distribution of the residue. *Dodge* v. *Dodge*, 291.

Under a will bequeathing the residue of testator's estate in trust, held that such residue vested immediately in testator's heirs on termination of the trust through release by the beneficiaries. *Dodge* v. *Dodge*, 291.

The contestants claimed that the instrument produced was not the last will of Marcia G. Coombs, by reason of the fraud of one of the devisees; *held*, that the evidence adduced by the contestants is insufficient to sustain the charge of fraud. The burden of proof is not only upon them, but they must sustain this burden by clear and convincing evidence. *Coombs, et al., Applts.*, 445.

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WRITS.

See ATTACHMENT. CERTIORARI. EXECUTION. INJUNCTION. MANDAMUS. PROHIBITION. QUO WARRANTO. REAL ACTION. REPLEVIN. SCIRE FACIAS.

WRIT OF ENTRY.

In a real action tried on a plea of nul disseisin, a warranty deed to plaintiff, or to the one from whom plaintiff has a quitclaim deed, is sufficient prima facie evidence of title in plaintiff to authorize a verdict in his favor, unless defendant proves a better title. *May* v. *Labbe*, 209.

Where in a real action plaintiff claimed title under a mortgage foreclosure, it was not material that the land described in the mortgage was not the same as that described in the writ, if the mortgaged land included that sued for and described. *May* v. *Labbe,* 209.

A grantee's occupation, in the absence of evidence to the contrary, is presumed to be in accordance with his deed, and co-extensive with the premises therein described. *May* v. *Labbe,* 209.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

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ERRATA

Smith v. *Booth Bros.*, page 304, line 17 from top of page, strike out "993" and substitute therefor "93."

Littlefield v. *Cook*, page 554, line 5 from bottom of page, strike out "11" and substitute therefor "111."