MAINE REPORTS

114

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MAINE

SEPTEMBER 1, 1915—APRIL 17, 1916.

*HON. WILLIAM P. THOMPSON

*TERENCE B. TOWLE

REPORTERS

PORTLAND, MAINE

WILLIAM W. ROBERTS

1916

*HON. WILLIAM P. THOMPSON Died February 5, 1916.
*TERENCE B. TOWLE, ESQ., Appointed March 1, 1916.

PRESS OF

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WATERVILLE, MAINE.

JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS

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

Justices of the Superior Courts

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

ATTORNEY GENERAL

WILLIAM R. PATTANGALL

REPORTER OF DECISIONS

TERENCE B. TOWLE

ASSIGNMENT OF JUSTICES

FOR THE YEAR 1915–16

DURING THE TIME OF THESE REPORTS

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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Y.

TABLE OF MEMORANDUM DECISIONS REPORTED

TABLE OF CASES CITED
BY THE COURT

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B.

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D.

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N.

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U.

V.

W.

Y.

CASES

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

LIDA M. THOMPSON

vs.

COLUMBIAN NATIONAL LIFE INSURANCE COMPANY.

Knox. Opinion September 1, 1915.

Accident Insurance Policy. Exceptions. Experts. Immediate Cause of Death. Rupture of Heart.

1. If an accident causes blood poisoning, and the blood poisoning causes death, the death is the direct result of the accident, and liability is established under an accident insurance policy which limits liability to death in consequence of the policy "independently and exclusively of all other causes."
2. An issue being whether a slit in the muscles of a human heart was a rupture caused by violence before death, or a cut made after death, it is within the discretion of the presiding Justice to permit or refuse to permit, the exhibition of the heart itself to the jury. And unless the discretion is abused exceptions do not lie. In this case it does not appear that the discretion was abused.
3. It does not clearly appear that the verdict for the plaintiff was wrong.

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

This is an action on an accident insurance policy issued by defendant to Warren Thompson, which, in case of his death, was payable to his wife, the plaintiff.

Plea, the general issue. The jury returned a verdict for plaintiff. The defendant filed a motion for a new trial and had various exceptions, all considered in the opinion.

The case is stated in the opinion.

A. S. Littlefield, for plaintiff.

Symonds, Snow, Cook & Hutchinson, for defendant.

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

SAVAGE, C. J. Action upon an accident insurance policy. The verdict was for the plaintiff, and the case comes before this court on defendant's exceptions and motion for a new trial. The plaintiff claims that her husband, the insured, received bodily injuries through accidental means in consequence of which he died. The defendant claims that the insured did not die in consequence of the accident "independently and exclusively of all other causes," as the policy phrases it. This present the issue of fact.

MOTION. The assured was mate on a steamer plying between Portsmouth and the Isle of Shoals. The evidence would justify a finding that on one trip in August, 1913, on a rainy day, when the boat was making a landing, the insured slipped on the wet deck, or lost his balance, while throwng a heaving line, and fell heavily to the deck. His weight was about 200 pounds. Apparently before this time he had been a well man. After this and until his death some days later, he complained of pain in his left side. He continued to work, but when not at work lay in his bunk. Sunday, August 31, he appeared to be worse, and lay in his bunk practically all day, and hot cloths were applied to his left side. That evening he went to a hospital, where he died the next morning. At the hospital it was discovered that he had a black and blue spot as large as the palm of a man's hand in the region of the heart, and one on the hip. He was weak and distressed for breath. Being turned in bed from his right side to his left, a few minutes before death, his breathing changed, and indicated impending death. The physician at the hos-

pital diagnosed the case as one of typhoid, but it is now conceded that such was not the fact.

Two autopsies were had, one October 8 at the instance of the plaintiff, and another October 10, for the defendant. The physicians who made the first autopsy say that they found signs of ecchymosis or settling of the blood over the pericardium, that is, in the heart region; that the discoloration covered an area about the size of the hand; that there was ecchymosis and discoloration about the tissues over the heart corresponding with the discolored area on the outside; that it continued in to the ribs; that upon opening the thoracic cavity, it was found that there was more or less congested and inflammatory appearance all the way to the pericardial sac; that the same was true of the chest walls; and that the tissues of the outer layer of the pericardium looked congested and red. On the other hand, the physicians who conducted the second autopsy say they discovered no signs of inflammation extending from the exterior to the heart.

At the first autopsy, the pericardial sac having been opened, the witnesses say a small quantity of watery blood was found in the sac, and on the surface of the left ventricle, a slit or rupture of the muscles, three-quarters of an inch long, from which a small clot of blood oozed out, when the heart was lifted. But the rupture did not penetrate to the cavity of the ventricle. At the second autopsy, the defendant's physicians say they found no blood in the sac, which perhaps is not surprising in view of the fact that the sac had been opened two days before; and they say further that they found a cut into the heart muscles over three inches long, and one-half inch deep in places. The difference in the length and the depth of the cut as developed in the two autopsies seems to have been a matter of discussion at the time, the plaintiff's physician who had made the autopsy, then present claiming the condition was changed.

The plaintiff contends that the heart was ruptured before death in consequence of the fall, and that the rupture was the immediate cause of death. And there is medical testimony that such a consequence might follow a fall. But the defendant contends that the heart muscles were cut, and that the cut was made after death. It is not claimed that the cut was made, even accidentally, when the pericardial sac was cut open at the first autopsy. So far as there is

any evidence on that question, it is all to the effect that the cut in the sac was at right angles with the line of the rupture. The defendant's experts testify that in their opinion the cut was made by the undertaker's trocar, or embalming tube, the beveled edge of which, it is claimed, constitutes a sharp instrument. The jury saw the instrument and could judge whether it was capable of making such a cut as the one described. There is a reason why the jury may have concluded that this theory of the experts was wrong. They might not have been able to see how a trocar, inserted, as the undertaker in this case says it was, between the third and fourth rib on the right side of the sternum, and pushed in until it reached the heart, could make a cut on the exterior of the left side of the heart. We ourselves are troubled to see how.

The defendant's experts all express the opinion that the man died of acute blood poisoning, from an infection caused by the germ pneumococcus. They say there had been an inflammation in the left pleura, causing adhesions, for which this germ is ordinarily responsible, and that the consequences of the infection caused by this germ were manifest in the condition of the liver, spleen and other organs as they found them. And they say furthermore that the adhesions in the pleura indicated that the inflammation there must have existed prior to the accident, upon the assumption that the accident was six or seven days before the death. It may be noted, however, in this connection that the time of the accident is left indefinite by the witnesses. One says it was "a few days before the death," and "I think about a week; between a week and ten days." Another says, "I guess it was about a week or ten days before it was time to haul up." And the time to haul up was September 2, the day after Mr. Thompson died. Evidently the length of time is too uncertain and indefinite to serve as the basis of a definite conclusion that he had pneumococcic inflammation before the accident.

In reply to the defendant's general contention the plaintiff says that even if the immediate cause of death was blood poisoning, yet if the blood poisoning was superinduced by the physical effects of the fall upon Mr. Thompson's body, as she says, from the defendant's evidence, it may have been, his death, within the meaning of the language of the policy, resulted "directly from the accident independently and exclusively of all other causes." And we think it

would be so. If an accident caused blood poisoning, either external or internal, and the blood poisoning causes death, the death is the direct result of the accident.

We have thought best to state the issues at some length. But it will serve no good purpose to discuss the evidence in detail. The mere statement of the case shows that the questions to be determined were purely those of fact. The ascertainment of the truth depended largely in the first instance upon the physical condition of Mr. Thompson's body, and especially of his heart, at the time of his death. And from the testimony on the one side and the other, different inferences may be drawn. What was the cause of death depended much upon the correctness of the views of expert physicians. And the views of the physicians were as expressed diametriacally opposed. We have examined the evidence with painstaking care, in the light of the arguments of the learned counsel, and it suffices to say that we are not convinced that the verdict was wrong. On the other hand there is credible evidence to support it. The motion for a new trial must therefore be overruled.

EXCEPTIONS. The defendant offered in evidence the heart of Mr. Thompson itself. It was excluded. The defendant contends that as the prime question at the trial was whether there was a rupture of the heart before death, or a cut upon the heart after death, the heart itself would be the best evidence of the truth. It would be good evidence, it must be conceded, if the heart remained in the same condition as it was at death, and would be properly admissible, if the jurors, who were non-experts, were competent to judge of a question, the answer to which must depend to a considerable degree upon expert knowledge.

Whether demonstrative evidence of this character should be admitted depends, within well defined limits, upon the discretion of the presiding Justice. And unless the discretion is abused, exceptions do not lie. Ordinarily a preliminary question is whether the thing offered is in substantially the same condition it was at the time in question. The determination of this fact is for the Justice, and to his finding exceptions do not lie. This is so well settled that the citation of authorities is unnecessary. In this case the Justice in excluding the heart gave no reason. We must therefore inquire whether there was any good reason. We think there was.

It is complained that he excluded the heart without examining it himself. But he had listened to reams of testimony about it. It is evident that there was a bona fide dispute as to whether the heart was in the same condition as to the rupture or cut at the time of the trial as it was at the first autopsy. If the Justice believed the witnesses for the plaintiff he was authorized to find that the condition was changed. And we cannot revise his finding on exceptions. Besides, the length of time that had elapsed since the body was exhumed and the susceptibility of matter of that kind to decay and degeneration may have led him in the exercise of a wise discretion to withhold it from the jury, even though there was testimony that it had been "scientifically preserved," and had not degenerated. Again, it admits of serious doubt whether non-experts are in a condition to judge a year and a half after death whether a slit in a human heart was caused by a rupture before death or by a cutting after death. If not, then such demonstrative evidence is not proper to be submitted to a jury of non-experts. We suggest this question. We have no occasion now to decide it. We think the exceptions are not sustainable.

Motion and exceptions overruled.

ALFRED LEBLANC *vs.* THE STANDARD INSURANCE COMPANY.

Androscoggin. Opinion September 7, 1915.

Automobile. Condition. Indemnity. Insurance. Negligence. Notice. Waiver.

The plaintiff held an insurance policy in the defendant company, issued by a local agent under which he was to be indemnified against loss from the liability imposed by law on account of bodily injuries accidentally sustained by any person through the maintenance or use of a certain automobile owned by himself. The insurance was subject to conditions in the policy, namely, that it did not cover liability for injuries received while the automobile was being used for other than certain specified purposes; that

upon the occurrence of an accident, the insured should give immediate written notice thereof to the company at its home office, or to its duly authorized agent; and that the insured should give like notice of any claim made against him on account of such accident, and that if thereafter any suit was brought against him, he should immediately forward to the company every summons or other process served upon him. An accident occurred. The plaintiff gave immediate oral notice to the local agent, who told him he would take care of him, and that a firm of local attorneys would see him. The local agent at once made a full written report to the company or one of its general agents. The company on the day following, by its attorneys in Boston, referred the matter for investigation to the same local attorneys. They investigated and reported. They were instructed to get the evidence in writing, and in the meantime to attempt to make a settlement. Plaintiff did not report the accident in writing to the company, nor did he when sued on account of the accident send the summons to the company, but gave it to the local attorneys as he had been directed to do by the local agent who issued the policy. In a suit on the policy, held:—

1. That the evidence does not sustain the contention that the automobile was being used for a purpose other than those covered by the policy.
2. That the failure of the plaintiff to give written notice of the accident and of the claim made on him, was waived by the acts of the local agent and of the various investigating attorneys.
3. That the company is bound by the direction given the plaintiff by the local agent to give any summons served upon him to the local attorneys, as much so as if the direction had come from the home office.
4. Under Revised Statutes, chapter 49, section 93, which provides that "the agents of insurance companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them," an agent has power to waive the requirement in the policy for a written report of loss or injury; and directions given to the insured by an agent as to procedure touching the subject matter of the insurance, are binding upon the company, whether given before or after liability has been incurred. The agent stands in the place of the company in all respects.

On report. Judgment for plaintiff for $2,533.27 and interest from October 5, 1914.

This is an action for indemnity under a contract of insurance entered into by and between the parties hereto. Plea, the general issue with brief statement. At the conclusion of the evidence, by agreement of the parties, this 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.

McGillicuddy & Morey, and Harry Manser, for plaintiff.

White & Carter, for defendant.

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

SAVAGE, C. J. On December 2, 1912, an automobile, owned by the plaintiff, and driven by his brother Philip, collided with a team driven by one Littlefield, as a result of which Littlefield was injured and afterwards died. On March 14, 1913, suit was brought by Littlefield's administrator against the plaintiff to recover the damages sustained by Littlefield, on account of negligence in the operation of the automobile. The case was tried at the April term of this court in Androscoggin county, and that plaintiff recovered a verdict and judgment, which afterwards was satisfied by this plaintiff by paying the sum of $2,533.27. At the time of the accident this plaintiff held a policy in the defendant company, issued by its local agent, Harvey, at Lewiston, indemnifying him "against loss from the liability imposed by law upon him for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally sustained by any person or persons, by reason of the maintenance or use of" the automobile in question. This action is brought upon that policy to recover the amount paid by the plaintiff in satisfaction of the Littlefield judgment, and comes to this court upon report.

By the terms of the policy, the insurance was made subject to certain conditions, among which are the following: "This policy does not cover loss from liability on account of such injuries (including death) caused or suffered by reason of the maintenance or use of such automobile . . . while used for any purpose other than as specified in Item 3 of said Declarations," and "The assured upon the occurrence of an accident shall give immediate written notice thereof, with the fullest information obtainable, to the company at its home office, Detroit, Michigan, or its duly authorized agent. He shall give like notice, with full particulars, of any claim made on account of such accident. If, thereafter, any suit is brought against the assured, he shall immediately forward to the company every summons or other process served on him." Item 3 of the Declarations referred to in the first of the foregoing conditions provides

that "the purposes for which the above described automobiles are to be used are private and pleasure purposes and all ordinary business uses for which automobiles are suitable."

In the brief statement under its plea of the general issue, the defendant set up the following defenses: 1, that at the time of the accident the automobile was not being used for any purpose specified in Item 3 of the Declaration, but was used by Philip Leblanc in the business of the Lewiston Steam Dye House; 2, that the assured did not give notice to the company in writing of any claim made on account of said accident; and, 3, that after suit was brought against the assured on account of said accident, the assured did not forward to the company the original summons and other papers served on him in the Littlefield suit. No other issues are of importance.

The case shows that the plaintiff did not give written notice to the company, but that on the day of the accident the plaintiff told Harvey, the local agent, that an accident had happened to his car, and Harvey replied that he would take care of him, that Oakes, Pulsifer and Ludden, attorneys, would see him.

It further appears that Harvey, the agent, on the day of the accident, made out a full and particular report of the accident upon the company's blank, and forwarded it to Mr. Kemp, the company's Boston resident manager, who had countersigned the policy; Kemp on the next day placed the matter in the hands of Dickson & Knowles, Boston attorneys, for investigation; they at once communicated by telephone with Oakes, Pulsifer & Ludden, and asked them to look the matter up. On the same day, Mr. Pulsifer went to the plaintiff and asked, and was told, how the accident happened, the details of which he reported to Dickson & Knowles. A week later Harvey told the plaintiff to turn over to Mr. Pulsifer any paper that might be served on him. When the summons in the Littlefield suit was served on the plaintiff, he did not forward it to the company, but he testifies that he gave it to Mr. Pulsifer. At the trial of the Alfred Leblanc case, Oakes, Pulsifer & Ludden appeared in defense for Mr. Leblanc. And we think they were justified in supposing that they had authority to do so from this defendant. Not only did Dickson & Knowles ask Oakes, Pulsifer & Ludden to investigate the accident, but they directed them to have the statements of the various witnesses reduced to writing and signed by them, that is, to

do the usual professional work in preparation for a possible trial. And at the same time they directed them to continue their efforts to bring about some satisfactory settlement. Efforts were made by Mr. Pulsifer to effect a compromise, whics he reported to Dickson & Knowles. The correspondence of the Boston attorneys and of the company's home office shows that Oakes, Pulsifer & Ludden were recognized as the local attorneys. We allude to this only because the defendant company now claims that their appearance in the Littlefield suit in its behalf was without authority from it. But in our view of the case, as will be shown hereafter, it is not material to this plaintiff whether Oakes, Pulsifer & Ludden had specific authority from the defendant company or not.

We now take up the several defenses offered in this suit. The contention that at the time of the accident the automobile was being used for a purpose excluded from the terms of the policy is not supported by the evidence. The contention that the plaintiff did not give notice of his claim to the company in writing is sufficiently answered by saying that the requirement was effectually waived by what was said and done by Harvey, the Boston attorneys and the company for a period of four months, before Littlefield suit was commenced, as we have indicated. They had power to waive the requirement that the notice should be given in writing, and that it should be sent to the home office, notwithstanding the provision in the policy that "no condition or provision of this policy shall be waived or altered except by written endorsement, signed by the Secretary." R. S. ch. 49, sect. 93; *Day* v. *Dwelling House Ins. Co.*, 81 Maine, 244.

But the third point in defense is strenuously urged. The policy required the plaintiff to forward the summons served on him to the home office. He did not do so. He says he gave it, as Harvey directed, to Mr. Pulsifer. The decisive question is, is the company bound by the direction which Mr. Harvey gave? If so, the plaintiff has done all that the law required him to do, and is entitled to recover. If not, the plaintiff has failed to perform a condition precedent to the right to maintain a suit. And the answer to the question must be sought in the statute.

The statute relied upon by the plaintiff is section 93 of chapter 49 of the Revised Statutes, which provides among other things that

the agents of insurance companies "shall be regarded as in the place of the company in all respects regarding any insurance effected by them." Other clauses of the statute, which we cite merely to show the scope and purpose of it, are, "The company is bound by their knowledge of the risk and of all matters connected therewith," and "Omissions and misdescriptions known to the agent shall be regarded as known by the company, and waived by it, as if noted in the policy." All these provisions were first enacted in chapter 156 of the Laws of 1870, and have remained unchanged in the several revisions since.

The language of this statute is most comprehensive, and we think it was intended to be so. The statute itself seems to place no limits. The simple purpose of the statute is that those seeking insurance and those afterwards holding policies may as safely deal with the agents, with whom alone they ordinarily transact their business, as if they were dealing directly with the companies themselves. While most of the decided cases in which this statute has been construed involved the agent's knowledge of the risk, or of the insured's title, before issuing the policy, it is certain that statutory provision is not limited to acts alone, or knowledge obtained, by the agent before the policy is issued. Thus, it was held in *Farrow* v. *Cochran*, 72 Maine, 309, that an alteration made by an agent in the policy itself after it was issued was binding on the company; and in *Packard* v. *Dorchester Mutual F. Ins. Co.*, 77 Maine, 149, that an agent's consent to alterations in the property, though in contravention of the terms of the policy, was binding; and in *Day* v. *Dwelling House Ins. Co.*, 81 Maine, 248, that an agent could in effect waive the filing of proof of loss within the required time, although the policy declared that no act of any agent, except the president or secretary, should be construed as a waiver; and in the same case that the statute applies to all agents of insurance companies, including those appointed to investigate the circumstances of fires and to adjust losses; and in *Frye* v. *Equitable Life Assurance Society*, 111 Maine, 287, that the company is bound by the agent's waiver of the provision in a policy requiring its return within six months after default in payment, in order to secure a new paid up policy for a specified amount. These cases all relate to dealings with agents on business

relating to the insurance after the policies were issued, and in one case, at least, after the loss had occurred.

There is no limitation in the statute, and we perceive none in the reason of the thing. The statute recognizes what common experience teaches. Men commonly do all their insurance business with agents,—agents appointed by the companies. They have no direct dealings with the companies. They go to the agents on matters of occupancy, alteration and assignment. They go to the agents when losses have occurred, and pursue the steps pointed out by them in proving the losses. To the insured the agent is for all practical purposes the company. Good public policy then requires that the companies that appoint these agents and hold them out as their representatives shall be bound by what they do, and that if an agent acts without authority, or in excess of authority, his principal should bear the consequences, rather than the insured who trusted him. The statute was enacted to give effect to that policy. Such has been the tenor of decisions hitherto, and such we think was the legislative intent. The statute is best construed by interpreting it just as it reads. The agent stands "in the place of the company," is the company "*in all respects* regarding any insurance effected by them."

A study of the history of another insurance statute tends to confirm our view. By section 22 of the same chapter 49, it is provided that "an agent authorized by an insurance company, whose name is borne on the policy, is its agent in all matters of insurance; any notice required to be given to said company or any of its officers by the insured may be given to such agent." Even in its present form, it covers some of the same matters, in the same way, as are provided for in section 93 which we have been considering. And both sections have been referred to, sometimes indiscriminately, as the source of the binding effect given to the acts of agents. But in its original form, Laws of 1861, chap. 34, sect. 2, the section contained the following language: "all acts, proceedings and doings of such agent with the insured shall be as binding upon the company as if done and performed by the person specially empowered or designated therefor by the contract." This language is even more comprehensive and sweeping than that in the Act of 1870, now section 93. It can scarcely be doubted that under such a statute as this, this defendant would be bound by the act of Harvey, directing the plain-

tiff to give any summons when served to Oakes, Pulsifer and Ludden. The language of the Act of 1861 remained unchanged through the several revisions until that of 1903, when the clause we have quoted was omitted in the final enactment. No amendment was made in terms. But the commissioner of that revision, Mr. Morrill, in his report to the legislature expressed the opinion that the clauses in section 21 (now 22) were in effect repeated in and fully covered by the later section, 90 (now 93), and recommended that they be omitted from the statute. And we think it is fairly inferable that the legislature, by adopting the recommendation, approved the interpretation of the commissioner to the effect that the sweeping language in the earlier section was virtually embodied in the later.

The question is not whether Harvey had authority to employ attorneys for the company, and to direct the plaintiff to give them the summons when served. It may be conceded that he had not. The question is whether, when Harvey did direct the plaintiff to give his summons to the attorneys, the company, by force of the statute, is bound by it. We think it is. Surely if the plaintiff had gone to the company's home office, and had there been told, "We will take care of you. If any papers are served give them to Jones," the company could not afterward complain because the summons was not forwarded to the home office. No more can it, when the direction was given by its agent, who is to be regarded as in its place "in all respects" regarding the insurance.

The entry will be,

Judgment for plaintiff for $2,533.27 and interest from October 5, 1914.

W. O. SEAVEY

vs.

GRANVILLE J. SEAVEY AND HARRIET E. SEAVEY, Trustee.

Lincoln. Opinion September 7, 1915.

Consideration. Creditors. Disclosure. Gift. Husband and Wife. Preference. R. S., Chap. 88, Sect. 63. Trustee Process. Voluntary Transfer.

1. A voluntary transfer or gift by a husband to a wife is prima facie fraudulent as to existing creditors.
2. When a transfer or conveyance is made without consideration, it is immaterial whether the grantee or donee is conversant of the fraud as to existing creditors.
3. When a transfer or conveyance is made for a valuable and adequate consideration it is valid as against existing creditors, unless there is a frudulent intention on the part of the transferree.
4. It is not a fraud at common law for an insolvent debtor to pay one creditor for the purpose of giving him a preference over others; nor to pay a debt barred by the statute of limitations.
5. When one summoned as a trustee of another attempts to account for money received from the defendant by saying it was received in payment of indebtedness, he is bound to make a full, direct and explicit disclosure of the character and amount of the claimed indebtedness; otherwise he should be charged as trustee. Doubtful, indefinite and sweeping statements will not supply the omission of details and particulars.
6. The disclosure in this case does not satisfactorily show that the relation of creditor and debtor existed between her and her husband, the defendant; nor the amount of the valid indebtedness, if any existed.

On report. Trustee charged for $770.

This is a trustee process and is reported to the Law Court to determine the trustee's liability.

The case is stated in the opinion.

John W. Brackett, for plaintiff.

C. R. Tupper, for defendant and trustee.

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

SAVAGE, C. J. Trustee process. The case comes before this court on report, to determine the trustee's liability. The defendant and trustee are husband and wife. The original disclosure is not made a part of the record, but from the nature of the trustee's testimony we assume that it was a general denial. The plaintiff alleged in substance that in March, 1914, the defendant gave to the trustee seven hundred and seventy dollars, and that the transfer was without consideration, and voluntary, and therefore, fraudulent and void as to existing creditors, of whom the plaintiff was one. Upon these allegations the trustee was examined.

It is admitted that in March, 1914, the defendant received by way of inheritance a check for the sum of seven hundred and seventy dollars which he immediately delivered to his wife, that then he had no other property, and was owing the plaintiff the amount sued for in this action. The trustee claims that her husband was indebted to her, and that the check was transferred to her by him in part payment of the indebtedness. And the issue to be determined is whether the transfer was in payment of a debt, or merely voluntary, without consideration. If it was in payment of bona fide indebtedness, and without intent on her part to hinder, delay or defraud other creditors, she cannot be charged as trustee. But if the transfer was voluntary, it was fraudulent and void as to creditors, and she is chargeable under the statute which provides that "if an alleged trustee has in his possession goods, effects or credits of the principal defendant, which he holds under a conveyance fraudulent and void as to the defendant's creditors, he may be adjudged a trustee on account thereof, although the principal defendant could not have maintained an action against him." R. S. chap. 88, sect. 63.

A voluntary transfer or gift by a husband to a wife is prima facie fraudulent, if at the time he be indebted. *French* v. *Holmes,* 67 Maine, 186; *Stevens* v. *Robinson,* 72 Maine, 381. And, of course, the probative force of the presumption is of the strongest, when the transfer or gift embraces all the property of which the husband is possessed. But the trustee here urges that the presumption does not arise when the donee is innocent of any fraudulent intent, which is claimed to be the fact in this case. But that is not the law. When

a conveyance or transfer is made without consideration, it is immaterial whether the grantee or donee is conversant of the fraud. *Knox* v. *Silloway,* 10 Maine, 201; *Call* v. *Perkins,* 65 Maine, 439; *Robinson* v. *Clark,* 76 Maine, 493; *Spear* v. *Spear,* 97 Maine, 498. It is prima facie fraudulent as to existing creditors. On the other hand, if it is made for a valuable and adequate consideration, it is valid unless there is a fraudulent intent on the part of the transferee. *Spear* v. *Spear,* supra. Such are the cases of *Stevens* v. *Hinckley,* 43 Maine, 440, and *Blodgett* v. *Chaplin,* 48 Maine, 322, the latter of which is relied upon by the trustee in this case. These general rules are applicable in all cases where transfers are claimed to be fraudulent as to creditors, whether they are attacked by trustee process, bill in equity or otherwise. It should be said, also, as applicable to this case, that it is not fraudulent, within the meaning of the statute, for an insolvent debtor to pay one creditor for the purpose of giving him a preference over others. *Hanscom* v. *Buffum,* 66 Maine, 247. Nor is the payment of a debt barred by the statute of limitations fraudulent and void as to other creditors, at common law.

But when one summoned as trustee attempts to account for money, admittedly received from the defendant, as a payment on account of indebtedness, we think he is bound, if inquired of on examination, to make a full, direct and explicit disclosure of the character and amount of the claimed indebtedness, in order that the court may be able to judge whether the relation of debtor and creditor actually existed, and, if so, the extent of the indebtedness. Doubtful, indefinite and sweeping statements do not satisfactorily supply the omission of details and particulars. *Dexter* v. *Field.* 32 Maine, 174; *Barker* v. *Osborne,* 71 Maine, 67; *Thompson* v. *Reed,* 77 Maine, 425; *Haynes* v. *Thompson,* 80 Maine, 125; *Thompson* v. *Dyer,* 100 Maine, 421.

In her examination, the trustee in this case testified that she and the defendant had been married about forty years, that she has always kept a boarding house, and that he was in the sail making business, until he retired about twenty or twenty-five years ago, when it is admitted what propery he had was divided among his creditors, not including his wife. She seems to have been prosperous. She paid for and owns their home. She says she paid all the house expenses, and never received a dollar nor a dress from him.

She says that while her husband was in business, she "loaned" him small sums from time to time when he was "in hard places." The first loan was soon after they were married. The last one, and the only one since he retired from business, was in 1907. She took no receipts. She kept no books. She took no notes. She kept the account "only in her mind." With two exceptions, she says she is unable to specify any particular amount for any particular purpose, at any particular time. But she says the amount of the loans "interest and all would be anywhere between two and three thousand dollars." She further says that as she never had received payment from him, she never expected any payment. She does not even claim that when she received the check in question from him, anything was said about it being a payment on account of what he owed her She says: "He had it indorsed and passed it over to me and I was very pleased to get it. I never asked him for it. I never suggested it to him."

Under the circumstances disclosed, it is very difficult to believe that this husband and wife understood that these advances of money by her to him were such loans as created the relation of debtor and creditor between them. But even if they were, her indefinite and sweeping statements afford no satisfactory basis on which to calculate amounts. She says, indeed, that "interest and all it would be between two and three thousand dollars." The margin in her statement indicates a certain degree of shadowiness in her claim. But however that may be, she does not claim any express promise to pay interest, and we think that under the conditions an obligation to pay interest is not to be implied. She says she cannot tell how much of the "between two and three thousand dollars" is principal and how much is interest. At the most she can hold only so much as equalled the debt, that is, the principal, and that amount is not disclosed. Any balance in the trustee's hands which she had over and above the amount the defendant owed her would be held by her without consideration, attachable by prior creditors. *Barker* v. *Osborne,* supra, and cases cited. The only "loans" concerning which the trustee discloses with any definiteness is one for $75, and one for $100. But even as to these we feel constrained to hold that the trustee has not sustained the burden of showing that they were valid obligations of the defendant, to the payment of which she

could apply the money received by her from him, to the prejudice of his creditors.

Trustee charged for $770.

HARRIET L. KNOWLTON *vs.* FRANK B. ROSS, et al.

York. Opinion September 7, 1915.

Damages. Duress. False Imprisonment. Misconduct of Counsel. Practice. Restraint. Trover. Waiver.

1. Misconduct of an attorney in argument to the jury must be objected to at the time, or it is waived.
2. To constitute false imprisonment there must be actual, physical restraint. Threats to imprison are not imprisonment.
3. The evidence does not warrant the conclusion that the plaintiff's liberty was restrained by the defendants.
4. Threats of unlawful arrest do not constitute duress, unless there is reasonable ground for apprehension of immediate or impending danger of arrest.
5. An act done, or contract made, under duress is voidable, not void. If a person, who has been constrained by duress to do an act, afterwards voluntarily acts upon it, or in any way affirms its validity, it is a ratification, and he is precluded from avoiding it.

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

This is an action for false imprisonment of plaintiff by the defendant. There is also a count for trover. 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.

Cleaves, Waterhouse & Emery, for plaintiff.

John A. Snow and E. P. Spinney, for defendants.

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

SAVAGE, C. J. This is a suit for false imprisonment, with a count for trover. The verdict was for the plaintiff, and the case comes before us on the defendan't motion for a new trial.

The plaintiff claims that she was restrained of her liberty by the defendants under circumstances constituting false imprisonment, until by means of the duress of such imprisonment she delivered to them a valuable diamond ring in pledge as security for the payment of a bill owed by her husband to one of them, and of another bill claimed to be owed by another person. The count in trover is for the conversion of the ring.

We first notice a question of practice. The parties were in controversy as to the value of the ring, which was material on the question of damages, if the plaintiff was entitled to recover. One of the reasons alleged in the motion for a new trial is the misconduct of plaintiff's attorney in his closing argument to the jury, in that he said "that the plaintiff stood ready to credit the sum of $800 on any verdict that the jury might return for the plaintiff, if the defendants would deliver to the plaintiff said ring." It is obvious that such language could not be other than prejudicial, since it would tend to remove from the jurors' minds any sense of responsibility for the amount of damages up to $800, which they might assess for the conversion of the ring. The attorney complained of testified that he said to the jury only that he had no doubt the plaintiff would gladly allow $800 upon any verdict which might be rendered if the ring was returned. Even in that form, the argument is not to be commended. But at the time of the argument defendants' counsel made no protest or objection. And that is fatal to his present contention. The rule is well settled. If counsel in addressing the jury exceed the limits of legitimate argument, it is the duty of opposing counsel to object at the time, so that the presiding Justice may set the matter right, and instruct the jury with reference thereto. If the Justice neglects or declines, after objection, to interfere, redress may be sought by a bill of exceptions. *Rolfe* v. *Rumford,* 66 Maine, 564. If the offending counsel, after being required to desist or retract refuses to do so, the remedy is by a motion for a new trial. *Powers* v. *Mitchell,* 77 Maine, 361. So, if the remarks are of such a character that even the intervention of the Justice is not deemed to have removed the prejudice and cured the evil, the

remedy is by motion. *Sherman* v. *M. C. R. R.*, 86 Maine, 422; *State* v. *Martel,* 103 Maine, 63. But in any event, objection must be made at the time; if not so taken, it is considered as waived. *State* v. *Watson,* 63 Maine, 128; *Powers* v. *Mitchell,* supra.

But we think the motion must be sustained upon another ground, namely, that it is manifestly against the evidence. The evidence is sharply conflicting, but after a careful analysis of it, we think that so much of it as the plaintiff relies upon, and which the jury might properly have found to be true, does not sustain the verdict.

It appears that the plaintiff's family, that is, her husband, herself, and their two daughters had been guests for several years at the summer hotel of Mr. Jacobs, one of the defendants, at Ogunquit. The bills for 1907 and 1908 had not been paid. In July, 1909, the family spent two days at the hotel. They had with them a friend, Mr. Lynch. The bills for all were charged to and paid by Mr. Knowlton, the plaintiff's husband. The plaintiff claims that at that time some talk was made about coming back later in the season, and that Mr. Jacobs showed them some rooms in a cottage of which he had the use, and told them that they could have them for $100 a week for all five, the four Knowltons and Lynch. This is denied by the defendants. In August, the plaintiff telephoned the management of the hotel for rooms, and the great weight of the evidence shows, we think, that she was told that they had no rooms available for them. Notwithstanding this, on the next day, August 17, the family and Mr. Lynch appeared, and after some colloquy, were assigned to the cottage, but not to the rooms which the plaintiff says Mr. Jacobs had shown to them in July. From all this, the plaintiff contends that Lynch was the guest of the family, and was so understood to be by Mr. Jacobs, and that for that reason, Lynch's board was included in the $100 a week which was to be charged for the family. But Mr. Jacobs, denying that there was any arrangement made in July for the family or Lynch, charged Lynch $20 a week for his board, and charged Mr. Knowlton $100 a week for the board of himself, wife and daughters. Mr. Jacobs also claims that owing to the failure of Knowlton to pay in 1907 and 1908, he declined to receive the family as guests until Mrs. Knowlton had promised to be personally responsible for the bill. This she denies. At the end of two weeks Knowlton gave the bookkeeper a draft

for $225, payable September 16, which was credited on his account. All the foregoing is material only as it tends to throw light on what happened on September 6.

On that day, Mr. Jacobs placed the bill against Knowlton and the one against Lynch in the hands of the defendant Ross for collection. Capias writs were made against these two on the strength of the oath of Jacobs that they were "about to depart and reside beyond the limits of the state, etc." It was later learned that Knowlton had gone to Boston. But Lynch was still at the hotel. Ross with a deputy sheriff went into a room and Lynch was sent for. When he came in he was shown the writ against himself, and informed that he must pay, give bond or go to jail. He protested that he was there only as a guest of the Knowltons, and therefore that the indebtedness was not his. At Lynch's request, the plaintiff was sent for to explain the matter. She came. And she too protested that the indebtedness was not Lynch's, but that it was her husband's. During the interview the writ against Knowlton was produced and shown to the plaintiff. In the account annexed no credit was given for the draft which the bookkeeper had received, as Jacobs claims, without authority.

So far, there is no material disagreement. But as to the other details of the interview, the parties are wholly at variance. The plaintiff claims that when she went into the room the doors were closed, and as she thinks locked. At the same time she says that the deputy sheriff and the hotel manager placed themselves so as to be apparently guarding the exits from the room. She says that Ross said to her, "You people can't came to the State of Maine and get your board here at a hotel and leave without paying the bill." "You know it is a state's prison offence to come into a state and leave without paying;" that he said also, "You don't want to go to jail. You don't want to disgrace yourself and your daughters to go," and that she replied, "Well, we will go to jail." She says that Lynch then said, "You know what it means; it means for us all to go to jail." She claims that she was asked by Ross if she had any property that she could give as security for the claims; that she showed him the diamond ring, which he took and examined, and put in his pocket, and that "they decided to keep it until the bill was paid;" and that they then told her she might go.

On the other hand, the defendants claim that the doors were neither locked nor guarded, that there was no talk about any state's prison or jail offense, or about anybody's going to jail, except what was said to Lynch; that Lynch besought the plaintiff to "fix it up," and save him from going to jail; that it was arranged that she would take care of that bill; that in the same connection, she mentioned the "family" bill, admitted that she had agreed to be responsible for that, and arranged to "fix" that up at the same time she "fixed" the Lynch bill. And as security for the payment of both bills, it is contended, she voluntarily put the ring in question into the possession of Ross. Whatever may have been said or done, it is entirely clear that as the result of the interview the plaintiff left the ring in Ross's possession with the understanding, and with her assent, unless void by reason of dures, that it should be held by him as security for the payment of both claims. For the plaintiff herself has testified with respect to the $225 draft which had been received by the bookkeeper, that she "asked Mr. Ross for it after he had taken the ring and we were out of the room and they had accepted the ring as a settlement from Mr. Knowlton." And further she says, "I said, 'As long as you have my ring which more than covers the bill, the draft is no good and I will take it.' He at first refused to give it to me, and I said 'I insist on having it,' and he gave it to me. I took it and kept it."

We think, in the first place, that the evidence does not warrant the conclusion that there was any imprisonment of the plaintiff. She was present in the room at the request of Lynch, and not of the defendants. There was a writ against Lynch, and one against her husband, but none against her. She was not touched. She was not told she could not leave the room. The doors were closed, as would be natural under the circumstances. There is no credible evidence that they were locked. There was nothing to prevent her leaving the room had she chosen to do so. She says the defendants made a show of guarding the exits from the room, that the officer walked back and forth, and that the manager stood for awhile at one door. It must be remembered that the plaintiff was not there at the defendants' solicitation, that apparently they had had no purpose of pursuing her that day, that they had no process against her, but that Lynch was practically under arrest. Under these cir-

cumstances, the fact that the officer walked back and forth has no significance that she too was restrained of her liberty. And the fact, if it was a fact, that the manager stood at the door would be vastly more significant of a purpose of preventing instrusion by others, than of preventing the going out of the plaintiff. The room was a public room to which the guests of the hotel and the servants ordinarly had access. And the presence of outsiders could not have been desired by any of the parties. There was nothing in the conduct of the officer or of the manager, we think, to justify the belief of the plaintiff that she was, as she terms it, "under arrest." If there were threats, as she claims, they did not constitute imprisonment. They would be evidence of an intention to imprison at some future time. To constitute false imprisonment there must be actual, physical restraint. *Whittaker* v. *Sanford,* 110 Maine, 77.

The question of false imprisonment thus eliminated, there is no basis for a recovery by the plaintiff on any ground. We have seen that she did not deliver the ring to the defendants under duress of false imprisonment, for there was none. Nor was there duress per minas. It is true that threats of unlawful arrest, accompanied with such circumstances as would indicate a prompt or immediate execution of the threats, if the will is thereby overcome, constitute duress. It is true also that the arrest of a married woman for debt would be unlawful. But it is doubtful if the language used, taking the plaintiff's own version of it, can properly be construed as threats. Even if so, there was no reasonable ground for apprehension of immediate or impending danger, which is essential. *Harmon* v. *Harmon,* 61 Maine, 227; *Higgins* v. *Brown.* 78 Maine, 473; 9 Cyc., 446. There was no allusion to any precept issued or to be issued against the plaintiff. On the contrary, precepts covering the entire claims had been issued against others, and the plaintiff knew it. Giving the language as related by the plaintiff, the defendants held out to her only a suggestion of what danger might befall her in the indefinite future. That is not duress.

But were it otherwise, the plaintiff's case is not sustainable. A contract made, or act done, under duress is voidable, not void. If a person having been constrained by duress to do any act afterward voluntarily acts upon it, or in any way affirms its validity, he precludes himself from then avoiding it. 9 Cyc., 443. It appears from

the plaintiff's own statement that after she had left the room and after the alleged duress was ended, she demanded, insisted upon, and received the surrender of the draft which her husband had given in payment of a part of the bill against him, and she did so on the ground that the defendants held the ring as security for the bill. This was entirely voluntary on her part. It was a recognition of the validity of the pledge. If the pledging had been before that time voidable, her act was a ratification of it. She could not demand, receive and retain the draft, and at the same time be permitted to deny the validity of the pledge.

Motion for a new trial sustained.

CITY OF AUGUSTA, Pet'r.

vs.

LEWISTON, AUGUSTA & WATERVILLE STREET RAILWAY.

Kennebec. Opinion September 7, 1915.

Jurisdiction. Public Utilities Commission. Remedy. Revised Statutes, Chapter 51, Section 75.

1. Questions of law arising upon rulings of the Public Utilities Commission may be presented to the law court on exceptions allowed by the chairman of the Commission.
2. The jurisdiction of the Public Utilities Commission is created by statute, and it has only such jurisdiction as the statute confers. Its jurisdiction cannot be enlarged by consent of parties, nor can want of jurisdiction be waived by a party.
3. The Public Utilities Commission has no jurisdiction to apportion the expenses of repairs to a highway bridge which have already been made, in accordance with an agreement between the municipality and a street railroad company whose road crosses the bridge.

On exceptions by petitioners. Exceptions overruled.

This is a petition by the City of Augusta to the Public Utilities Commission, praying that the Public Utilities Commission will review the whole matter and make such apportionment of the expenses for repairs already made on a certain bridge. The Public Utilities Commission dismissed the petition for want of jurisdiction; to this ruling the petitioners excepted, and the exceptions were allowed by the Commission and certified to the Chief Justice of the Supreme Judicial Court.

The case is stated in the opinion.

M. E. Sawtelle, city solicitor, for City of Augusta.

Andrews & Nelson, for Lewiston, Augusta & Waterville Street Railway.

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

SAVAGE, C. J. This case comes before this court on exceptions to a ruling by the Public Utilities Commission dismissing the petitioner's petition for want of jurisdiction. The procedure is novel in this state, but it is authorized by the act creating the Public Utilities Commission, which provides that "questions of law may be raised by alleging exceptions to the ruling of the commission on an agreed statement of facts, or on facts found by the commission, and such exceptions shall be allowed by the chairman of the commission and certified by the clerk thereof to the Chief Justice of the supreme judicial court, . . . And such questions of law shall be considered and decided by the Law Court as soon as may be." Laws of 1913, Chap. 129, Sect. 53.

The City of Augusta, in its petition alleges, so far as material to the present inquiry, that the respondent is now operating its railway over a certain highway bridge in Augusta; that on the nineteenth day of August, 1914, it was mutually agreed by the city and the respondent that the bridge was not safe for the use to which it was being put by the city and the respondent, and that the bridge should be strengthened and certain repairs and renewals made; and the kind and amount of such repairs, strengthening and renewals were agreed upon between the parties, it being also understood and agreed that such strengthening, renewals and repairs should be made under

the direction and supervision of the city, the expense thereof to be borne by the parties in such proportion as might thereafter be determined, but to be paid in the first instance by the city, and that "pursuant to said agreement the bridge was strengthened, renewed and repaired, under the direction and supervision of said city, at a total cost of twelve thousand five hundred ninety and fifty one-hundredths dollars."

The prayer of the petition is that the Pulic Utilities Commission will review the whole matter to the end that if public safety requires additional repairs, renewals or strengthening of parts to the bridge, the Commission will so order, and that the Commission will make such apportionment of the expenses for the repairs, renewals, and strengthening of part already made, and for such further repairs, renewals or strengthening of parts as may be ordered, as it shall deem just and fair.

The petition was brought under the provisions of section 75, chapter 51, of the Revised Statutes, which reads as follows: "Bridges erected by any municipality, over which any street railroad passes, shall be constructed and maintained in such manner and condition, as to safety, as the board of railroad commissioners may determine. Said board may require the officers of the railroad company and of the municipality to attend a hearing in the matter, after such notice of the hearing to all parties in interest as said board may deem proper. Said commissioners shall determine at such hearing the repairs, renewals or strengthening of parts, or if necessary, the manner of rebuilding such bridge, required to make the same safe for the uses to which it is to be put. They shall determine who shall bear the expenses of such repairs, renewals, strengthening or rebuilding, or they may apportion such expense between the railroad company and the city or town, as the case may be, in such manner as shall be deemed by the board just and fair." By section 71 of the Public Laws of 1913, all powers vested previously in the board of railroad commissioners together with all the duties and privileges imposed or conferred upon said board were imposed and conferred upon the Public Utilities Commission.

The Commission decided in effect that they had no jurisdiction to apportion the expense of repairs, renewals and strengthening of the bridge already made by agreement of the parties, and for this

reason dismissed the petition. The correctness of this ruling is the question now to be determined by us. It is true that one of the prayers of the petition is that the Commission will determine whether additional repairs are necessary for public safety. It is not controverted that the Commission has jurisdiction to make such a determination. But that is not the real issue in this case. There is no allegation in the petition that public safety requires additional repairs. The Commission in its decree says that "it was frankly stated at the hearing that nothing more was to be done to the bridge, except cause it to be painted." Under these conditions, there was nothing left for the Commission but to decide the other question, whether it had jurisdiction to apportion expenses of repairs already made by agreement of the parties.

We think the ruling of the Commission was right. The jurisdiction of the Commission is created by statute. It is limited by statute. The Commission has just the kind and extent of jurisdiction which the statute gives, and no more. By statute, R. S. ch. 51, sect. 75, it has jurisdiction over the repairs of highway bridges which are crossed by a street railroad, to the extent of requiring them to be kept safe for public use. It may inaugurate proceedings for that purpose against the municipality and the railroad company, and may determine the repairs necessary and award which party shall bear the expense, or it may apportion the expense between them. Such proceedings are compulsory. The statute however does not prevent the parties from determining for themselves the necessity of repairs, nor from contracting with each other with reference thereto. This would be voluntary. Of course, they cannot thereby deprive the Commission of its jurisdiction to determine that other repairs are necessary, and to order the same. But, as we have seen, that is not the question now. If the parties agree upon repairs, and make all that are necessary there is no occasion for the Commission to exercise its jurisdiction.

By the allegation in the petition, which, on a motion to dismiss must be taken to be true, *Rines* v. *Portland,* 93 Maine, 227, it appears that the parties in this case adopted the voluntary method. They determined to their own satisfaction what repairs were necessary, and contracted with each other with reference to making the same. The repairs have been made. The city has paid the expense in the

first instance as agreed. But for some reason or other the proportion to be paid by the railroad company has not been determined, in accordance with the agreement, and has not been paid. It seems to be clearly a case of contract rights for the breach of which ample remedy may be found in the courts.

Has the city an additional remedy by application to the Commission for an apportionment? An examination of the statute which gives jurisdiction to the Commission leaves no doubt that the answer must be in the negative. What is that jurisdiction? It is to "determine . . . the repairs, renewals or strengthening of parts . . . required to make the same safe for the uses to which it is to be put," and to "determine who shall bear the expenses of *such* repairs," etc., that is, the repairs, etc., which they determine necessary; or to "apportion *such* expense," that is, the expenses of repairs, etc., determined by them to be necessary, "between the railroad company and the city or town." The language employed is clear. Jurisdiction is conferred on the Commission to apportion the expense of repairs determined by it to be necessary. No jurisdiction is given to apportion the expense of repairs determined in any other manner. And this necessarily excludes a determination made by agreement of parties.

It is argued that the parties may waive the preliminary determination, and still call on the Commission for an apportionment. Not so. That would in effect invest the Commission with a power which the statute has not conferred upon it. That cannot be done.

We hold accordingly that the Public Utilities Commission has no jurisdiction to apportion the expenses of repairs to a highway bridge which have already been made in accordance with an agreement between the municipality and a street railroad company whose road crosses the bridge.

Exceptions overruled.

JOSEPH E. F. CONNOLLY, In Equity,

vs.

MATTHEW J. LEONARD, et als.

Cumberland. Opinion September 7, 1915.

Bill. Commissions. Construction. Executor. Fees. Legacy. Life Estate. R. S., Chap. 65, Sect. 37. Trustee. Will.

Bill in equity to obtain judicial construction of certain portions of a will.

Held:

1. If the will disclose that it was the intention of the testator to reward the executor for his services by a legacy, it is conclusive on the executor that if he accept the position and administer the estate by virtue of his appoint ment as executor, he must accept the reward for his services named in the will.
2. Where the testator nominates the same person as executor and trustee, and provides that certain repairs on the real estate, to be done by certain interested parties, are to be done "subject to the approval of my executor and trustee herein named and his successor or successors," and the probate court confirms the appointment as executor but not as trustee, appointing some other person as trustee, the required approval for repairs, under the terms of the will under consideration, is to be given by the trustee who is thus appointed.
3. Where the testator gives money on deposit in a Savings bank to a trustee, who is to pay the dividends to certain heirs, the trustee may retain possession of the bank book, notwithstanding a wish expressed in the will that those heirs should "draw said dividends from the bank as they accrue."
4. This court will not advise trustees and construe wills for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is imminent. Then all the parties interested at that time can be heard under the existing conditions and circumstances.

On report. Decree according to the opinion.

This is a bill in equity, in which complainant seeks a construction and interpretation of certain parts of the last will and testament

of Thomas D. Leonard, late of Portland, in said county, deceased. At the conclusion of the hearing of this cause, by agreement of the parties, 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.

Foster & Foster, and William Lyons, for plaintiff.

Dennis A. Meaher, for Matthew J. Leonard, Thomas Leonard, Sally Leonard, Matthew J. Leonard, Jr., Ann Quinlan, Patrick Leonard.

David E. Moulton, for Elizabeth Ellen Graney.

John B. Thomes, for Mary Alice Haley.

Albert E. Anderson, for Alice Graney, John Graney, Thomas Graney, George Graney.

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

PHILBROOK, J. This is a bill in equity brought for the purpose of obtaining judicial construction and interpretation of certain provisions of the will of Thomas D. Leonard. The testator in his will requested that the defendant Matthew J. Leonard be appointed both as executor and trustee, but the probate court declined to confirm this request, except in part; and Matthew having been appointed as executor, the plaintiff was appointed trustee, and in his said capacity he institutes this proceeding.

The testator having nominated Matthew as executor and trustee, also made to him a devise of certain real estate which, according to the terms of the will, was "to be in lieu of any payment for services as executor or trustee of my estate and is so to be accepted and understood by the said Matthew J. Leonard in accepting this property." In his answer to this bill, the latter asks this court to determine whether, as executor, he would be prevented from asking for the commissions specified in R. S., chap. 65, sec. 37, as amended by chap. 78 of the Public Laws of 1911.

It is familiar learning that under the common law of England executors and administrators were entitled to no compensation for the discharge of their duties, but in this country nearly every state has provided by legislative enactment for just and moderate remuneration for services of this class of trust officers. It is also to be observed that in many states in the Union their statute law requires

executors whose compensation is provided for by will to renounce such provision in writing or forfeit their compensation under the statute. It has been held, in the absence of statutory provision and of any provision in the will that the bequest is intended to exclude further compensation, that the executor is entitled to both the legacy and his statutory commissions. *In re Mason,* 98 N. Y., 527; *Aspinwall* v. *Pirnie,* 4 Edw. Ch., 410 (N. Y.). The weight of authority, however, seems to be that if the testator has given a legacy in lieu of commissions, or imposed upon his executors the condition that they should not have commissions, the court cannot defeat the provisions of the will. *In re Kernochan,* 104 N. Y., 618, s. c. 11 N. E., 149; *Succession of Fink,* 13 La. Ann., (Louisiana Sup. Ct.) 103; *Haine's Accounting,* 8 N. J. Eq., 506; *Fox Estate,* 235 Pa. St., 105; s. c. 83 Atl., 613; s. c. Ann. Cas., 1913D, 991. In the latter case, the language of the court is as follows: "If the will disclose that it was the intention of the testator to reward the executor for his services by the legacy, it is conclusive on the executor, and if he accept the position and administer the estate by virtue of his appointment as executor, he must accept the reward for his services named in the will." In view of the language used in the will at bar, we have no hesitation in saying that Matthew J. Leonard is not entitled to commissions as executor in addition to the legacy therein provided.

Turning our attention now to the questions raised by the plaintiff, we observe that he asks interpretation:

FIRST. Of the eighth item of the will, which is as follows:

"Eighth. I give, bequeath and devise to my two daughters Elizabeth Ellen Graney and Mary Alice Haley for and during the term of their natural lives my houses and lands situated at number 2, number 4, number 10 and in the rear of number 10 and number 12 Briggs Street, in said Portland, to manage and control the same, keep the same insured against loss by fire for the benefit of my estate, to keep the same in repair, tenantable, and let the same and receive the income therefrom and from such income pay the expenses of keeping the same insured and in good repair. Such repairs and keeping to be subject to the approval of my Executor and Trustee herein named and his successor or successors. My said daughters are at liberty to occupy the rents in which they now live and continue in the same as they have during my life. The net income after

paying the above named expenses is to be divided equally between my said daughters and this life estate is to continue during the life of each daughter and the survivor.

This property shall not be sold or disposed of except as above stated during the life of my daughters or the life of the survivor."

The plaintiff trustee desires to know whether or not he, as such trustee, is to be one of the parties who shall approve the repairs and keeping as above stated, and whether it belongs to him alone or to him and the executor jointly to make such approval. The repairs and keeping relate only to real estate. By virtue of statute, the real estate of a testator may be sold by the executor, under authority of the probate court, when the same is necessary to pay debts, legacies and expenses of administration. When not so necessary, it passes by law directly to the devisee, in the absence of any testamentary provision. Nothing in the case indicates that the executor will ever be required to use the proceeds of the sale of real estate for the purposes just referred to. The precise question we are called upon to answer at this point is,—what testamentary provision, if any, would give the executor any control over or management of the real estate in question? Here we know of no rule of law to guide us except the familiar one of ascertaining the intention of the testator, so far as that intention has been expressed, and being goverened thereby. *Torrey* v. *Peabody,* 97 Maine, 104. The will declares that repairs and keeping are "to be subject to the approval of my Executor and Trustee herein named and his successor or successors." In the mind of the testator the executor and trustee would be one and the same person but acting in a dual capacity. Did the testator mean that the keeping and repairs were to be approved by Matthew as executor or by Matthew as trustee? As executor, the duties of Matthew would soon end, and he was not liable to have a "successor or successors." As trustee, the duration of duty must be longer and might require a "successor or successors." When the duties of administration were done by the executor and his final accounts allowed, he ceased to be executor unless the probate court should open the administration for proper causes, and could no longer approve the keeping and repairs in that capacity. Evidently then the trustee, whether it be Matthew or his successor, is the trust officer whose duty it would be in the last analysis to

approve the keeping and repairs. The only trustee in the case thus far is the plaintiff; and we are of opinion that he, and he alone, is the person to approve the keeping and repairs until his successor is appointed.

SECOND. But the plaintiff says that he is in further doubt and uncertainty in relation to the last portion of item eight when taken in connection with item eleven of the will. Quoting again the said last portion and said item eleven, we find that the will declares as follows:

"The net income after paying the above named expenses is to be divided equally between my said daughters and this life estate is to continue during the life of each daughter and the survivor. This property shall not be sold or disposed of except as above stated during the life of my daughters or the life of the survivor."

"Eleventh. In case of the death of either daughter, I direct my executor and trustee to take charge of her portion of the estate that she would have held if she continued to live and pay over the net income therefrom to her legal heirs up to the time of the death of the other daughter."

The plaintiff here inquires whether a trust is created for the legal heirs mentioned in item eleven, and if so, what becomes of the life estate of the survivor; also whether there is such a conflict between the last part of item eight and item eleven that the latter is to prevail over the former.

The duty of the trustee under the provisions of the last part of item eight is plain. The contingency mentioned in item eleven has not yet arisen and may not arise for many years. This court has said in *Huston* v. *Dodge*, 111 Maine, 246, "we do not think it wise, nor within the intent of the statute, to assume jurisdiction to advise trustees, and to construe will for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is about to arise, until it is imminent. Then if the trustee needs present advice to know how to meet the contingency it will be given him. Then the parties interested in the issue can be heard under the conditions and circumstances as they may exist at that time. They should not be prejudiced. Nor should there be

any judgment until there is occasion for it." We are of opinion that the provisions of item eleven, either alone or in conjunction with item eight, should not now be construed.

THIRD. Item nine of the will is as follows:

"Ninth. I give and bequeath to my nephew Matthew J. Leonard of Portland, Executor and Trustee under the provisions of this will, his successor or successors in office, all money which I have on deposit in the Portland banks in trust, to pay over to my daughters Elizabeth Ellen Graney and Mary Alice Haley semi-annually during their lives respectively, the net income received from said money as dividends, the same to be divided equally between them after deducting any necessary expenses incurred for my estate. It is my wish that my said daughters and the survivor draw said dividends from the bank as they accrue."

The trustee says he is in doubt and uncertainty as to who is to retain the bank books or evidences of deposit in the Portland banks. It has been held that a trustee may and should keep trust deeds and other documents and evidence of title within his control; *Corin* v. *Thomas,* 46 L. T. Rep., N. S., 916. The testator in this case expressed a "wish that my said daughters and the survivor draw said dividends from the bank as they accrue," but this does not necessarily mean that the daughters are to be placed in possession of the bank books, as against a possession by the trustee, but rather that they might enjoy the benefits of such dividends as the same might be available. It is our opinion that the trustee should retain the bank books or evidences of deposit in the Portland banks.

FOURTH. The request for interpretation of the twelfth and thirteenth and last items of the will must be regarded as falling under the rule hereinbefore referred to in *Huston* v. *Dodge,* supra.

Decree accordingly.

HOWARD B. CROSBY, Petr., *vs.* MORRISON LIBBY.

Kennebec. Opinion September 7, 1915.

Appeal. Ballots. Covering up the Name. Designation of the Office. Election. Intention of Voter. R. S., Chap. 6, Sects. 70-74. Slips. Stickers.

1. An appeal from a judgment rendered upon a petition brought under R. S. ch. 6, secs. 70-74, to determine whether the petitioner, at the State election held September 14, 1914, was duly elected county commissioner of the County of Kennebec for the term beginning January 1, 1915, or whether the respondent was so elected.
2. The word "For" preceding the title of office upon the official ballot is not essential nor within the requirements of statute.
3. As used in ch. 6, R. S., a slip is a strip and a sticker is a gummed slip or strip.
4. The proper place for a slip printed by the Secretary of State is that wherein the strip must be placed by the voter, when voting for a substitute that is on and over the name of the candidate deceased or withdrawn, and the rules for counting ballots when a strip is attached by the voter apply equally when a slip is attached by direction of the Secretary of State.
5. When in applying a slip or a strip, the voter in the one case or an official, under direction of the Secretary of State, in the other, covers the designation of office in whole or in part, the vote should be counted when from an inspection of other parts of the same ballot and of other ballots cast at the same election, it is apparent what the designation of office, so covered, is.
6. When a slip or strip placed in one column or group of the ballot over the name of a candidate, whether done by direction of the Secretary of State or by the voter, extends into an adjacent column or group and covers part, or the whole, of the christian name of a candidate in the latter column over which the voter places his cross, the vote should be counted for the candidate whose christian name is thus wholly or partly covered.
7. Where a slip is so applied that the names of both the original candidate and the substitute fully appear under the designation of the office, each is equally entitled to be counted and neither can be. But where the strip is so placed that a portion of the original name is covered, the name so covered must be regarded as erased, although it can be read.

On appeal by petitioner. Petition dismissed with costs for the respondent.

This petition was brought under the provisions of sections 70-71-72-73 and 74 of chapter 6 of the Revised Statutes, to determine whether the petitioner, at the state election held on September 14, 1914, was elected county commissioner of the County of Kennebec for the term beginning January 1, 1915, or whether the defendant was so elected. The petition was heard before a single justice, who ordered, adjudged and decreed that the petition of Howard B. Crosby be dismissed with costs. From this decree, petitioner appealed.

The case is stated in the opinion.

William R. Pattangall, for petitioner.

Frank L. Dutton, for defendant.

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

BIRD, J. This is an appeal from the judgment of a single justice rendered upon a petition brought under §§ 70-74, c. 6, R. S., to determine whether the petitioner, at the State election held on September 14, 1914, was duly elected county commissioner of the County of Kennebec for the term beginning January 1, 1915, or whether the defendant was so elected.

The name of the petitioner was printed upon the official ballots. Arthur W. Leonard was also duly nominated for the office of county commissioner and his name printed upon the official ballots, but on the thirteenth day of September, 1914, after distribution of the ballots by the Secretary of State as provided by § 16, c. 6, R. S., Mr. Leonard died and the respondent, Morrison Libby, was duly nominated to supply the vacancy and the nomination certified to the Secretary of State, in accordance with R. S., c. 6, §§ 6 and 8.

The printing of new ballots being, as admitted, impracticable, slips containing the new nomination were printed, under the direction of the secretary of state (R. S., c. 6, § 8) and by him distributed to the clerks of the cities towns and plantations of Kennebec County with instructions, addressed to the presiding election officers of the several voting places therein, directing them "to place on the official ballots the printed slips containing the new nomination aforesaid over

the name of the above mentioned Arthur W. Leonard, such slips to be placed upon every ballot before the same has been given into the hands of the voter." Out of the compliance, or attempted compliance, apparently, of the election officers with these instructions arise questions affecting by far the larger number of ballots now in dispute. The difficulty confronting us as to these ballots was occasioned by the careless manner in which some of the slips were "pasted" upon sundry ballots.

In announcing his conclusions the sitting justice declared he had been guided by the following rules:

"Rule 1. All ballots were counted wherever the title to the office could be discovered by reading the letters that appear above the sticker.

"Rule 2. All ballots were counted when the designation of the office to be filled, though fully covered by the sticker, could be clearly read through the sticker.

"Rule 3. All ballots were counted, although the sticker placed in the corresponding column at the left of the petitioner's name extended over the line and covered the whole or a part of said petitioner's first name."

As most of the ballots disputed were disposed of pursuant to these rules and the exhibits are arranged accordingly, we will first consider the ballots allowed or rejected under these rules.

The ballots allowed by the sitting justice, twenty-three in number under Rule 1, and those admitted by him under Rule 2, one hundred and ninety-five in number, involve the obliteration in part, or in whole, of the designation of the office. Premising that we do not consider the word "For" preceding the title of the office as essential or within the requirement of the statute, we will consider the ballots admitted under Rules 1 and 2 of the sitting justice together.

It is agreed by counsel that the slips, the application of which caused the obliteration, in whole or in part, of the designation of office were applied by election officers acting upon the order of the Secretary of State.

Among the directions for the preparation and distribution of ballots, found in R. S., c. 6, it is provided in section 10 that "Every general ballot . . . shall contain the names . . . of all candidates whose nominations for any office specified in the ballot

have been duly made and not withdrawn . . . and the office for which they have been severally nominated . . . . A blank space shall be left after the names of the candidates of each different office in which the voter may insert the name of any person, for whom he desires to vote as candidate for such office.

In section 8 of the same chapter provision is made for supplying a vacancy caused by the death or withdrawal of a candidate and printing upon the ballots the name "supplied for the vacancy" "or, if the ballots have been printed, new ballots containing the new nomination shall, whenever practicable, be furnished, or, slips containing the new nomination shall be printed under the direction of the Secretary of State, which may be pasted in proper place upon the ballots and thereafter shall become part and parcel of said ballots as if originally printed thereon." That is, the name borne upon the slips, not the slip, shall become part of the ballot as if originally printed thereon.

Neither section eight nor section ten indicate what is the "proper" place for the pasting of the slips. The former simply makes the requirement and the latter provides for a blank space after the names of candidates in which the voter may fill in the name of any person for whom he desires to vote. Section twenty-four of chapter 6 clearly shows that this space is not appropriate for stickers unless the name above the space is otherwise erased. But somewhat minute directions are given the voter in section twenty-four of chapter 6 indicating the manner in which he shall prepare his ballot. After providing for a change in candidates by erasure and "filling in," under the name erased, the name of the candidate of his choice, it also indicates how strips or stickers may be used as follows: "Or if the voter places and sticks on and over the name or names of any candidate or candidates for any office or offices, a small strip or strips of paper, commonly known as a sticker or stickers, bearing thereon a name or names other than the name or names of the candidate or candidates so erased or covered up, the name or names of such candidate or candidates so covered shall be considered to be erased from the ballot, and the person or persons whose name or names shall so appear on said strip or strips of paper so placed and stuck on the ballot, shall be deemed to be voted for by the voter as a candidate or candidates for such office or offices." The first method

requires erasure and substitution as two distinct acts while by the second method one act constitutes both erasure and substitution.

It may be objected that strips or stickers are not slips, but we think they are. A strip is a slip. Johnson's Dict.; Webs. New Intern. Dict.; Standard Dict.; The Century Dict. A sticker is a gummed slip or strip. The words are to be construed according to the common meaning of the language.

We think it requires no argument to reach the conclusion that the proper place for a slip printed by the Secretary of State is that wherein the strip must be placed by the voter pursuing the second method, that is on and over the name of the candidate deceased or withdrawn and that the rules for counting such ballots when the sticker is attached by the voter apply equally when it is attached by direction of the Secretary of State.

The sitting justice evidently sought to apply the rule laid down in *Bartlett* v. *McIntire*, 108 Maine, 161, which was followed in the later case of *Pease* v. *Ballou*, 108 Maine, 177, and has since been recognized as the established rule of law in this State. *Bartlett* v. *McIntire*, concerned ballots to which strips had been attached by voters. In it, it was said that "The designation of the office is an indispensable part of any ballot. There must be an office to be filled as well as a candidate to fill it, and if a sticker entirely covers the designation of office, or if the designation be erased, the ballot cannot be counted. But when a sticker is so placed that enough of the top parts of the letters of the designation remain so that the eye can see what the office was the vote should be counted."

The case of *Bartlett* v. *McIntire* marked a distinct departure of the court as then constituted from the somewhat narrow rules theretofore adopted in construing the ballot law, was the result of a conviction that a more broad and reasonable interpretation should be given and the opinion was drawn in absolute conformity to the rules laid down by the court as the actual count progressed. But we are strongly impressed that the rule there laid down as to the designation of office should be still further broadened and liberalized.

It must be conceded that the designation of the office, as well as the candidate, must appear upon the ballot as printed by the Secretary of State, such being the positive requirement of statute. But conceding this, is the rule that when by the use of a strip or sticker

part of the designation of the office so printed is covered, the ballot is to be counted when and only when "enough of the tops of the letters of the designation remain so that the eye can see what the office was," (noting that there is no provision of statute for the erasure of the designation of office) a certain and workable rule which will lead honest minds to the same conclusion? All such must know from other ballots or, indeed, from the same ballot what the designation partly covered was, for the like space in each column is devoted to the same office and its candidate or candidates. Will not knowledge of this fact subconsciously lead one to count, while another fully conscious of the fact refrains? It seems a rule of doubtful reasonableness when honest minds may so differ and the right of franchise of the voter made to depend upon the number on the one hand of letters exposed and on the other of letters concealed or erased and the degree to which the former are apparent, varying in many cases by the merest fraction of an inch. As already stated it must be as absolutely known from other ballots and like parts of the same ballot as any fact may be known, that the place in or upon which a strip or slip is applied is devoted to the candidacy of a certain office whether the investigator is a primary counting officer or the court or any unofficial person of ordinary intelligence. Is not the intention of the voter clear who accidentally covers the designation of the office in whole or in part by a strip, when the designation of office covered must be perfectly well known?

Given then a ballot properly prepared by the Secretary of State with the designation of the office and the name of the candidate, the vote should be counted when from inspection of other parts of the same ballot and of other ballots cast at the same election, it is apparent what the designation of office covered is. When the designation of the office has been placed upon the ballot by the Secretary of State in conformity with law and it has been covered by the voter in applying the strip or sticker, it cannot be contended that such voter applying the sticker intended by the same act to render his vote void. Is the presence of the designation of the office upon the ballot less certain and known when wholly covered than when parts of its letters are disclosed or less certain when the parts exposed cannot be read than when they can be read?

The ballots in question under the first two rules of the sitting justice, twenty-three and one hundred ninety-five in number respectively are allowed and counted for respondent.

The ballots of the third class, considered by the sitting justice under Rule 3, to the number of three hundred and thirty-seven, are those whereon, as claimed, the slips bearing the name of Morrison Libby extended over into the next group or column to the right, in which the name of petitioner appeared, and covered in part, and, in one instance the whole, of his Christian name "Howard."

It is admitted that Howard B. Crosby and Morrison Libby are the only men of those names in the County of Kennebec and that there are no men in the county by the name of Morris Libby or Ward B. Crosby.

The intent of the Australian ballot law was not "to limit or defeat the sacred right of franchise by establishing a method so intricate or complicated as to circumvent the intention of the honest voter. That intention must of course be expressed in compliance with statutory requirements but those requirements are to be interpreted broadly and reasonably. Sec. 27 provides that if for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot, shall not be counted for that office. If the converse of this be thereby implied, namely, that all ballots shall be counted where it is possible to determine the voter's choice, a wide latitude would be given to the canvasser. However it must be a legally expressed choice with presumptions in favor of the voter rather than against him." *Bartlett* v. *McIntire,* 108 Maine, 161, 166. And in the same case it is said on page 171 that in order that a distinguishing mark be effective to cause the rejection of a ballot it must be established from an inspection of the ballot "that it was made intentionally and not accidentally." See *Libby* v. *English,* 110 Maine, 449, 454. Pub. Laws, 1911, c. 71.

The name of Howard B. Crosby as candidate for the office of county commissioner was printed upon the ballot in the second column or group from the left by the Secretary of State. The act, whether of the voter or of the election officer, while applying the strip or slip over the name of the deceased candidate, in the first or left hand column, by which it was placed over the whole or part of the Christian name of Howard B. Crosby was casual and acci-

dental so far as inspection of the ballot reveals. It is equally as idle to assume that the voter or an election officer in applying a strip or slip in one column intended to cover part of the name in the next column as it is to assume that the voter or election officer purposely covered with a sticker the designation of office. Such an act on the part of the election officer would have been fraud which is not to be presumed and which should be ineffectual to affect the rights of the voter.

Assume a voter, intending to vote for the candidates in the first or left hand column, places a sticker over the name of the candidate in that column covering as well the Christian name of the candidate in the column next to the right, or second column and that he then changes his purpose, and, deciding to vote for the candidates in the second column, makes the appropriate mark in the square at the head of that column. Can it be held an intentional erasure of the Christian name in question? Does an inspection of the ballot reveal such intent? The name of the candidate in the second column was printed there by the proper official and remains except that part of the name is casually covered. There can be no question of the voter's intent.

A uniform rule applicable in all cases whether a sticker is applied by an official or a voter is desirable that confusion arising from the existence of one rule in the one case and a different rule in the other may be avoided. No possible advantage is conceivable from such diversity.

This conclusion is in harmony with the rule laid down in *Bartlett* v. *McIntire* as to "incomplete names" by reason of "broken stickers." In the prseent case, however, it is known to a certainty that the full name of Howard B. Crosby, although accidently partly concealed by a slip or strip applied in another column, was printed upon the ballot, while in the case of the broken sticker the portion of the name lost is inferred.

The case of erasure of part of the name of a candidate by a strip manifestly applied in the same column in which the name is printed, or by pencil, will be considered when occasion requires.

Of the three hundred and thirty-seven ballots in the class now under consideration, six must be rejected as bearing distinguishing marks, the nature of which it will be profitless to discuss. The

remainder of these ballots three hundred and thirty-one in number must be counted for the petitioner.

Sixteen ballots, rejected for various reasons by the sitting justice, are exhibited and to his action in so doing counsel make no serious objection. We have already rejected six, in considering class three and find nine others which should be rejected making a total of fifteen.

Six other ballots claimed by petitioner are presented. As no objection is urged for their rejection in argument, or brief, by counsel for respondent, they are counted for petitioner. One other ballot claimed for petitioner and clearly defective is rejected.

Twenty-five ballots apparently counted for respondent remain to be considered. The objections may be roughly classified as follows:—fourteen ballots on which all of the letters in whole or in part of the name of Arthur W. Leonard appear above the sticker bearing the name of Morrison Libby, thus enabling the name of the former to be read and nine ballots whereon the sticker exposes part only of the letters of the name of the deceased candidate, but not enough to enable his name to be read. We think in considering these ballots, the intention of the voter as gathered from an inspection of the ballot should control, unless non compliance with some positive provision of statute forbids. The ballot should be counted where it is possible to determine the voter's choice legally expressed. The presumption is in his favor. Section 24 of c. 6, R. S., provides two methods, as already seen, by which the voter may substitute a new candidate for one printed upon the ballot.

Under the first method the drawing of a pencil mark through the name of the candidate discarded has been considered as a sufficient erasure, although the primary meaning of erasure is to rub out or obliterate. To erase is synonymous with to expunge or to cross out. When a name is crossed out by the pencil, it is seldom that the name cannot be read. Yet the erasure is held complete. That the strip should be applied with mathematical precision can hardly be intended or that complete obliteration be indispensable in the second method more than in the other. In the second method the use of the strip in itself indicates an intention to vote for a substitute candidate. If, however, the strip is so applied that the name of both the original candidate and the substitute appear in full under the designation of

the office each is equally entitled to be counted and neither can be. R. S., c. 6, § 27. But where the strip is so placed that a portion of the original name is covered, we think the name so covered must be regarded as erased although it can be read. There remain two other ballots, upon one of which a cross was made in the squares above two columns or groups with clear indications of an attempt to erase that in the square other than that above the name of respondent and one in which, by reason of a broken sticker, the last syllable only of the Christian name of respondent appears. The twenty-five ballots are counted for respondent.

Our conclusions may be tabulated as follows:

Number of ballots rejected.....		16
Number of ballots for Morrison Libby now undisputed	5742	
Number counted for Libby of the disputed.....	243	5985
Number of ballots for Howard B. Crosby now undisputed	5489	
Number counted for Crosby of the disputed.....	337	5826
Total		11,827

Libby's plurality, 159.

It is therefore held that the respondent having received a plurality of all the ballots cast for county commissioner for the County of Kennebec at the State election held on the fourteenth day of September, 1914, was duly elected county commissioner of said county for the term beginning January 1, 1915, and is entitled by law to the office now held by him.

Petition dismissed with costs for respondent.

OPINION BY CORNISH, J. I concur in the result of the opinion of a majority of the court but think that so much of that opinion as overrules the doctrine of *Bartlett* v. *McIntire,* 108 Maine, 161, governing the counting of ballots with stickers placed by the voters themselves, is unnecessary in this case and therefore in the nature of dicta.

The case of *Bartlett* v. *McIntire,* supra, and the other cases following, viz: *Pease* v. *Ballou,* 108 Maine, 177, and *Libby* v. *English,* 110 Maine, 177, all involved the effect of stickers affixed by the voter himself under R. S., ch. 6, sec. 24, while the case at bar calls

for the determination of the effect of slips pasted by an election officer under R. S., ch. 6, sec. 8. It does not seem to me to be necessary in deciding this case to either affirm or overrule the prior cases which rest upon a different state of facts and are governed by a different section of the statute. It may be proper and timely to consider that question when the occasion calls for such re-examination and I express no opinion as to the wisdom of then modifying the existing rule or adopting that announced in the decision of the court. It is sufficient now to decide the case before us.

1. The distinction between the prior cases and the present is apparent. R S., ch. 6, sec. 24, prescribes the manner in which the voter shall mark his ballot with a cross in the appropriate place and then continues, "And if the voter shall desire to vote for any person or persons, whose name or names are not printed as candidates on the party group or ticket, he may erase any name or names which are printed on the group or party ticket, and under the name or names so erased he may fill in the name or names of the candidates of his choice. Or if the voter places and sticks on and over the name or names of any candidate or candidates for any office or offices a small strip or strips of paper, commonly known as a sticker or stickers, bearing thereon a name or names other than the name or names of the candidate or candidates so erased or covered up, the name or names of such candidate or candidates so covered shall be considered to be erased from the ballot and the person or persons whose name or names shall so appear on such strip or strips of paper so placed and stuck on the ballot shall be deemed to be voted for by the voter as a candidate or candidates for such office or offices."

This section has no application to the present case. The voters who cast ballots now under consideration did not "desire to vote for any person or persons whose names were not printed as a candidate on the party group or ticket." On the contrary they desired to vote and they did vote for the respondent, whose name was printed on a slip and had been placed on the party group or ticket by the proper officials. They did not "place and stick on and over the name or names of any candidate or candidates for any office or offices a small strip or strips of paper commonly known as a sticker or stickers, etc." On the contrary they did not change or attempt

to change the official ballot in the slightest degree, but simply followed the statutory instructions by placing the cross in the party square; and by so doing the statute expressly declares that "they shall be deemed to have voted for all the persons named in the group under such party or designation." This respondent was named in that group as a candidate for county commissioner and therefore these voters must be deemed to have voted for him. And he was the only candidate for that office in that group. The original nominee had died, and his place had been filled by another, the respondent. The name of the original nominee in the space had become a nullity. It was as if the space were vacant and the new name had been inserted in it. Nor was there any candidate over whose name a sticker could be placed, because a dead man cannot be a candidate in the eye of the law. Section 24 contemplates two living people, either of whom would be eligible, and the substitution of one for the other by the voter himself who has a preference and expresses it. Here death had created a vacancy, had removed one name, and the name of the new nominee was really the only name in the space.

It is obvious therefore that sec. 24 has to do only with voter-changed ballots, with split tickets, so called, and the cases already cited apply only to that class. But that is not this case. Other provisions of the statute govern here because the facts and the situation are different.

2. It is admitted that Mr. Leonard, the original nominee for county commissioner, died on the eve of election. The ballots had already been printed and distributed. A new nomination was duly made by the proper authorities and the new name was furnished to the Secretary of State. That official followed the directions specified in R. S., ch. 6, sec. 8, enacted to meet such an emergency, viz: "If the ballots have been printed, new ballots containing the new nomination shall, whenever practicable, be furnished, or slips containing the new nomination shall be printed under the direction of the Secretary of State, which may be pasted in proper place upon the ballots and thereafter shall become part and parcel of said ballots as if originally printed thereon." The time was too short to permit the printing of new ballots for the entire County of Kennebec. That was not "practicable," and therefore slips were printed under the

direction of the Secretary of State and were pasted upon the ballots by the proper election officers before they were delivered to the voters. All this is conceded.

But the statute says they shall be pasted "in proper place." What is the fair and reasonable meaning of those words? Obviously the proper place is the appropriate place, that portion of the party column devoted to county commissioner. That is precisely what was done here. The slips were placed in proper place and the fact that they covered or failed to cover the name of a deceased candidate is entirely immaterial. In legal contemplation the old name had vanished and the new name was the only one in the space.

And whether in the rush and hurry of preparing a large number of ballots within a brief period of time some of the slips were accidentally or carelessly pasted by the officials so as to cover in whole or in part the name of the office is likewise immaterial. Too great nicety is neither demanded nor expected in the placing of these slips. Section 8 does not require it. The rights of the voter and the rights of the candidate ought not to depend upon the exact angle at which the slip adheres to the official ballot, nor upon its precise location within the fractional part of an inch.

But even if it could be held that the officials had made an error in allowing the slip to cover too much of the title or too little of the original name, even then the voters should not suffer, for no principle is better settled than that they shall not be disfranchised by reason of official neglect. The right of suffrage is jealously guarded by the law, and unsuspecting voters are not to be deprived of that right through the ignorance or carelessness of those who represent the State and stand charged with official responsibility. The will of the people is not to be thwarted by immaterial errors in the ballot. Opin. Justices 107 Maine, 514-517.

The ballots in the case at bar do not contain "stickers," but, as the statute terms them, they are "slips" containing "the new nomination," the only name on the official ballot that can be voted for for county commissioner in that party column. The indisputable fact is that all these rejected ballots in the precise form in which they were rejected, were not split tickets but official ballots. The slips were as official as the rest of the ticket. They were printed under the direction of the Secretary of State, they were affixed by the

election officers in the space set apart for the candidate for county commissioner and they thereby became in the language of the statute "part and parcel of said ballots as if originally printed thereon." Every ballot bore the official indorsement, the sign manual, required by section 10, "Official ballot for Ward —" and the fac simile of the signature of the Secretary of State. They were delivered to the voter as official ballots and he had a right to rely upon them as such and to assume that they were correct in every respect. Reliability has been declared to be one of the chief purposes of the official ballot. Opin. Justices, 107 Maine, supra. The voter is forbidden to use any other or deposit any other in the ballot box. Sec. 27. Unless, then, we are prepared to say that the voter who receives an official ballot and casts it unchanged is to be disfranchised, these ballots must be counted.

3. But it is urged by the petitioner that this court, as counting officials, can be governed by nothing else than by the ballots as cast and by the form in which they appear before us. If by this is meant that in counting ballots with stickers upon them affixed by the voters, we cannot go outside the ballots to ascertain the voters' intention, but must be governed by their intention as expressed, I readily concur. But if it means that when it is admitted as here that the slips containing the name of the new candidate were affixed by the election officers themselves in perfecting the official ballot, and were not stickers affixed by the voters after the perfected official ballot had been received by them, still we must shut our minds to that fact and must count them as sticker ballots and not as slip ballots, I must most vigorously dissent. What right have we to do this? Whence comes our authority for such action? Sticker ballots are governed by one section of the statute, sec. 24, and slip ballots by another, sec. 8. The former change the official ballot, the latter perfect and complete the official ballot. They are entirely distinct, and each must be counted according to the requirements of the respective sections. Section 24 has been construed in the decisions before referred to. But a count under section 8 has never arisen in this State until the present time. That section has now come up for construction and I have endeavored to construe it according to its plain and unambiguous terms, giving that reasonable interpretation which is in harmony with the letter and the spirit of

the whole Australian ballot law and with the general rules of law applicable to all elections under our form of government.

And what applies to the Court applies with equal force to the original count in open town or ward meeting by the election officers themselves when the polls are closed. They are the identical persons who pasted the slips and have full knowledge of the fact. Must they too shut their minds and memories to the manner in which the slips found their way to the ballots and regard them as stickers and count them as if affixed by the voters? Can the same hand and eye that pasted the slips in the morning, prepared the ballots and offered them to the voters as official and correct, reject them in the evening as defective on the ground that they do not meet the requirements as to stickers? Such a position is untenable.

If the rule contended for by the petitioner should obtain it would open the door to such wholesale fraud in the hands of unscrupulous officials as it is not pleasant to contemplate. A way is thereby pointed out by which not merely by accident but by design such officials might so prepare the official ballot under like circumstances as to disfranchise a large number of helpless and unsuspecting voters, if they should see fit to do so, by the artful manner of pasting the slips, and such ballots would be rejected by the very hand that perpetrated the trick. This puts too high a premium upon wrong doing and leaves the electors at the mercy of designing officials, a situation that should never be countenanced, much less encouraged.

In the case at bar there is neither claim nor indication of any fraud. The election officers were doubtless honest in the performance of their duties. They endeavored to give the voters an opportunity to vote for the respondent as the new nominee for county commissioner, and in my opinion they did so, because the ballot they perfected complied with the statute regulating the substitution. The voters by making the cross at the head of the party column expressed their intention to vote for the new nominee in the only manner in which such intention could be expressed, and thereby, in the language of the statute, "they are deemed to have voted" for him. The title to an elective office is derived from the popular expression at the ballot box, and the will of the people is not to be defeated by the mistakes, negligence, or fraud of election officers. To hold in this case that the candidate who actually received a substantial plu-

rality of the votes cast must be thrust from his office simply because some of the officially placed slips covered a portion of the title, or failed to cover the name of a dead man, is in my judgment to violate the statute under which elections are held as well as the fundamental principles of law and good government.

Without, therefore, re-examining the doctrine of *Bartlett* v. *McIntire,* supra, as to voter placed stickers, my conclusion is that the voters in the case at bar ought not to be disfranchised because of carelessly placed official slips and that the entry should be, as held by the majority of the court,

Petition dismissed with costs.

MR. JUSTICE KING concurs in this opinion.

WILLIAM BASS *vs.* ALFRED DUMAS and Logs and Lumber.

Somerset. Opinion September 13, 1915.

Attachment. Bankruptcy. Filing Copy of Attachment. Lien. Possession. Preserving Attachment. Return. R. S., Chap. 83, Sect. 27. Signature.

1. To preserve an attachment of personal property, the officer must either retain the possession of it, or he must within five days after the attachment, in case the property is bulky, file in the town clerk's office an attested copy of so much of his return on the writ as relates to the attachment.
2. If an officer making an attachment of bulky property does not either retain possession, or within five days file in the town clerk's office an attested copy of so much of his return on the writ as relates to the attachment, the attachment is dissolved.
3. A return not signed by an officer himself is not a return, although it may have been signed by someone else in his name, by his direction.
4. When the signature of a public officer is required he must make it himself. He cannot delegate the doing of it to another.
5. The copy of an officer's return of an attachment filed in the town clerk's office must be attested by the officer himself, or the attachment is not preserved.

6. In this case, the officer did not preserve his attachment by retaining the possession.
7. When an attachment is dissolved by failure of the officer either to retain possession or by filing an attested copy of his return in the town clerk's office, he cannot revive the attachment by merely taking possession afterwards. He must make a new attachment. And that he cannot do after the writ is entered in court.
8. When an officer has several writs to serve against the same defendant, attaches the same property on all, and in one case makes a good return, and files an attested copy of it in the town clerk's office, but fails to make a good return or to file a sufficiently attested copy in any of the others, the preservation of the attachment in the one case does not continue the officer's right to possession in the other cases, in which the attachment was dissolved by failure to comply with the statute.
9. When an officer making an attachment fails to preserve it, in the case of bulky property, either by retaining possession or by filing in the town clerk's office a copy attested by himself of his return signed by himself, the attachment is not revived by the officer's amendment of his return by signing it afterwards, by leave of court.

On report. Judgment that plaintiff has no lien. Remanded.

This is an action to enforce a lien for cutting and hauling certain logs. Plea, the general issue with brief statement.

At the conclusion of the evidence, the case, by agreement of parties, was reported to the Law Court for determination. Upon so much of the evidence as is legally admissible, the Law Court will render such judgment as the law and the evidence require.

The case is stated in the opinion.

Butler & Butler for plaintiff.

W. B. Brown, for Dumas.

W. R. Pattangall and Thomas Leigh, for Schmick Handle & Lumber Co.

George W. Heselton and Fred F. Lawrence, for Wendell F. Brown Co.

Harvey D. Eaton and H. L. Hunton for David B. Ellis.

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

SAVAGE, C. J. Action to enforce a lien for cutting and hauling logs. The defendant was a contractor. The Schmick Handle and Lumber Company was the owner. The logs were taken to the yard of the owner, and there sawed into lumber, and the lumber was

stuck up. Other lumber was intermingled with it by the owner without the plaintiff's consent. The Schmick Handle and Lumber Company was afterwards petitioned into bankruptcy, and all the lumber was sold to the Wendell F. Brown Company by the trustees in bankruptcy. The latter company appears now to defend against any judgment in rem. It is admitted that the amount claimed is due from the defendant Dumas. The labor was performed in November and December, 1913 and January, 1914. The suit was begun January 19, 1914. An attachment of the sawed lumber was made January 20, and a copy of the return of so much of the officer's return as related to the attachment, and so forth, as required by statute, was filed in the town clerk's office, January 21. R. S., chap. 83, sect. 27. The Schmick Handle and Lumber Company was adjudicated a bankrupt February 6, and the lumber was sold September 26.

The writ in this case was one of fifty-seven writs, all made the same day for different persons claiming liens. All were against the same defendant and against the same sawed lumber. On one writ the officer made a return of the attachment and signed it with his own hand. He also signed and attested the copy filed in the town clerk's office. But on each of the others, including the one in this case, the return and the copy filed were, under his direction, made and signed by others, in his name, as "David B. Ellis, by E." It is admitted that on January 29, 1915, the officer being advised that the legality of his return was questioned took actual possession of so much of the lumber attached as had not previously been shipped away, and still retains the same. At the January, 1915, term of court the officer was granted leave to amend his return by signing it, which he accordingly did.

The Wendell F. Brown Company defends against any judgment in rem on several grounds. We consider only one, namely, that the lien by attachment was lost because of the failure of the officer to sign the return and to attest the copy filed in the town clerk's office, by his own hand.

That the officer made a valid attachment may be conceded. An attachment of personal property is made by taking possession and control of the same to be held to be forthcoming on execution. *Darling* v. *Dodge,* 36 Maine, 370; *Lewiston Steam Mill Co.* v.

Merrill, 78 Maine, 111. Independent of any statute, to preserve and continue the attachment the officer must retain possession. He must either have the actual physical custody of it, or such control as to have the power of taking immediate possession. *Nichols* v. *Patten,* 18 Maine, 238; *Brown* v. *Howard,* 86 Maine, 342. To obviate the inconvenience of doing this in the case of bulky articles, the statute provides that in such a case, "the officer may, within five days thereafter, file in the office of the clerk of the town in which the attachment is made, an attested copy of so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is commanded to attach, the names of the parties, the date of the writ, and the court to which it is returnable, and such attachment is as effectual and valid as if the property had remained in his possession and custody." R. S., chap. 83, sect. 27. To relieve the officer from the necessity of retaining actual possession he must follow the statute. He must file an attested copy of his return, and that means that he must first make a return. Filing the attested copy does not continue the possession. It is a substitute for possession. By it the lien of the attachment is preserved. So is the officer's special property, and right to take possession. *Wentworth* v. *Sawyer,* 76 Maine, 434; *Lewiston Steam Mill Co.* v. *Merrill,* 78 Maine, 107; *Perry* v. *Griefen,* 99 Maine, 420. But, if the officer does not either retain possession or within five days file such an attested copy of his return as the statute prescribes the attachment is dissolved. It no longer exists. And in order to get the right of control over the property again he must make a new attachment.

In this case the officer did not make any return over his own signature, nor did he file any copy of a return attested by himself. A return not signed by the officer is not a return, although it may be signed by someone else in his name and by his direction. The very office of a return requires a signature. And it is the signature which authenticates it and gives it its official character. When the signature of a public officer is required he must make it himself. He cannot delegate the doing of it. The question is res adjudicata in this state. *Chapman* v. *Limerick* 56 Maine, 390. See Opinions of the Justices, 68 Maine at p. 588; 70 Maine at p. 564; *McGuire* v. *Church,* 49 Conn., 248. So the attestation of the copy filed is an

official act. It must be done by the officer, by his own signature. Indeed, this proposition is not controverted in argument. The officer therefore did not comply with the statute. He did not make a valid return. He did not attest the copy of the return that was made. We must hold accordingly that the attachment was not preserved by filing the paper in the town clerk's office.

But it is contended in argument that the officer did continue to retain such a possession as was sufficient to preserve the attachment, irrespective of the filing of the copy of the return. Of course, an officer may preserve an attachment by filing the copy and by retaining possession at the same time. But we think this officer did not do so. The nature of the property, taken in connection with the fact that the officer attempted to preserve the attachment by filing the copy, has some significance, as ordinarily the copy is filed as a substitute for possession. It is admitted that while the trustees of the Schmick Handle and Lumber Company were conducting work in the yard, and when the Wendell F. Brown Company were sorting and shipping six cars of the lumber that had been attached, the officer did not in any way interfere or attempt to prevent the work, or the management and control of the lumber. And perhaps it is more significant than all the rest that the officer as soon as he learned that the preservation of the attachment was to be questioned in this suit, immediately took steps to take what the case calls "manual possession" of what lumber was left. And it should be noted that the officer was not called to testify, and there is no testimony that he retained possession. From all this, we think the only reasonable inference is that he did not retain possession, but that he filed the copy of the return as a substitute for it.

But the plaintiff makes one other point. It seems that the attachment in one case was preserved by making a good return and filing a good attested copy of it. And it is argued, as we understand the contention, that in some way this continued the possession of the officer, or his right to possession, so that he could afterwards take and hold possession under the attachment in this case. The suits were separate and the attachments separate. One might be preserved and another lost. Whether preserved in any case depended upon what was done in that particular case. The filing of the good copy in one case did not of itself, as we have said, continue the

possession. It continued the right to possession only, and only in that case. If in other cases, the attachment was lost by failure to comply with the statute, the good attachment could not sustain or revive those that were dissolved. This one attachment could be preserved only by retaining posession or filing a statutory copy. We have seen that the officer did neither.

The amendment of the return by signing it could not help the matter. The attachment had ceased to exist a long time before. So the taking "manual possession" did not help. The attachments had been dissolved. There is no way of reviving an attachment that is lost. The only way the officer could get possession to hold the property on this claim was by making a new attachment. And that he did and could not do.

The necessary conclusion is that the plaintiff is not entitled to a judgment in rem against the property attached. His lien has been lost. The docket entries exhibited to us show that the bankruptcy of the defendant has been suggested below. Accordingly we do not direct judgment against him, but remand the case for further proceedings against him at nisi prius.

Judgment that plaintiff has no lien.
Remanded.

KENNETH P. MORAN, By Next Friend, *vs.* GEORGE W. SMITH.

MAURICE *S.* MORAN *vs.* GEORGE W. SMITH.

Knox. Opinion September 13, 1915.

Automobile. Contributory Negligence. Damages. Negligence. "The Last Clear Chance."

A boy eight years of age saw an automobile approaching on the street, not more than 40 or 50 feet away, and then attempted to run across the street in front of it. He either ran against the automobile or was struck by it.
Held:

1. That he was guilty of contributory negligence.
2. When one negligently runs upon or injures another who has negligently put himself into a dangerous situation, he is liable for his subsequent and independent negligence. But this rule does not apply when the injured party's negligence is progressive and actively continues up to the point of collision.

On motions by defendant for new trial. Motions sustained.

These two cases, one by father and one by minor son, are brought to recover for injuries received by reason of a collision between the defendant's automobile, driven by him, and Kenneth P. Moran. Plea, the general issue. The jury returned a verdict for plaintiff in both cases. Defendant filed motions for new trial in both cases.

The case is stated in the opinion.

M. A. Johnson, for plaintiffs.

A. S. Littlefield, for defendant.

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

SAVAGE, C. J. The plaintiff in the first action, a boy eight years old, seeks to recover damages for injuries occasioned by being run against and thrown down by an automobile negligently driven by the defendant. The other action is brought by the boy's father to recover for alleged loss of services, and expenses of nursing. In each case the plaintiff recovered a verdict. And the cases are before us on defendant's motions for new trials.

The collision occurred on Limerock street in Rockland, between Broad and Lincoln streets. These streets intersect Limerock street at right angles, and are seventy feet apart. Limerock street is about fifty feet wide between street lines, and thirty-six feet between gutters. The boy plaintiff, with two other boys, was riding in a hayrack, going westerly on Limerock street. The hayrack was on the right hand side of the street. One of the boys got off somewhere between Lincoln and Broad streets, and ran across the street to the opposite sidewalk. The plaintiff followed from the rack, and started to run across the street. Meanwhile the defendant drove his car along Broad street and turned easterly into Limerock street, facing the boys. The boy on the sidewalk saw the car and shouted to the plaintiff. The plaintiff saw the car, stopped, and then started to run again, and endeavored to cross the street in front of the car.

He claims that in doing so he got nearly by and was struck by the right hand mud guard and thrown down. The defendant claims that the boy ran against the left hand mud guard. And it is certain that the great weight of disinterested testimony sustains this claim.

It is claimed that the defendant was negligent in that he did not blow his horn before he turned the corner, that he was driving too fast, considering the circumstances, and that he did not stop as quickly as he might when he saw the boy attempting to cross. In passing, we will say as to the first point, that it is immaterial in this case whether the horn was blown or not, because the plaintiff saw the car in season to stop. In fact he did stop. As to the other features of alleged negligence, it is unnecessary to discuss them, for we think the plaintiff was guilty of contributory negligence. Whether he was hit by one mud guard as he claims, or ran against the other, he was trying to run across in front of an approaching car, which could have been only a few feet away, when he started the second time. It was a childish impulse, no doubt, to follow his playfellow. But the danger was so obvious and so immediate that even a child of his years should have known better. Children even of his age are held to the exercise of some care. They cannot be absolutely careless, and then hold others responsible to them for the results to which their carelessness contributed. *Colomb* v. *Portland & Brunswick St. Ry.*, 100 Maine, 418.

The plaintiff contends that even if he was negligent, the defendant nevertheless is liable because he might, after he saw the plaintiff, by the exercise of reasonable care, have stopped his car and avoided the collision. This is the so called "last clear chance" doctrine. The doctrine is recognized in this state. But this case does not fall within its limits. That doctrine, speaking in a broad way, applies when one negligently gets himself into a dangerous situation, or a trap, as it were, from which he cannot extricate himself, and being there another negligently runs upon, collides with, or in some other manner injures him. It does not apply when, as in this case, the injured party's negligence is progressive and actively continues up to the point of collision. In such case the negligence of the other party is not subsequent to and independent of the injured party's contributory negligence. It is contemporaneous with it to the last instant. It operates to produce the result in connection with the

other negligence, and not independently of it. *Butler* v. *R. T. & C. St. Ry.* 99 Maine, 149. In this case, the plaintiff could have stopped at any moment. By stopping he would have avoided the collision. He continued. His negligence continued.

It is clear that the verdict of the jury was not warranted by the evidence, under the rules of law. The father's case falls with the other. The certificate in each case will be,

Motion for a new trial sustained.

EDWIN A. SHEPHERD, et al., *vs.* P. A. DAVIS.

Penobscot. Opinion September 19, 1915.

Attestation. Attesting Witness. Holmes Note. R. S., Chap. 83, Sect. 89. Statute of Limitations.

1. An action of assumpsit upon a Holmes note. The defense is the Statute of Limitations, and the note is within the statutes, unless saved by the attestation. It was attested by one of the payees.
2. The phrase "signed in the presence of an attesting witness" in R. S., Chap. 83, should be construed to mean that the attesting witness must be some one other than the parties to the note.

On exceptions by plaintiff. Exceptions overruled.

This is an action of assumpsit on a Holmes note. The defense was the statute of limitations. The case was heard by the court with the right of exception. The note was attested by one of the parties to the transaction. The Justice before whom the case was heard ruled that the attesting witness must be some one other than the party to the note. The plaintiff excepted to the ruling.

The case is stated in the opinion.

Percy A. Hasty, for plaintiffs.

Freeman D. Dearth, for defendant.

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

SPEAR, J. The presiding Justice who heard and rendered judgment in this action with the right of exception states the case and finding as follows:

"This case was heard by the court, with the right of exception. The action is assumpsit upon a Holmes note. The defense is the statute of limitations. The note is within the statute, unless saved by the attestation. It was attested by one of the payees.

I think the phrase 'signed in the presence of an attesting witness' in R. S., ch. 83, should be construed to mean that the attesting witness must be some one other than the parties to the note. Accordingly I rule that the payee of a note cannot be an attesting witness, within the meaning of the statute. Judgment for defendant."

The case comes up on exceptions to this ruling. The plaintiffs' counsel frankly admits that "a careful examination of the authorities fails to disclose any case directly in point" sustaining his contention, but refers to *Shepherd* v. *Parker,* 97 Maine, 86, as a case affording a possible analogy. But in that case the wife who witnessed the note was a third party and a witness to the transaction between the maker and payee of the note. In the case before us E. A. Shepherd, the witness, was not a third party but a party to the transaction and therefore a witness to his own act. The statute reads: 'The foregoing limitations do not apply to actions on promissory notes signed in the presence of an attesting witness." This language clearly implies that the witness must be some person other than the party to the note.

Exceptions overruled.

GUY A. TRASK *vs.* AMANDA B. TRASK.

Cumberland. Opinion October 1, 1915.

Annulment of Marriage. Divorce. Essence of the Contract. Fraud. Jurisdiction.

It is uniformly held that no fraud will avoid a marriage which does not go to the very essence of the contract, and which is not in its nature, such a thing as either would prevent the party entering the marriage relation, or, having entered into it, would preclude performance of the duties which the law and custom impose upon husband or wife as a party to the contract.

On exceptions by plaintiff. Exceptions overruled.

This is a petition brought by the plaintiff for the purpose of annulling the marriage between the plaintiff and defendant.

At the hearing, the presiding Justice dismissed the bill, and the plaintiff excepted to said ruling.

The case is stated in the opinion.

Irving E. Vernon, for plaintiff.

Clifford E. McGlauflin, for defendant.

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

HANSON, J. Petition to annul the marriage between the plaintiff and defendant. At the hearing the presiding Justice ruled pro forma that the bill be dismissed. The case is here on the plaintiff's exception to that ruling. The exceptions contain the following clause: "For the purpose of these exceptions, it is also to be considered that the question of jurisdiction of proceedings for annulment of marriage on the part of the Supreme Judicial Court in the county of Cumberland, is to be considered."

The record shows a prior marriage and divorce on the part of the defendant. It appears that the petitioner did not know of the defendant's prior marriage until about two years before their final separation, and that such separation was for other causes than the alleged former marriage.

The petitioner bases his claim to relief upon the following allegation:

"Your petitioner further avers that the said Hannah A. Moore fraudulently and for the purpose of inducing your petitioner to marry her, concealed the fact of her previous marriage, divorce and cause for divorce, from your petitioner, and for the same purpose falsely represented herself to be a spinster, by name Amanda Blackwood, of chaste and virtuous habits, and that your petitioner was induced to marry said Hannah A. Moore by said fraud practiced upon him and that said fraud was such as went to the essence of the contract of marriage, and that had he known the true facts your petitioner would never have gone through the ceremony of marriage with the said Hannah A. Moore."

Copies of the court records of Massachusetts were introduced showing that the divorce was decreed upon proof of the charge of adultery.

As to jurisdiction: At the time of filing the petition in this case, the Superior Court for Cumberland county had exclusive jurisdiction in divorce proceedings. Chap. 174 of the Public Laws of 1913. The jurisdiction of this court in matters of annulment was not affected by the last named act; but by Chapter 39, Public Laws of 1915, said act was amended, giving the Superior Court of Cumberland county exclusive jurisdiction, within said county, x x x x x x of "libel for divorce including any petition for annulment of marriage, or petition for modification of a decree of divorce, whether such decree was granted in the Superior or the Supreme Judicial Court of said county."

It requires no citation to establish the claim that this court has jurisdiction in the case at bar, the above named amendment not having been made at the date of filing the petition herein.

As to the merits: It is uniformly held that no fraud will avoid a marriage which does not go to the very essence of the contract, and which is not in its nature such a thing as either would prevent the party entering into the marriage relation, or, having entered into it, would preclude performance of the duties which the law and custom impose upon husband or wife as a party to the contract. *Reynolds* v. *Reynolds,* 3 Allen, 605; *Smith* v. *Smith,* 171 Mass., 404. The case at bar is well within the rule laid down in the above named cases. The motion was properly granted.

Exceptions overruled.

ALBERT DOSTIE, Petitioner for Certiorari,

vs.

BOARD OF MAYOR AND ALDERMEN OF THE CITY OF LEWISTON.

Androscoggin. Opinion October 1, 1915.

Acceptance of Resignation. Certiorari. Dismissal. Resignation. Vacancy. Withdrawal of Resignation.

1. The petitioner had the right to withdraw his resignation at any time before its acceptance by the mayor and aldermen.
2. In the absence of a statute provision in cases of this kind, a resignation is not complete until it is accepted by competent authority, which is the appointing power.
3. As neither the petitioner nor the defendant, on their own motion, can create a vacancy, it follows that the term of service of petitioner was not legally terminated, either by the alleged resignation or by the subsequent attempt to remove him.

On report. Record quashed.

This is a petition for writ of certiorari, wherein petitioner asks to have the records of the board of mayor and aldermen of the city of Lewiston quashed so far as they relate to the discharge of the petitioner from the police force. The case was reported to the Law Court upon an agreed statement of facts for determination.

The case is stated in the opinion.

George S. McCarty, for petitioner.

Wm. H. Clifford, city solicitor, for Board of Mayor and Aldermen.

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

HANSON, J. This case came before the Law Court upon the following agreed statement of facts:

"This is a petition for writ of certiorari to quash the records of the board of mayor and aldermen of the city of Lewiston, relating to the discharge of the petitioner from the police force.

On the thirteenth day of March, 1915, Albert Dostie was a member of the police force of the city of Lewiston, duly elected and qualified, having been appointed in March, 1913, for a term of three years. On said day, because of alleged misconduct, he was asked to sign a prepared resignation. Said resignation was drafted by the deputy marshal of said city and was signed by Dostie in his presence and also in the presence of the city marshal and at the latter's request. The resignation was of the following tenor:

'Lewiston, Maine, March 13, 1915.

To the Hon. Board of Mayor & Aldermen,
Lewiston, Maine.

GENTLEMEN:—

Through unfortunate circumstances, I humbly submit to your Board my resignation. Thanking you for your kindness extended for several years past.

I remain, very truly yours,
(Signed) ALBERT DOSTIE.'

After the signing of the above resignation, the same was held by the city marshal and later the same day was delivered to the Honorable Robert J. Wiseman, mayor of said city of Lewiston, by said city marshal. The following day, March fourteenth, at the request of the said Dostie, the said resignation was returned to him by said mayor. On the morning of March 15th following, charges were preferred against Dostie by the mayor and a hearing upon said charges was had before the mayor and board of aldermen. It is agreed that the proceedings of said meeting so far as they relate to the matter of the removal of Dostie from the police force are irregular and illegal and therefore null and void. It is further agreed that the resignation of Dostie was at no time presented to the board of mayor and aldermen and that they as a body never acted upon the same nor did they have the opportunity of so doing.

It is agreed that either party may refer to Chapter 293 of the Private and Special Laws of 1880, and to Chapter III of the Ordinances of the city of Lewiston.

It is further agreed that the decision of the Law Court shall be final and as of a hearing upon the writ rather than the petition for certiorari.

GEORGE S. MCCARTY,
Attorney for Dostie.
WM. H. CLIFFORD,
City Solicitor for Board of Mayor and Aldermen.

Upon the foregoing agreed statement of facts by agreement of parties, this case is reported to the Law Court.

If the Law Court are of opinion that the petitioner is not barred from maintaining the petition by reason of his alleged resignation, the entry is to be 'Record quashed;' otherwise, 'Petition dismissed.' The petition and answer need not be printed, but may be referred to by either party."

The admissions made leave but one question for determination: Is the petitioner barred from maintaining his petition by reason of his alleged resignation?

The petitioner contends that it is the general rule that in order to perfect a resignation, the same must be accepted by the proper authority. And the authority competent to accept the resignation, in the absence of statutory provisions regulating the matter, is the authority which by law has the right to fill the vacancy caused by the resignation.

The defendants contend that the resignation, although withdrawn, was a resignation in fact, that the petitioner had not the right to withdraw it, and that the mayor had no authority to return it; that (1) a public officer may resign at pleasure without the assent of the appointing power, and that, in the absence of any statute to the contrary, an absolute and unconditional resignation vacates an office from the time the resignation reaches the proper authority, without any acceptance, express or implied, on the part of the latter. (2) That a resignation which is intended to take effect immediately, and which was delivered for that purpose to the officer authorized to receive it, cannot be withdrawn.

On the date of the resignation the plaintiff was under suspension awaiting the action of the officers having his case in charge;—the mayor and aldermen at their next meeting, as provided by Section 1

of Chapter 293, Private and Special Laws of 1880. Pending such meeting the resignation had been tendered and withdrawn, with no protest from the mayor, and no act on his part or on the part of the board of aldermen, tending to show an acceptance of the same: on the contrary there was an apparent ready compliance with the request to return the resignation, and an immediate resort on the part of the mayor to a different mode of procedure to remove the petitioner. The record discloses the means used, and the admitted failure of the mayor and aldermen to effect such removal. In view of the record we hold that the petitioner had the right in the circumstances to withdraw the resignation at any time before its acceptance by the mayor and aldermen. That it had not been accepted by them is clearly shown by the surrender of the resignation by the mayor and the subsequent proceedings to remove the petitioner. These acts on the part of the mayor and aldermen constituted a waiver of any right or advantage they may have had while holding the resignation. The office could not be abandoned at the pleasure of the petitioner. He had been appointed for a term of three years. Under the city charter his appointment was authorized to be made by the city council. Chapter 105, Sect. 4, Laws of 1861, provides that "the city council shall, annually, on the third Monday in March, or as soon thereafter as may be convenient, elect, and appoint for the ensuing year, all the subordinate officers and agents for the city. . . . and may by concurrent vote remove officers when in their opinion, sufficient cause for their removal exists . . . All the said subordinate officers and agents shall hold their offices during the ensuing year, and till others shall be elected and qualified in their stead, unless sooner removed by the city council." Section 1, Chapter 293, Laws of 1880, provides that "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. . . . 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 cause."

Appointment, suspension and removal of such officers were provided for, but no provision seems to have been made for dealing with a vancancy caused by resignation, or of dealing with a resignation when offered. The term of service having been fixed by law, and

not being subject to the will of the mayor and aldermen, the petitioner could be removed only as provided by law. In this case the lawful means of removal having failed, the defendant claims a vacancy in the office due to the alleged resignation. We cannot sustain such view of the law. It does not appear that the resignation was accepted before it was withdrawn.

It is contended that the petitioner had no right to withdraw his resignation. We do not agree with the defendant in this contention. We think the petitioner had the right to withdraw the resignation at any time before its acceptance. In the absence of a statute provision in cases of the kind, a resignation is not complete until it is accepted by competent authority,—in this instance the appointing power. As neither the petitioner nor the defendant on their own motion can create a vacancy, it follows that the term of service of the petitioner was not legally terminated, either by the alleged resignation or by the subsequent attempt to remove him. *Rogers* v. *Slonaker,* 32 Kan., 191; *Edwards* v. *United States,* 103 U. S., 471; *Commonwealth* v. *Krapf,* 94 Atl. Rep., 553 (Supreme Court Pa. April 12, 1915).

It is the opinion of the court that the petitioner is not barred from maintaining the petition by reason of the alleged resignation.

In accordance with the stipulation, the entry will be,

Record quashed.

WILBRA E. BILLINGS *vs.* FRANK E. BEGGS.

Knox. Opinion October 4, 1915.

Buildings. Consideration. Deed. Evidence. Exception. Title. Trover.

Action of trover for the value of a dwelling house now standing on the lot of land in Vinalhaven, on which it was built. The lot, containing only 7500 feet, was conveyed to Rufus A. Coombs in 1872 and he built the dwelling house thereon. March 1, 1876, after the house was built, Coombs gave a warranty deed of the land to Moses Webster. That deed recited a consideration of $100, and contained the following clause immediately after the description of the land: "This consideration does not include the buildings standing thereon." The title to the land has passed to the defendant. The plaintiff claims title to the dwelling house under a bill of sale of it from the widow and children of Coombs dated November 25, 1913. His contention is that the house was excepted from the conveyance to Webster under the clause quoted, and the construction of that clause is the real question presented.

Held:

1. Where the language in a deed claimed to have been used to make an exception or reservation, is doubtful, it is to be construed most strictly against the grantor and most favorable for the grantee.
2. If a grantor does not intend for a dwelling house to pass under his conveyance of the land on which it is built, and of which it forms a part, it is incumbent upon him to so provide in his deed by language free from doubt and uncertainty.
3. Where a deed of real estate contained the following clause immediately after the description of the land: "This consideration does not include the buildings standing thereon," with nothing further to indicate the purpose of its insertion, the literal meaning of the clause cannot be disregarded and a strained construction given to it as expressing an intention of the parties to the conveyance that the title to the dwelling house on the land conveyed did not pass to the grantee.
4. Contemporaneous entries made in the books of a large business corporation, regularly kept in the ordinary course of its business, by a person now deceased, whose duty it was to make the entries, and who had knowledge of the subject matter of the entries, and whose situation excludes all presumption of his having any interest to misrepresent the

facts by false entries, are admissible as original evidence of the facts so recorded.

On exceptions by plaintiff. Exceptions overruled.

This is an action of trover, in which plaintiff seeks to recover the value of a building situate in the town of Vinalhaven, Knox county. Plea, general issue. The defendant was allowed to introduce in evidence the books of the Bodwell Granite Company, to which admission of said books the plaintiff excepted.

The case is stated in the opinion.

Frank B. Miller, for plaintiff.

Arthur S. Littlefield, for defendant.

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

KING, J. Action of trover for the value of a dwelling house now standing on the lote of land in Vinalhaven on which it was built. The lot, containing only 7500 feet, was conveyed to Rufus A. Coombs in 1872 and he built the dwelling house thereon. March 1, 1876, after the house was built, Coombs gave a warranty deed of the land to Moses Webster. That deed recited a consideration of $100, and contained the following clause immediately after the description of the land: "This consideration does not include the buildings standing thereon." The title to the land has passed to the defendant. The plaintiff claims title to the dwelling house under a bill of sale of it from the widow and children of Coombs dated November 25, 1913. His contention is that the house was excepted from the conveyance to Webster under the clause quoted, and the construction of that clause is the real question presented.

The literal meaning of the clause is not uncertain. The consideration named in the deed did not include the value of the buildings thereon. Did the parties use the words of the clause literally, desiring for some reason to have it appear in the deed that the value of the buildings was not included in the $100 named in the deed as the consideration? Or did they insert the clause to make an exception of the buildings from the conveyance? It is an established principle that where the language in a deed, claimed to have been used to make an exception or reservation, is doubtful, it is to be construed most strictly against the grantor and most favorably for

the grantee. *Kuhn* v. *Farnsworth,* 69 Maine, 404; *Wellman* v. Churchill, 92 Maine, 193, 195. In this case the words of the clause in question certainly admit of much doubt as to whether they were used to express an intention of the parties that the dwelling house then constructed on this small lot of land conveyed was to be retained by the grantor and not pass to with the land. To give them that intendment would indeed require some constructive strain, which is not permitted in favor of a grantor whose own words are the subject of construction. Moreover, the subsequent acts of the parties and of those claiming under them do not support the plaintiff's theory that the title to the dwelling house did not pass with the land, for the house was not removed from the land, but has remained thereon and been used as the chief part of the premises for a period of nearly forty years. The dwelling house was a part of the land described as conveyed in the deed, "it having been annexed to the soil by the act of Mr. Coombs," as stated by the learned counsel for the plaintiff. If Mr. Coombs did not intend for the dwelling house to pass under his conveyance of the land of which it was a part it was incumbent upon him to so provide in his deed by language free from doubt and uncertainty. It would have been a simple matter for him to have done so. Not having done so, we think the clause in the deed now under consideration is not to be construed as expressing an intention of the parties to the conveyance, that the title to the dwelling house on the land conveyed was retained by the grantor.

This conclusion, that the dwelling house was not excepted from the conveyance, necessarily defeats the plaintiff's claim of title, and renders it really unnecessary to pass upon the plaintiff's other exception to the admission of certain evidence, but we will briefly consider the question there raised.

It appears by the bill of exceptions that the materials and labor for erecting the buildings in question were funished by the Bodwell Granite Company of Vinalhaven in 1874 to the amount of $610 and charged on the books of that company, in the first instance, against "Coombs House," and subsequently charged against Moses Webster's personal account with that company, of which he was vice-president, and he paid the charge. The book-keeper who made those entries on the books of the company is dead, but the handwriting of the

entries was identified as his. The books were shown to have been kept in the ordinary and regular course of business of the company, and to have been produced from the proper custody. These entries in the books of the Bodwell Granite Company relating to the charges against the "Coombs House" for materials and labor furnished in its construction, and the subsequent charges of the same to Mr. Webster and his payment thereof, before the deed to him from Coombs, was offered by the defendant, and admitted against objection, as tending to show a reason for the clause in question being inserted in the deed with its literal signification.

We think the entries admitted were material and competent. They were contemporaneous entries made in the books of a large business corporation, regularly kept in the ordinary course of its business, by a person now deceased whose duty it was to make the entries, and who had knowledge of the subject matter entered, and whose situation excludes all presumption of his having any interest to misrepresent the fact by a false entry. *Lord* v. *Moore,* 37 Maine, 208. In the recent case of *Arnold* v. *Hussey,* 111 Maine, 224, the rule for the government of the admission of this class of evidence is fully discussed and the decisions of our own court in enunciating and supporting it collated. We need only refer here to that decision, and to the decisions therein referred to, to show that the entries in the books of the Bodwell Granite Company admitted as evidence in the case at bar were admissible.

Finding no merit in any of the plaintiff's exceptions, the entry will be,

Exceptions overruled.

JAMES B. BARROWS *vs.* PARKER M. SANBORN.

Somerset. Opinion October 4, 1915.

Contract. Deceit. Fraud. Newly Discovered Evidence. Rescission. Sale.

1. Where a plaintiff, in an action of deceit in the sale to him of a farm, bases his ground of action on the claim that a small tract of land of little value, and which was never owned by the grantor, was fraudulently represented to be a part of the property being sold, the oral evidence in support of such claim should be clear, strong and convincing, amounting to something more than a mere preponderance of proof.

And this rule is especially applicable where the only evidence of the alleged fraudulent representation is the testimony of the plaintiff who, previous to the transfer, visited the property and thereafter accepted a deed containing a clear and specific description by metes and bounds of the real estate thereby conveyed.

2. From a careful study of the evidence presented at the trial, and independent of the evidence presented as newly discovered, the court is of the opinion that the plaintiff failed to prove by clear, strong and convincing evidence that the alleged fraudulent representation was made.

On motions by defendant. New trial granted..

This is an action on the case for alleged deceit in the sale of a farm situate in Skowhegan, in Somerset county. Plea, the general issue. The jury returned a verdict for the plaintiff. 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.

Merrill & Merrill, for plaintiff.

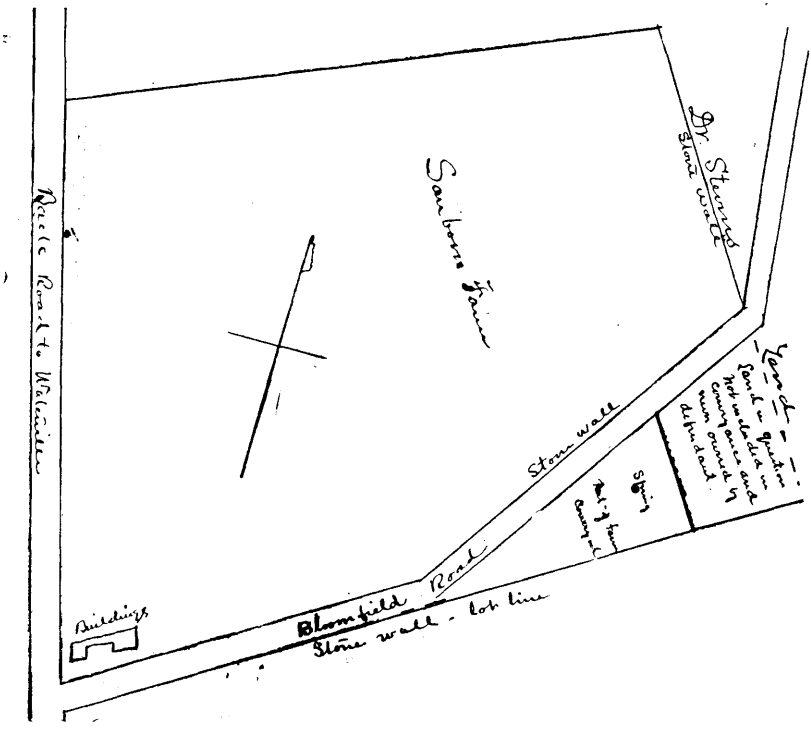
George W. Gower, for defendant.

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

KING, J. Action for alleged deceit in the sale of a farm. The case comes up on defendant's motions for a new trial; one, the usual motion on the ground that the verdict is against the weight of

the evidence, and the other on the ground of newly discovered evidence.

The claim set up by the plaintiff is that he was defrauded in the purchase of the farm in that the defendant's deed of conveyance to him did not include a small piece of land within the limits of the boundary lines of the farm which he says the defendant's agent pointed out to him. The piece in question is a small tract of less than an acre, and of little value, which a former owner had conveyed to an adjoining owner out of the extreme northeasterly corner of the original farm. It was never owned or claimed by the defendant, having been expressly excepted by metes and bounds from the deed to him given between three and four years previous. The following sketch indicates the location of the small piece and its relation to the property conveyed.



The plaintiff and his friend Eli C. Carpenter came to Skowhegan in the late afternoon of October 9, 1912, and consulted the Strout Agency as to the purchase of farms. Early the next morning they, together with Warren Swain and Shepherd Swain who represented the Agency, drove out to the defendant's farm. The plaintiff and Warren Swain rode in one team and Mr. Carpenter and Shepherd Swain in another. They came by the Back road on the westerly side of the main part of the farm, and the plaintiff testified that Warren Swain with whom he was riding did not stop his team at the farm buildings but continued up the Bloomfield road towards the easterly line of the lot and said that line "comes right up by that stone wall and continues right across and strikes that other stone wall by an elm tree;" that they were up there perhaps two minutes and then turned and came back to the defendant's dooryard where Mr. Carpenter and Shepherd Swain were and where the plaintiff met the defendant for the first time. After looking over the buildings the plaintiff decided to purchase the property, and thereafter he and the defendant, at the latter's suggestion, went out to see the wood lot situated westerly of the Back road. The plaintiff does not claim that any of the other boundary lines or corners of the property were specifically pointed out to him or that he particularly looked for them except so far as he examined the wood lot. On the afternoon of the same day the parties met in the office of Butler & Butler, attorneys in Skowhegan when and where the defendant produced his deed and directed the attorneys to prepare a deed of the same property from him to the plaintiff (including also the wood lot on the west side of the Back road) and such a deed was drawn, executed and delivered.

The plaintiff testified that he first learned that Dr. Stevens owned the small lot in question the next spring and then spoke to the defendant about it, but when asked if he made any complaint about it at that time, he said, "No, not to amount to anything. I asked him how much there was sold off there, and he said he didn't know." The plaintiff took no action to rescind the contract on the ground of the alleged fraudulent representation, but retained it with its profits and advantages, and now after nearly two years brings this action seeking to recover damages for the alleged deceit.

In *Parlin* v. *Small,* 68 Maine, 289, 291, a case, like the one at bar, for deceit in the sale of a farm on the ground that the boundaries pointed out embraced a small lot that was not in fact included in the conveyance, having been previously sold off, the court, by Peters, J., said: "It (a deed) should not be battered down for alleged deceits and misunderstandings, unless the proof of them is clearly and abundantly established. The plaintiff must prevail, not only on a preponderance of evidence, but such preponderance must be based upon testimony that is clear and strong, satisfactory and convincing."

The material issue at the trial of the case at bar was whether Warren Swain, who was the defendant's agent in the sale of the farm, drove the plaintiff by the defendant's buildings without stopping and up the Bloomfield road to the east line and made the fraudulent representation as claimed by the plaintiff, for it was not contended that the representation was made by anyone other than Warren Swain, nor by him at any other time.

The plaintiff introduced no evidence in support of that issue except his own testimony. On the other hand Warren Swain positively denied it, and Shepherd Swain, Mr. Sanborn, and Mrs. Sanborn each testified that Warren Swain and the plaintiff did not drive up the Bloomfield road as the plaintiff claimed, but that both teams turned into the dooryard at the same time. The circumstances disclosed also strongly tend, we think, against the plaintiff's claim that Warren Swain drove right by the owner's house, without stopping to present the prospective purchaser, and pointed out to him a specific line and corner of the property though not asked to do so. It seems unreasonable that Mr. Swain would have done that, and quite incredible that he did do it in view of his testimony that he had no knowledge of the true line or corner. There was testimony tending to show that when they returned to Skowhegan from the property they came by the Bloomfield road, and that circumstance may account for a mistaken belief on the plaintiff's part that he rode up to the east line before stopping at the buildings.

From a careful study of the evidence presented at the trial, and independent of the evidence presented as newly discovered, the court is of opinion that the plaintiff did not by a preponderance

of testimony clearly and abundantly prove that the alleged fraudulent representation was made.

Accordingly the entry must be,

New trial granted.

ELIZABETH L. GARMONG *vs.* JOHN B. HENDERSON.

Penobscot. Opinion October 6, 1915.

Accusing another man with seduction during the engagement with defendant. Breach of contract of Marriage. Conflicting Evidence. Contract of Marriage. Promise of Marriage. Unchastity of Plaintiff with another man.

1. The unchastity of the plaintiff in a suit for breach of promise of marriage with another man prior to or during an engagement of marriage with the defendant is a bar to the suit, unless at the time he made or renewed the promise of marriage relied upon, he knew or had been informed of her unchastity.
2. It being admitted that the plaintiff in an action for breach of promise of marriage, pending an engagement of marriage with the defendant, made accusations on oath in court charging another man with seduction during the period of the engagement and with the paternity of her unborn child, such accusations constitute a bar to the suit, unless the defendant after knowledge that the accusations had been made, made or renewed a promise of marriage. It is immaterial whether the accusations were true or false. Even if false, the making of such accusations was such conduct on her part as tended necessarily to destroy the confidence essential to connubial happiness, and to defeat the great purpose of the marriage relation. It released the defendant from the obligation of any promise he had made.
3. On a motion for a new trial on the ground that the verdict is against the evidence, if the evidence is conflicting, the court will not disturb the verdict, if it is found to be supported by evidence, credible, reasonable, and consistent with the circumstances and probabilities of the case so as to afford a fair presumption of its truth.

4. A verdict will be set aside as against the evidence, when it is not such as reasonable minds are warranted in believing, as when it is incredible or unreasonable, or inconsistent with the proved circumstances of the case, or when the evidence to the contrary of the verdict is so overweighing as to induce the belief that the jury were led into mistake, or were so moved by passion or prejudice as not to give due consideration and effect to all the evidence.
5. In this case, giving to the plaintiff such degree of credibility as her own statements entitle her to, the court are of opinion that her practically unsupported testimony is so overborne by proved circumstances, by her obvious disregard of the sanctity of an oath, by her own inconsistent conduct, by the mutual conduct of both, by the testimony, contradictory to hers, of witnesses apparently reputable, disinterested and credible, and by the probabilities of the case, inconsistent with her claim, as to induce the belief that the jury either did not sufficiently weigh all of the evidence in the case, or were influenced by sympathy, passion or prejudice.

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

This is an action of assumpsit brought by the plaintiff to recover damages of the defendant for a breach of a promise of marriage, alleged to have been made by defendant to the plaintiff. The defendant pleaded the general issue. The jury returned a verdict for the plaintiff. Defendant filed a general motion for a new trial.

The case is stated in the opinion.

John B. Merrill and Creed M. Fulton, for plaintiff.

L. B. Deasy, and Fellows & Fellows, for defendant.

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

SAVAGE, C. J. This is an action for breach of promise of marriage. The plaintiff recovered a verdict for $116,000. The case comes before this court on the defendant's motion for a new trial. The plaintiff in her writ alleged a promise on March 10, 1910, and another on November 6, 1910. And she testified that such promises were made. The defendant denies that he ever promised the plaintiff to marry her. And further he pleads, and relies upon as a bar, the unchastity of the plaintiff prior to the date of the first alleged promise, and between that date and the date of the second alleged promise; and that, pending the first alleged promise, she began two

criminal proceedings against one Roscoe D. Smith, one before a justice court in Iowa, and another before a grand jury, wherein she charged upon oath that she had been seduced by Smith under promise of marriage, during the period between the two alleged promises. The evidence is voluminous. The extent of it precludes any attempt to analyze it minutely in an opinion. It will suffice to state only the substance of so much of it as seems to be material and important.

The plaintiff is a native of Iowa. There, in school, she became acquainted with Roscoe D. Smith. He became her lover, and they were engaged to be married. In 1907 she came to Baltimore to pursue medical studies. The defendant was and is a resident of Washington, D. C. In 1909, when their story began, he was a widower with one child. At that time they were respectively about 29 and 39 years of age. In June or July, 1909, they casually met at a gentleman's residence near Washington where she was visiting. On that occasion he took her on a short automobile ride. A day or two later he called at the residence of her aunt in Washington, where she had informed him by telephone she was staying, and left for her a medical book which they had talked about at their first interview; but he did not then see her. About that time she says he took her on an automobile ride in and about Washington, during which he told her that he loved her, that he was coming to Bar Harbor, and that he urged her to visit him at Bar Harbor. This he denies. But at any rate, in July she came to Bar Harbor without informing him that she was coming. After getting there she notified him by telephone of her presence, and within a day or two he called upon her at her boarding place. They were in each other's company more or less for several weeks. They disagree as to the times of meeting, and the extent and nature of the acquaintance. But it is not questioned that he took her to ride one or more times, that they walked together, and that once or twice they went sailing in his motorboat. She says that he caressed and kissed her, and talked love to her. This he denies. At one time she was accused of larceny. She referred to him as her friend, and he was sent for. The property alleged to have been stolen was subsequently found in a room adjoining hers, and the matter dropped. He gave her money for her expenses. She says it was a loan. He says she asked for a loan

large enough to cover the expense of going to Des Moines, Iowa, where her parents lived. He ascertained the probable expense, and let her have the money. After leaving Bar Harbor she went first to Scranton, and then, three weeks later, to Philadelphia, where she remained four or five months, serving as nurse for an old gentleman who was ill. During that time she says that she visited the defendant three or four times in Washington at his suggestion and at his expense, being with him at various places, and that he called upon her once in Philadelphia. In February, 1910, she went to Washington, and lived for a time at her aunt's house. On several occasions the parties met. They rode together in his car, and dined together at one or more hotels. At one time they went to Baltimore in each other's company, returning the same night. In March, she says the defendant definitely promised to marry her sometime during that year. This he denies.

About the first of April, 1910, the plaintiff went to Des Moines. She soon met Roscoe D. Smith. On July 6, she made complaint on oath in a criminal proceeding against Smith, alleging that "on or about June 15, 1910 and 4th of July, 1910," he had seduced her under promise of marriage. Smith was arrested and put into jail. She did not appear on the day set for hearing the criminal proceeding, and prosecuted that no further. About the same time she began a civil suit against Smith for breach of promise of marriage, with an allegation of seduction. Attempts were made by Smith and his father to settle the civil suit, liability in which does not seem to have been denied. The witnesses say that a certain considerable sum of money was agreed upon for a settlement, but that she refused to sign a receipt or release, and so the settlement fell through. She admits being at meetings where attempts were made for a settlement. We think the overwhelming weight of the evidence compels the finding that she did agree to settle for a definite amount. Though she refused to sign a release, she still insisted that Smith was the father of her unborn child, and that he would have to take care of her and it. Upon the failure of the settlement she even attempted to get into the wagon of the elder Smith to go home with him for the avowed purpose of being taken care of. But an officer was called, and she was prevented. In the meantime, she wrote to the defendant informing him that she was in the family way, and asking for help.

Replying, July 16, he offered advice and financial aid, which latter he subsequently furnished to the extent of $100.

On September 21, 1910, the plaintiff appeared before a grand jury in Iowa, and testified on oath that she had been engaged to marry Roscoe D. Smith, that he had had sexual intercouse with her soon after the first of April in that year, that she was in the family way by him, that she had submitted to the intercourse on the strength of his promise to marry her, that she had asked him to fulfil his promise, and that he had said he would go to the penitentiary first. Upon this testimony, in November the grand jury returned an indictment against Smith for seduction. It does not appear that he was ever put upon trial.

The plaintiff returned to Washington the very last of October, 1910, and on November 6, she had an interview with the defendant at Hotel Driscoll, where she was staying. She charged him with the paternity of her child and she says that she told him that in order to protect him from any violence she had brought suit against one of her friends who had seduced a nurse at the hospital, that he, the defendant, expressed himself as under great obligation to her, and that they then and there agreed to be married sometime in the earlier part of the next year, the date not being then definitely fixed. Two days later she gave birth to a child at a hospital to which she had gone under an assumed name. The defendant visited her at the hospital one or more times, and she says gave her fruit and flowers. Afterwards they met, once in a hotel parlor, and at other times by appointment at various points on the streets of Washington. After the birth of the child and prior to March, 1911, he gave her about $900 in money. The defendant denies any promise of marriage after she returned from Iowa. He denies that she told him her proceedings against Smith in the criminal courts. He says that before that time he knew that she had brought a civil suit against Smith, or contemplated doing so. He says the meeting on November 6 was a stormy one, that she charged him with being the father of her child, and said that he would have to take care of her and take care of it, and that afterwards at one time she threatened to take the child to his father's house where he lived and leave it on the doorsteps. He says that his meetings with her after November 6, and his payments of money to her, were for the purpose of buying his peace, arrang-

ing a settlement with her, and avoiding a public scandal, and that she did at one time agree to settle for $900 in four instalments, one of which he paid.

The plaintiff says that shortly before the first of March, 1911, the defendant announced that the engagement was off. In April or May she followed him to Bar Harbor, and had an interview with him. She says that afterwards he telephoned her that she should have no more money from him, and that he would have nothing more to do with her. Soon after she brought proceedings in bastardy against him. A trial was had. We gather from certain inquiries made of witnesses by her counsel that the result of the trial was adverse to her. This suit followed. We have thus outlined the history of this case. We have omitted many details not without significance. There is much conflict between her testimony and that of the defendant and his witnesses, not only as to vital points, but as to details.

In considering a motion for a new trial on the ground that the verdict is against evidence it is not the province of the court to weigh the evidence for the purpose of determining the preponderance of it between the parties. That is the province of the jury. Where the evidence is conflicting, a verdict will not be disturbed, if it is found to be supported by evidence, credible, reasonable, and consistent with the circumstances and probabilities of the case, so as to afford a fair presumption of its truth, even though it may seem to the court that the evidence as a whole preponderates against the finding of the jury. A verdict will be set aside as against the evidence supporting it when the evidence is not such as reasonable minds are warranted in believing, as when it is incredible, or unreasonable, or inconsistent with the proved circumstances of the case; or when the evidence to the contrary of the verdict is so overweighing and so overwhelming as to induce the belief that the jury were led into mistake, or were so moved by passion or prejudice as not to give due consideration and effect to all the evidence.

Before considering the force and value of the evidence it is proper briefly to discuss certain features which bear upon the credibility of the parties themselves. At the outset, the burden was upon the plaintiff to establish a valid contract for marriage, subsisting up to the time of the alleged breach. The proof of such a contract, as the

record shows, comes almost entirely from the plaintiff's own lips. But she admits, or rather it is her avowed contention, that in the two court proceedings in Iowa in 1910 she deliberately swore falsely, and stated as facts matters that had absolutely no existence. And the only kind of a moral justification which she suggests for her false oath and perjury is that she did not raise her hand "very high" when she was sworn, and didn't call it an oath." She excuses her proceedings by saying that her purpose was, not to protect the defendant from scandal, but to protect him from the violence of her family, as she expected him to come there and marry her; and also to compel Smith to marry the nurse whom she says he had seduced.

A little reflection will show how utterly flimsical and baseless these reasons are. They are unbelievable. If she had reason to expect that the defendant was going to Iowa to marry her, what reason could she have for expecting him to marry her after he should have reached there, and learned that she had made her shame public by swearing the paternity of her unborn child upon another man? And if he would be willing then to marry her, what reason could she have for thinking that her family would inflict violence upon a man who had come to cover her disgrace as far as it could be done, and to give her child a name, by marrying her? And how could she suppose that she could force Smith, her former lover, to marry the nurse by falsely charging him with seducing herself? What inducement could it be to him to marry another woman, for this woman falsely (as upon her theory he would have known it to be) to charge upon him the paternity of another man's child? It is contrary to all experience, and to human nature itself, for a woman to bring such a charge against a man to force him to marry another woman. Had the plaintiff testified that she brought these charges against the former lover, Smith, to force him to marry her, that would be believable. It cannot reasonably be conceived otherwise than that these excuses are forged, and clumsily forged, by the plaintiff to meet the exigencies of the situation. It must be regarded as self evident that a woman such as the plaintiff describes herself to be with respect to the Iowa court proceedings, has little or no regard for the sanctity of an oath, and its binding obligation to tell the truth. It is equally evident that the plaintiff either was a perjurer in Iowa, or is one now. Such moral callousness reaches and undermines the very

groundwork of judicial decision. "What ground of judicial belief," asked Judge Story, "can there be left when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?" The Santissima Trinidad, 7 Wheat., 283.

On the other hand, it must be said with equal plainness that the jury were undoubtedly warranted in believing either that the defendant was in reality the father of the plaintiff's child, or that he had reason to believe that he was; and that he swore falsely when he testified that he never had had illicit relations with her. Although neither party swears to it, the greatly preponderating effect of the evidence, weighed in the light of their conduct, would warrant a finding that they were unduly intimate from nearly the beginning of their acquaintance. And of this it is probable that the jury took full account.

We are now in position to examine the evidence respecting the alleged promises of marriage. And first the promise in March, 1910. The proof of that promise in terms comes from the plaintiff alone. As a premise to that promise the plaintiff says that love making on the defendant's part began in Washington and was continued in Bar Harbor in July and August, 1909, that the defendant persuaded her to leave her medical studies, told her she would not need them, and told her that he expected to make her his wife. This is denied. We do not say that as between the differing testimony of the parties themselves, her statement might not be taken as the true one. He was certainly showing her some attention of some kind. But the after conduct of the parties, and particularly their correspondence, fails to corroborate the plaintiff, but is indicative rather that there was no engagement of marriage, nor contemplated engagement. They corresponded pleasantly from time to time, from August, 1909, to March, 1910. In the first three weeks after she left Bar Harbor, the "ardent wooer," as she says he was, wrote to her once, and then to excuse the non-fulfilment of an appointment. In all nine letters or empty envelopes of his were introduced by the plaintiff, which were written within the period named. In the letters he addresses her as "My dear Miss Garmong," and signed himself "Sincerely yours." There is not one word of love or sentiment in any degree in any of these letters. There is not one word

about engagement or marriage. There is not one word which indicates any intimate relation whatever between them. They are such letters as any gentleman might write to a pleasant lady acquaintance. It does not appear that she ever complained to him that the tone of his letters was any different from what she had reason to expect. It is quite singular in view of the plaintiff's description of the defendant's attitude to her, that not one written word of his remains which has any tendency to show a lover's affection for her.

The plaintiff says, indeed, that she had other and tenderer letters from him which she has destroyed. It is difficult to believe that a woman would voluntarily destroy the letters expressing the affection of her lover and the hopes of their future marriage, and at the same time preserve and retain only those which possessed no significance, the mere platitudes of good fellowship. And the inquiring mind asks, why were there two kinds of letters, so dissimilar? If there were other letters, letters of another kind, warm letters, affectionate letters, such letters as she suggests they were, interspersed among those which have been kept and produced, they must have been curious oases of love in a desert of platonic friendship.

She was five months in Philadelphia. During that time he called upon her once, he living in the midst of affluence in Washington, and she whom he expected to make his wife, as she swears he told her, earning her living in Philadelphia, as a nurse. And when she visited Washington three or four times at his instance, and while she was in Washington afterwards, she did not go to his house. He apparently did not call upon her at the home of her aunt except to take her from there to go to other places. She says they went where they could be alone with each other. He showed her no public attention. Weighing both her affirmation and his denial in the light of their conduct, and imputing to each the degree of credibility which we think is deserved, we feel bound to say that the evidence does not support her contention that they were avowed lovers in anticipation of marriage from the Bar Harbor meetings up until the next March.

The next period is from March to November, 1910, during all of which time she says they were under an express and formal engagement to marry. This is the period during which she sued Smith for

breach of promise of marriage, and prosecuted him criminally in two courts for seduction. We have already discussed the reason she gives for the prosecutions,—reasons without reason. In view of the unreasonableness of her reasons, is it not altogether improbable and unreasonable that she would have commenced these prosecutions, and also have sued Smith in a civil action for breach of promise of marriage, if at the time she believed that she was engaged to the defendant, and expected him to marry her that year? It would seem so, unless in fact her charges against Smith were true, which she denies.

So far as correspondence is concerned, what has been said respecting the former period applies as well to this. He still addressed her as "My dear Miss Garmong," or "My dear Miss G," and signed himself as formerly, "Sincerely yours." In all of these letters so far as they appear in the record, (and there are only five which she has preserved) there is no word of sentiment. She was in Iowa, and she says she expected him to come there to marry her. Yet nothing in these letters, at least, affords the slightest ground for such an expectation. Indeed, in them all there is no suggestion of any intimate relation between them, proper or improper, except that in September he wrote, "it seems inevitable that I eventually shall be held to blame owing to our acquaintance, and that Bar Harbor trip you took;" and except such inferences as may be drawn from the letter of July 16, in which he advised her, and promised to send money to her after she had written to him that she was in a delicate condition. In a letter of July 11, apparently the last one before she disclosed her condition to him, he addressed her as "My dear Miss Garmong," congratulated her on her success as a lecturer, about which she had written to him, and closed by saying *"If you write,* please address me, 'Care of Reading Room, Bar H.'" The italicizing is ours. And these are letters, it is claimed, from an affianced husband to a betrothed wife, under an engagement which she says sprang from mutual love, and written when, prior to her July letter, he had no motive to conceal his sentiments from her, at least.

He did not see her during this period. He was once at St. Louis, but he did not go to Iowa. She says she was expecting him constantly. After she returned to Washington, the last of October, she

did not see him until November 6, and there is no suggestion that he was not in Washington during that time. If the plaintiff's right of recovery depended upon proof of the promise alleged to have been made in March, 1910, we should have to say that the evidence of the conduct of both parties, all of the evidence, except her own unsupported word, is wholly inconsistent with the theory that a contract for marriage was subsisting between them.

But in the end, whether such a contract had been made, or not, is not so very important. It is important only as it bears upon the probability or improbability that a new contract was made, or an old one renewed, in November. We say it is relatively unimportant because of the legal aspect of certain features now to be considered upon which our judgment must rest.

The defendant contends that the plaintiff was unchaste with other men, before the time of any alleged promise on his part. He also contends that during the pendency of the March contract, if contract there was, she was unchaste with Smith, and that she published her unchasity to the world by her sworn complaint in the justice court, by her testimony on oath before a grand jury, and by her declarations to divers persons out of court, to say nothing of her civil suit against Smith for breach of promise of marriage. If the plaintiff was unchaste with another man prior to or during any engagement of marriage with the defendant, it is a bar to this suit, unless at the time he made or renewed a promise of marriage, now relied upon, he knew or had been informed of her unchasity. The authorities all agree that the unchastity of a woman before or pending a promise of marriage, if unknown, and if the promise be not renewed after knowledge, legally justifies a man in the breach of any promise. The presumed chastity of the woman is one of the essential elements of a contract for marriage. A man may assume that the woman he promises to marry is chaste, and if he enters upon an engagement upon that assumption, and afterwards discovers that she has been unchaste, he will not be bound by his promise. *Berry* v. *Bakeman,* 44 Maine, 164; *Snowman* v. *Wardwell,* 32 Maine, 275; *Foster* v. *Hanchett,* 68 Vt., 321; *McKane* v. *Howard,* 202 N. Y., 181. See also, authorities collected in note to *Van Houten* v. *Morse,* 26 L. R. A., 430.

So the sworn accusations against Smith afforded the defendant ample justification for the breach of any promise he had made previously, and constitute a bar to this suit, unless the defendant after knowledge that the accusations had been made, made or renewed a promise. And it is immaterial in this respect whether the accusations were true or false. If true, they bring the case within the principle just now stated. If false, the making of the accusations was such conduct on her part as tended necessarily to destroy the confidence essential to connubial happiness, and to defeat the great purposes of the marriage relation. It struck at the foundation of marital confidence. *Berry* v. *Bakeman,* 44 Maine, 164.

With regard to the contention that the plaintiff was unchaste prior to the making of any alleged promise, the defendant chiefly relies upon the testimony of Smith, who testifies that he seduced her. The plaintiff denies it. If true, there is no pretense that the defendant ever knew it. Without corroboration it may well be that Smith's testimony, under the circumstances, should not outweigh the plaintiff's. But we think there is significant corroboration. First, there is the great improbability that she would have made such a charge against a man who had been her friend and lover, and who up to that time apparently had continued to be on friendly terms with her, unless he had at some time been sexually intimate with her. Then, in a letter from her to him, written June 20, 1908, after asking him to visit her in August, she used language somewhat obscure or veiled, which we are unable to interpret otherwise than as signifying that undue sexual intimacy had existed between them. The language referred to is this: "Thanks for your compliments, dearest, but so far I've had none of that cheap love you once spoke of, and those other elements only belong to the highest attributes of womanhood. The fact that you have owned forsaken love is sufficient. If I may ask of you faithfulness and on the contrary to mine it is untrue, may I then use the limit of my nerve power to satisfy the longing for you with another in your absence. Will await an answer. Then with your permission will not feel deceitful, but you won't let me, will you, but I *must.* August is too far away."

The claim that she was unchaste with Smith in Iowa in 1910, rests upon her sworn complaint that he had sexual intercourse with her "on or about June 15 and the 4th of July," her testimony before the

grand jury that he had such intercourse with her "soon after" the first of April that year, and her declarations made to Smith and to four or five others in Iowa, in Washington and in Maine. The witnesses testifying to such declaration seem to be reputable and disinterested. None of them, except possibly Smith, who it is urged, is seeking revenge, apparently has any motive to swear falsely. Their testimony, we think, shows internal evidence of truth. In addition, it is true we think beyond reasonable doubt that she attempted to get money from Smith or his father on account of the alleged paternity of her unborn child, and, the settlement failing, threatened to throw herself on them for support. If she was unchaste with Smith in April, or June, or July, there is no claim that the defendant was ever informed of it. She denies making the unsworn declarations. She claims that the sworn statements were perjuries on her part. That she made the sworn statements that Smith had seduced her in 1910 is not in dispute. If she told the defendant that she had made them, and then with that knowledge he promised to marry her, no reason is shown why he should not answer for the breach of that promise. But if she did not tell him, and he did not know of these accusations against Smith, he was justified upon discovery in breaking any promise he then made to her. And as we have already said, her conduct in this particular had released him from the binding obligation of any promise he had previously made.

Did she tell him? And did he thereafter promise? In her direct examination she says only that she told him that in order to protect him from any violence, she had brought a suit against one of her friends who had seduced a young nurse. On re-direct examination, her counsel asked her if she had told the defendant fully what she had charged Smith with, and why. She answered, "Yes, sir." Later on she said "I told him of the whole situation, just what I had done in the west. Then we discussed our plans for the child's future, and we also discussed our home and our marriage." She was asked on re-cross examination to state all that she had remembered of the substance of what she told the defendant, and answered, "I said to him that I had protected him by holding another man responsible, a former sweetheart of mine, for my condition." She was pressed to state any other details that she could remember of what she told

the defendant in this regard, and she professed that she could remember nothing more. Under the circumstances, the burden was strongly upon her to show that she told him fully and particularly what she had done. If the particulars she gives were all that she told the defendant, they fell far short of the whole truth which he was entitled to know. He was entitled to know, not alone that she had "sued" Smith, and had "held another man responsible," but also that she had prosecuted Smith criminally in the Justice court for seducing her that year, and that she had been the complaining witness before the grand jury on the same charge against him. Did she tell the defendant these particulars? Did she tell him that in the attempt of Smith to settle with her she had charged him with the paternity of her unborn child in the presence of divers persons? He denies it.

If we assume that she did tell him, did he thereupon renew a promise of marriage? She says he did, and with expressions of gratitude and affection. He says he did not. When we consider all the circumstances surrounding these two people, such a proposition on the face of it seems innately improbable, and well nigh incredible. And yet it must be granted it is not impossible. If there were no further light, we might say that a jury might be warranted in believing even so improbable a story. But in our judgment the after conduct of the parties is inconsistent with her claim. Although her accouchement as it turned out was only two days distant, it would seem that the defendant took no part in the arrangements for the expected illness of his betrothed wife. It may be easily understood that he might not at that time wish to appear very prominently in the matter. But she testifies only that he agreed to follow her on to New York where the child was expected to be born, and to provide her with money. The child was in fact born at a hospital in Washington. He visited her in the hospital. They disagree as to the number of times. He paid her money from time to time. They were both in Washington all that winter, but after November they did not dine together as they had done before. They did not ride together as they had done before, except in the evening, and then he did not call for her at her boarding place, but took her at some place on the streets which they had previously agreed upon. They had meetings by appointment under the shade

of evening, at divers places on the public streets, and once in a hotel parlor. There is no evidence that he called upon her after she left the hospital. He wrote her no affectionate letters, but merely notes making appointments. Yet she says that during all this time he continued to be affectionate, and that at their meetings they pleasantly discussed their future life as man and wife, and the nurture of their child, whose existence he desired should be unknown for the time being. He says that she held over him the imminent danger of public scandal and threatened to leave the child upon his father's doorsteps. He says the meetings with her were had in an endeavor on his part to reach a pecuniary settlement with her, and that he paid money to her to prevent publicity. Surely it may be said that the conduct of these parties was not as consistent with her claim of their continued affectionate relations in the expectation of marriage as it was with another relation which he might have supposed that he bore to her. Discussion of details cannot make it plainer. Even if she were not self-impeached, the probabilities would seem to be against the truthfulness of her contention.

But finally, and perhaps more significant than all the rest, is the fact that the plaintiff, who says that she was engaged to the defendant until the first of March, 1911, and that they had continued on terms of mutual affection, followed him to Maine, after the alleged breach, and began, not a suit for breach of promise of marriage, but a prosecution against him for bastardy. It was a most unlikely election on her part. If she then thought that he had promised to marry her, and had broken his promise, is it within any bounds of likelihood that she would have resorted to a remedy for bastardy, in which the damages recoverable would relate only to the expense of supporting her child, instead of pursuing the more ample one for a breach of promise to marry in which she might expect to recover large damages for pecuniary loss, and wounded sensibilities, enhanced by the fact of his seduction, if she had chosen to allege it? We think not. Such is not human nature. Such is not the course that would be pursued by an unjustly discarded woman against her faithless lover who had been affianced to her.

We have omitted many minor considerations not without significance. We have omitted for the most part consideration of the particulars of the defendant's testimony. As must be done on a

defendant's motion for a new trial, we have examined the record from the viewpoint of the plaintiff's testimony, to see if it is sufficiently credible to sustain the verdict, when weighed in connection with the circumstances of the case, which we think should be regarded as proved. We do not say that there is no evidence to sustain the verdict in this case, for the plaintiff has testified. But we do say that upon the whole record, giving to the plaintiff such degree of credibility as her own statements entitle her to, her practically unsupported testimony is so overborne by proved circumstances, by her obvious disregard either here or in Iowa, of the sanctity of an oath, by her own inconsistent conduct, by the mutual conduct of both, by the testimony, contradictory to hers, of witnesses apparently reputable, disinterested and credible, and by the probabilities of the case inconsistent with her claim, as to induce the belief that the jury either did not sufficiently weigh all of the facts of the case, or were influenced by sympathy, passion or prejudice. Even the amount of damages awarded, considering all the circumstances, furnishes manifest evidence that the real merits of the case have not been properly passed upon by the jury. *Hill* v. *Jones,* 109 Minn., 370. We do not think we would be justified in accepting the verdict as the basis of judgment. *Rovinski* v. *Northern Assurance Co.,* 100 Maine, 112. Justice requires that it be set aside.

Motion for a new trial sustained.

STATE OF MAINE *vs.* J. WASILENSKIS.

Androscoggin. Opinion October 9, 1915.

Complaint. Demurrer. Description of Person. Exceptions. Misnomer. Plea in Abatement.

Exceptions to overruling of defendant's demurrer to a complaint charging one by the name of J. Wasilenskis with the illegal possession of intoxicating liquors.

Held:

1. Letters of the alphabet, consonants as well as vowels, may be names sufficient to distinguish different persons of the same surname.
2. If the name of the defendant, by which he was christened or generally called or known, be other than that by which he is designated in the complaint or indictment, it is a case of misnomer and should be pleaded in abatement.

On exceptions by defendant. Exceptions overruled.

This is a complaint charging one J. Wasilenskis with the possession of intoxicating liquors. The defendant demurred to said complaint. The presiding Justice overruled the demurrer and the defendant excepted to the overruling of said demurrer.

The case is stated in the opinion.

William H. Hines, county attorney, for the State.

H. E. Holmes, for defendant.

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

BIRD, J. This case is before this court upon exceptions to the overruling of defendant's demurrer to a complaint charging one by the name of J. Wasilenskis with the illegal possession of intoxicating liquors. It is conceded that the question intended to be raised by the demurrer is whether or not this description of the defendant is sufficient.

It does not appear from the complaint, demurrer and joinder, and these constitute the record, that defendant has any other or any

more of a name than J. Wasilenskis. Letters of the alphabet, consonants as well as vowels, may be names sufficient to distinguish different persons of the same surname: *State* v. *Cameron,* 86 Maine, 196, 197 and cases cited: *State* v. *Libby,* 103 Maine, 147, 150. See also *Dutton* v. *Simmons,* 65 Maine, 583, 585.

If the name of the defendant by which he was christened or generally called or known, be other than that by which he is designated in the indictment, it is a case of misnomer and should be pleaded in abatement. Mr. Heard's statement of the law is "Whatever mistake may be made in his name, the defendant can take advantage of it by plea in abatement only." Heard Cr. Pl., 51. We think it may be adopted as correct, with two possible exceptions which, in this case, it is unnecessary either to consider or to state.

Exceptions overruled.

ALBERT A. CONANT *vs.* GRAND TRUNK RAILWAY COMPANY.

Oxford. Opinion October 9, 1915.

Bailee. *Collision.* *Contributory Negligence.* *Damages.* *Flagman.* *Negligent.* *Warning Signal.*

Action on the case to recover damages to a Ford automobile resulting from a collision between it and the defendant's train, on September 27, 1912, at about five o'clock in the afternoon, at Hicks Crossing, in the town of Norway. The case comes up on report of the evidence.

Held:

1. The evidence shows that the required signals by whistle and the ringing of the bell were given by the train as it approached the crossing.
2. Where no request has ever been made of a railroad corporation under Revised Statutes, Chapter 51, Section 71, to maintain a flagman, or gates or automatic signals at a railroad crossing, the railroad company is not to be held negligent, as a matter of law, in not maintaining such.
3. Whether this crossing is "near the compact part of a town" within the meaning of Revised Statutes, Chapter 52, Section 86, may not be free from doubt. But if it be assumed that the statute applies in this case, and,

therefore, that the speed of the train exceeded the rate specified in the statute, that fact does not conclusively show that the defendant was negligent in so running its train under the circumstances.

4. There is no sufficient evidence in the case that would warrant a finding that the defendant was negligent in fact in the management or speed of its train at the time and place of the accident, under all the circumstances disclosed.

5. The plaintiff, having failed to prove any negligence on the part of the defendant, is not entitled to recover; and, therefore, it becomes immaterial whether or not his car, at the time of the accident, was in the control of the driver as bailee.

On report. Judgment for defendant.

This is an action on the case brought by Albert A. Conant to recover for the value of a Ford automobile alleged to have been damaged by the negligence of defendant in a collision on the 27th day of September, 1912, at Hicks Crossing, in Norway. Plea, the general issue. At the conclusion of the evidence, by agreement of parties, 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.

Fred R. Dyer for plaintiff.

Clarence Hight, H. P. Sweetser and James S. Wright, for defendant.

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

KING, J. Action on the case to recover damages to a Ford automobile resulting from a collision between it and the defendant's train, on September 27, 1912, at Hicks Crossing, so called, in the town of Norway. The case comes up on a report of the evidence, "the court to determine the question of liability of defendant," the parties having agreed on the amount of damages to be assessed in case the defendant is found to be liable.

In considering and weighing the evidence, therefore, the court is acting with full jury powers.

We think the evidence clearly shows the following: The plaintiff, living in Hebron, directed his son, Forest B. Conant, sixteen years of age and who had been driving the automobile about three months, to take the car to Smith's garage at South Paris in order

that some trouble with the engine causing "skipping" might be remedied. Young Conant took with him William E. Walker, a fellow-student at Hebron Academy, and also invited two young ladies to go with them. They left Hebron about four o'clock in the afternoon and drove directly to the garage in South Paris, the distance from Hebron being about six miles. Young Conant, leaving the car outside the garage, went in and saw Smith who came out to the car and said he would need to drive it to best determine the trouble, whereupon Conant told him to go ahead and cranked the car for him. Smith got in behind the wheel, with Conant beside him, and drove the car along Pleasant street towards Norway. Walker and the two girls were on the back seat.

From the defendant's depot at South Paris a short branch line track runs from the main line to Norway a distance of about a mile and a half. Pleasant street, leaving South Paris and going towards Norway, runs quite near and generally parallel with the Norway branch track. For the distance of about half a mile from the depot in South Paris the branch track is on the left-hand side of Pleasant street going towards Norway. It then crosses the street obliquely, and at grade, called Hicks Crossing, and continues to Norway on the right hand side of the street. The trains over the branch are light and few in number, being drawn by an engine equipped to run forward or backward, having a head-light, pilot and cow-catcher on the end of the tender the same as on the front of the engine. It is admitted that the situation at the crossing at the time of the accident was substantially as shown in two photographs introduced. They were taken from points in Pleasant street, one 91 feet, and the other 133.6 feet from the crossing towards South Paris. Those pictures disclose that from the points in the street where they were taken a train coming from Norway could be seen when it was some little distance back from the crossing. Pleasant street appears to be straight and to have little or no grade for some distance on either side of the crossing, and, generally speaking, the land through which the branch track is located towards Norway of the crossing seems to be comparatively level.

As the automobile came along Pleasant street from South Paris towards this crossing a train, consisting of the engine and tender drawing an empty coal car and a loaded box car, was approaching the

crossing from Norway at a speed of from ten to fifteen miles an hour. The engine was at the head of the train towards South Paris and running the tender first. The automobile came along the street to the crossing at the rate of about twenty miles an hour and struck the side of the tender on the crossing, causing the damages complained of. Neither Smith who was driving the car, nor Conant who sat beside him, nor either of the others in the car, gave any care or attention whatever to the fact that they were driving upon a railroad crossing. Mr. Smith, who was killed in the collision, was holding his head down and apparently looking down and listening to the engine of the automobile. Young Conant was turned towards the other young people on the back seat, and they with him were joking and "kidding" those in an old Reo car behind them which they had outspeeded. The evidence will justify no other conclusion than that there was gross carelessness in the management of the automobile as it approached the crossing, and that all the people in the car were negligent.

But it is the contention of the plaintiff, and he bases thereon his right to recover, that Smith, the driver of the car at the time of the accident, had so far taken the car into his possession to repair it that he had become the plaintiff's bailee of it, and, therefore, that Smith's negligence is not imputable to him, being a bailor, so as to debar him from recovering for any injury to the property bailed caused by the defendant's negligence, although the negligence of Smith contributed thereto.

But we do not find it necessary to decide whether the car at the time of the accident was in the control of Smith as a bailee of the plaintiff, or still in the control of young Conant as the plaintiff's agent, for we are of the opinion that the plaintiff's case fails in limine, in that there is no sufficient evidence of any negligence of the defendant which is accountable for this collision.

The plaintiff alleges in his writ in substance and effect that the defendant was negligent in the following particulars: that it did not give the required warning signals of the approach of the train by whistle and ringing of the bell; that it did not provide a flagman or gates or some automatic signal to warn persons of the approaching train; and that it operated its train over this crossing, which is alleged to be near the compact part of a town, at a rate of speed

greatly in excess of that allowed by law, and with the engine running backward.

We cannot here take space to give an analysis of the evidence showing in extenso wherein it fails to sustain the plaintiff's allegations and contentions that the defendant was negligent in the operation of its train and thereby caused the collision. It would be profitless to do so. We will therefore briefly state the conclusions we have reached after a study of the evidence in the light of the arguments urged on the one side and the other.

1. The evidence abundantly shows that the required signals by whistle and the ringing of the bell were given as the train approached the crossing.

2. It is admitted in the case that no request has ever been made to the defendant by town authorities, or by any public commission of the State, for the establishment of a flagman, or gates, or automatic signals at this crossing. It cannot, therefore, be held as a matter of law that the defendant was negligent in not providing such at the crossing. *Sykes* v. *Maine Central Railroad Co.*, 111 Maine, 182, 183. Was the defendant negligent in fact in not providing a flag man, or gates or automatic signals at this crossing? We think not. An examination of the situation at this crossing as disclosed in the photographs shows that the traveler when at a safe distance from it can see a train approaching it from Norway at a considerable distance back from the crossing, and, further, that there are no deep cuts or embankments, or high blocks of buildings to prevent a traveler hearing the warning signals and the noise of an approaching train. The evidence plainly shows that this crossing is not one where a train may suddenly come upon a traveler unawares from behind some obstruction. On the other hand, a train approaching the crossing is in plain view for a sufficient distance to enable any reasonably prudent person in the exercise of due care to avoid a collision with it. In view therefore of the situation at the crossing as disclosed, and the limited amount and kind of train service over it, the court is clearly of the opinion that the defendant should not be held negligent in fact because it did not maintain there a flagman, or gates, or automatic signals.

3. The train approached the crossing at a rate of speed not exceeding fifteen miles an hour, indeed practically all of the wit-

nesses estimated its speed at from ten to fifteen miles an hour. But the plaintiff contends that notwithstanding the low rate of speed of the train the defendant was negligent because it violated the provision of section 86 of chapter 52, Revised Statutes, which reads: "No engine or train shall run across a highway near the compact part of a town at a speed greater than six miles an hour, unless the parties operating the railroad maintain a flagman, or a gate, or automatic signals ordered or approved by the railroad commissioners, at the crossing of such highway."

Whether this crossing is "near the compact part of a town" within the meaning of the statute may not be free from doubt. But if it be assumed that the statute applies to this crossing, and, therefore, that the speed of the train over it exceeded the rate specified by law, that fact does not conclusively show that the defendant was negligent in so running its train under the circumstances. In *Moore* v. *Maine Central R. R. Co.*, 106 Maine, 297, 304, this court said: "The running of a train faster than the statute permits is not negligence per se." It is competent evidence to be considered on the question whether in fact the defendant was negligent in running its train at a dangerous rate of speed at the time and place and under all the circumstances disclosed, but it is not conclusive.

We have already pointed out that the situation at the crossing was such that the traveler on the highway when at a safe distance from the crossing can see a train approaching from the direction of Norway. In further confirmation of that the conductor of this train testified that he was standing between the engine and tender looking ahead and that when the train was about 100 feet back from the crossing he saw the automobile "coming around the bend there" and that it "must have been two hundred fifty feet, and perhaps a little more" from the crossing. The engineer was in his seat looking towards the crossing and he first saw the automobile when it was "one hundred fifty feet to two hundred feet. I should judge" from the crossing. The brakeman stood on the pilot of the tender at the extreme head of the train, and he testified that the automobile was two hundred and fifty feet from the crossing when he first saw it. As showing that the rate of speed of the train was well within the estimate of the witnesses, and probably less than fifteen miles an hour, the brakeman, when he saw that the automobile did not stop

and would strike the tender near where he stood, jumped off on the other side, in about the middle of the street, and did not fall down. He said, "when I stepped off, I made one step. I let the train go by. I waited for the train to go by." Four other travelers on Pleasant street at the time and in the vicinity of the crossing testified that they heard the whistle of the train as it approached the crossing, and another heard the ringing of the bell, but did not remember hearing the whistle. That testimony confirms what has already been stated that the situation at this crossing is such that the warning signals of a train coming from Norway can be readily heard by travelers approaching the crossing.

After a careful examination and painstaking consideration of all the evidence, the court is of the opinion that there is no sufficient proof that would warrant a finding of negligence on the part of the defendant in the management or speed of its train at the time of the accident. Accordingly the entry must be,

Judgment for defendant.

KATHERINE L. MCMANUS *vs.* PEERLESS CASUALTY COMPANY.

Cumberland. Opinion October 21, 1915.

Application. Beneficiary. Contingent Right. Evidence. False Answers. Insurance. Occupation. Vested Interest. Warranties.

The policy in suit provides that "The consent of the beneficiary shall not be requisite to the surrender of this policy nor to a change of beneficiary."

Held:

1. That under the terms of said policy, the beneficiary, who is the plaintiff, does not have a vested interest.
2. That the applications of the insured to the Prudential Insurance Company, which were offered in evidence and excluded, should have been admitted.

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

Action on a policy of insurance issued by defendant to George M. McManus, late of Brunswick, deceased, the plaintiff being the beneficiary named in said policy. Plea, the general issue, with brief statement. The jury returned a verdict for plaintiff, and defendant filed a motion for a new trial and had exceptions allowed to the exclusion of certain evidence.

The case is stated in the opinion.

Clement F. Robinson and Arthur L. Robinson, for plaintiff.

Charles G. Keene, Barrett Potter, and Anthoine & Anthoine, for defendant.

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

SPEAR, J. This is an action in assumpsit on a policy of insurance issued by the defendant company to George M. McManus, late of Brunswick whose widow and beneficiary is the plaintiff. The policy provides for the payment of five thousand dollars to the beneficiary in the event of the death of the insured by accident. The insured died on February 21, 1914, as a result of an accident which occurred on February 2, 1914, as admitted by the defendant, but the defendant disputed liability because of certain statements appearing in the application annexed to the policy.

As the exceptions are decisive in this case, there is no occasion to consider the motion. The main question in the exceptions, was whether McManus' occupation was truly stated in the application. The statements in the application were warranted by him "to be complete and true and material and binding" and the warranty was reaffirmed in the policy and a copy of the application was endorsed on the policy. Accordingly, untrue answers in the application would make the policy void. *Johnson* v. *Insurance Company,* 83 Maine, 182; *Boston* v. *Insurance Company,* 89 Maine, 266; *Strickland* v. *Casualty Co.,* 112 Maine, 100. In the latter case it is said, "that statements in the application untrue in fact vitiated the policy is settled law." The defendant contends that the application said McManus was a hotel proprietor and teaming contractor, supervising only. It was admitted that he operated a summer hotel or boarding house, but claimed that he was also a farmer and a teamster; and if so, the policy was void, and for two reasons: (1)

because the answer was untrue, and (2) because the occupations of farming and teaming were classified by the defendant in its manual as more hazardous than was stated in the application. On this issue, touching the truth of the application, the defendant was allowed to go back in the introduction of testimony to September, 1912, fourteen months before the date of the application, to show what the occupations of the insured were during that time, and numerous witnesses testified that he was then both a farmer and a teamster, the defendant relying upon the presumption of the continuance of such occupation. 16 Cyc. Evidences, 1052-54; Greenleaf Evidences, Par. 41. The defendant then offered three exhibits. They were all applications of McManus to the Prudential Insurance Company of America for the reviving of policies on his life previously issued by that company which had lapsed for non-payment of premiums. They were dated November 14, 1912; July 11, 1913; and October 24, 1913, respectively. That dated October 24, 1913, being within 10 days of the date of the application upon which the policy in suit was issued. McManus was called upon in each of these applications to state what his occupation was at the time of the application and, in each, said he was a farmer. These exhibits were offered to corroborate the witnesses who had testified that McManus was a farmer; they were excluded. The question, therefore, is, whether the admissions of the insured was admissible against his beneficiary. If McManus were living and had brought an action on the policy to recover a sick benefit, no doubt the Prudential applications would have been admissible against him. Is his widow and beneficiary so in privity with him that they are admissible against her? This is the only question on this branch of the case. And this further depends upon the inquiry whether the widow and beneficiary by the terms of the policy had a vested interest in the policy. Article 20 (d) of the policy provides that "the consent of the beneficiary shall not be requisite to the surrender of this policy nor to a change of beneficiary." It is claimed that this provision is decisive of the question at issue. The line of demarcation between a vested interest and a contingent interest in a life or accident policy is found in the terms of the contract. This line is also usually found in the character of the policy. The old line policies usually create a vested interest; the fraternal policies, it may be said, usually do not. If

the policy reserves no right of control in itself or in the procurer, over the interest provided for the beneficiary, the policy, the moment it is issued, creates a vested interest in the beneficiary therein named. This was expressly held in *Laughlin* v. *Norcross,* 97 Maine, 33. If the contract reserves the right to modify the policy or change the beneficiary without the consent of the beneficiary, then it creates a mere expectency. "A vested interest is where there is an immediate fixed right of present or future enjoyment." See Vested Interest, Words and Phrases, Vol. 8, 7303. Again, "it is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment which makes the difference between a vested and a contingent interest," id. Again, "Vested interest can mean nothing else than an interest in respect of which there is a fixed right of present or future enjoyment." id., 7304. In 29 Cyc., 126 C., under the head "Right to Make Change as Against Original Beneficiary," it is said: "The cases as to the right of a member of a beneficiary society as against the person originally designated by him, to substitute another beneficiary in place of that person, are not in accord. By the weight of authority, however, if there is nothing to the contrary in the statute, or in the society's charter or laws, or in the certificate of insurance, the beneficiary originally designated has no vested interest in the contract, and hence the member may at his pleasure designate a new beneficiary and thus defeat the original beneficiary's contingent right to benefits." See numerous cases cited under note 19. "In any event this is so where the statutes, the charter or laws of the society, or the certificate of insurance expressly or impliedly authorizes a change of beneficiaries." A case in point, cited in Cyc. is *Marsh* v. *American Legion of Honor,* 149 Mass., 1889. The policy issued in this case reserved the right to make a change in the beneficiary. Such change was made and the right contested by one who had been named in the policy as a beneficiary. Regarding the right of this claim, the court say: "In the certificates of a beneficiary association which are issued to a holder, and which authorize him to designate another beneficiary than the one originally named, the holder may make such changes as the law of the association permits within the limits of those classes for whom, by statute, such association may provide. All that a beneficiary has during the life time of the member who

holds the certificate is a mere expectency, which gives no vested right in the anticipated benefit, and is not property, as, owing to his right of revocation, it is dependent on the will and pleasure of the holder." After alluding to some cases which seem to hold that the beneficiary is as a rule not bound by the admission of the insured, 2 Bacon on Benefit Societies, etc., Par. 460 states the rule as follows: "The better view and that logically correct, is that the contrary is true because the member is the party with whom the contract is made and remains so until his death. Consequently up to that time he is the only party in interest and his admissions and declarations are clearly admissible against the beneficiary. The authorities cited in this work recognized the distinction between cases where one has and has not a vested right in the policy.

The general principle seems to be overwhelmning in favor of the rule that where a beneficiary has a vested interest in the policy the admissions or statements of the applicant for the policy are inadmissible; where the beneficiary has not a vested interest, such admissions or statements are admissible.

If, then, it is true that the applications offered in evidence as exhibits were statements made by McManus, they were admissible, not necessarily as admissions nor as declarations against interest but as evidence tending to prove whether his statement as to his occupation was true or false; whether he was telling the truth in fact; whether he was a farmer or a hotel keeper. The issues directly involved in this exception are (1) Was McManus a farmer? (2) Did he tell the truth in his application as to his occupation? The evidence is pertinent under the first issue, as the limit of insurance on a farmer in this company was $1500 instead of $5000. The evidence offered was material upon the second issue because his statements in the application according to the contract were warranties, and if false, would defeat the policy. The question here is, whether these exhibits were competent. We have nothing to do with their weight. That is a question for the jury.

The plaintiff, however, objects to the admission of the exhibits on several grounds, among others that the offer was unaccompanied with any evidence that the exhibits comprised statements made actually by Mr. McManus. But the exceptions do not sustain her contention. They show that all the applications were signed by

Mr. McManus but that two of the three were filled in by an insurance agent. The necessary inference is that the other was executed by McManus in the usual way. Without giving effect to the rule, that when a party signs a written contract he is presumed to understand its contents, one of the three exhibits,—and the evidence does not show which one,—must be regarded as containing statements actually made by McManus.

The plaintiff further contends that the exhibits were properly excluded under the express wording of the policy. Under the head, General Agreements, the part of Article 20, invoked by the plaintiff, reads as follows: "No agent has any authority to change this policy or to waive any of its provisions, conditions or limitations. No statement made by the assured shall void this policy or be used in evidence unless endorsed hereon and no provision of the charter, constitution or by-laws, shall be used in defense with any claim under this policy unless such provision is incorporated in full in this policy. Then there is a further provision that the policy with a copy of the application therefor signed by the assured, and any riders or endorsements signed by the president or secretary shall constitute the entire contract of insurance, etc. Construed in pari materia with reference to the subject matter, the purpose, the results to be effectuated and the consequences, the true interpretation of these provisions is that the assured while negotiating for his policy and doing the things which resulted directly in its execution and issue, shall be regarded as having been incorporated in the policy, and that any statement which he has made during these negotiations which are presumed to be embodied in the writing when the policy is issued, shall not be offered in evidence. This is practically a declaration of the common law rule, that a written contract is presumed to be the consummation of everything said and done leading up to it. It is not reasonable that, by these provisions, the defendant company intended to preclude itself from the use of any relevant testimony pertinent upon any issue, that might be raised under the provisions of the policy. The policy provides that material statements made in the application shall be regarded as warranties. It further provides that if any material statement is not true it avoids the policy. It would be pertinent under these provisions for the company to show in defense to an action on a policy, that statements

made in the application were false regarding occupation or the other material matters prescribed therein. Any evidence tending to prove this contention would be admissible. The statements made by the assured, within a reasonable time, whether before or after the issue of his policy, tending to contradict him and to corroborate other witnesses as to the truth or falsity of the representation made in his application, might be the best evidence of proof of the issue; whatever its value it would be admissible under the general rules of evidence, and the interpretation of the provisions of the policy, involved to exclude it, cannot be sustained.

We are of the opinion that, under the exceptions, as stated in the report all three of the applications offered as exhibits, were, in the first instance, admissible. They were all signed by McManus, which makes them prima facie evidence. They are, of course, subject to explanation and their probative force may thereby be shown to be of very little weight, or even valueless. Other exceptions were raised and argued, but those considered being decisive of the case, it is unnecessary to discuss them.

Exceptions sustained.

ELLEN S. CLARK AND O. E. HANSCOM, Aplts.
From the Decision of the Judge of Probate.

Androscoggin. Opinion October 21, 1915.

Beneficially Interested. Credible Attesting Witness. Pecuniary Interest. R. S., Chap. 76, Sect. 1. Will. Witness.

The question is whether Florence R. Johnson, wife of a legatee under the will of Adelbert I. Clark, was a competent attesting witness to said will.

Held:

1. A wife is not a competent attesting witness to a will which contains a devise to her husband.
2. The term "credible" is not defined by the Statute, but as construed by the common law means competent.
3. If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event which may happen, he has a beneficial interest under it in contemplation of law.
4. If the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competence.
5. That Florence R. Johnson, at the time of the execution of the will, was not a credible witness, that she was beneficially interested under the will, and that said will is void.

On report upon agreed statement. Judgment of Probate Court affirmed.

This is an appeal by Ellen S. Clark and O. E. Hanscom from a decree of the Judge of Probate disallowing and refusing to admit to probate an instrument purporting to be the last will and testament of Adelbert I. Clark, late of Greene, in the county of Androscoggin, deceased. The case was reported to the Law Court by agreement of parties, upon an agreed statement of facts, for decision in accordance with stipulations relating thereto.

The case is stated in the opinion.

William H. Newell, for contestants.

Fred O. Watson, for executor.

George S. McCarty, for Mary E. Clark.

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

SPEAR, J. This case comes up on an agreed statement. There is, however, only one question raised, whether or not the fact that Florence R. Johnson subscribed as an attesting witness to the will of Adelbert I. Clark rendered the will void, it being admitted that Florence R. Johnson was the wife of William M. Johnson, a devisee named in the will. R. S., Chapter 76, Section 1, provides as follows: "Any person of sound mind, and of the age of twenty-one years, may dispose of his real and personal estate by will, signed by him, or by some person for him at his request, and in his presence, and subscribed in his presence by three credible attesting witnesses, not beneficially interested under said will."

(1) Was Florence R. Johnson, at the time of the execution of the will, a credible witness? The term "credible" is not defined by the statute, but as construed by the common law means competent. Castine Church, Appellant, 91 Maine, 416. Under R. S., Chapter 84, Section 107: "No person is excused or excluded from testifying in any civil suit or proceeding at law, or in equity, by reason of h's interest in the event thereof as party or otherwise, except as hereinafter provided, but such interest may be shown to affect his credibility; and the husband or wife of either party may be a witness." But section 109 modifies the scope of section 107 as follows: "Nothing in section one hundred and seven affects the law relating to the attestation of the execution of last wills and testaments, or of any other instrument, which the law requires to be attested."

(2) Was Florence R. Johnson, at the time she witnessed the will, "beneficially interested under said will?" If she was, the will is void. We think she was manifestly so interested. Paragraph III of the will reads: "I give and bequeath to William N. Johnson, five thousand dollars and I also give to him, William N. Johnson, my homestead forever, being all the real estate I own."

Florence R. Johnson was, and is, the wife of William N. Johnson. The case does not show whether they have children or not. It makes no difference, however, with the legal aspect of the case. Yet, it is the established law of this State, since 1895, R. S., Chapter 77, that if the husband dies without issue the widow takes one-half and if with issue, one-third, by descent, of all the real estate of which the husband was seized during coverture. The moment the

real estate devised under this will vested in the husband, the statutory interest vested in his wife, and he was powerless from that time to alienate or in any way dispose of it without her consent; or by sale, without paying her the appraised value of her interest. R S., Chapter 77, Section 17.

That the wife's interest is contingent does not avail the appellant. In Castine Church, Appellant, supra, it was held: "Was Agnes T. Hooper, at the time she attested the will, 'beneficially interested' under it? She is named as a legatee, in a certain contingency. If Anstres R. Folsom, the legatee, should decease before the testatrix, Agnes was to take, otherwise not. While she did not take an absolute, certain interest under the will, it would become absolute and certain in an event which might happen . . . If the will provides a pecuniary benefit to the attesting witness, though dependent upon the happening of an event, which may happen, he has a beneficial interest under it, in contemplation of law; and if the subsequent event upon which the interest depends does not happen, that fact does not relate back and restore competence. It is important that the safeguards which the law has thrown around the execution of wills, should not be withdrawn or weakened; and to that end, a will which provides a pecuniary benefit, absolute or contingent, to a legatee, should not be witnessed by such legatee. He is interested, and therefore not credible or competent." In the case at bar the pecuniary interest of the wife is not remote and uncertain but direct and fixed upon the contingency of the husband's death.

We are unable to discover any profit to be derived from an extended review of the cases cited, as, like the case at bar, the opinions are predicated upon the interpretation of the phraseology of the particular statute under consideration. It may be proper, however, to allude to *Winslow* v. *Kimball,* 25 Maine, 492, as this case seems to be relied upon as the one Maine case presenting the logical and proper theory upon which the present case should be decided. But it will be observed by a reference to the statute there under consideration, R. S., 1841, Chapter 92, Section 5, that it was an entirely different statute from the one now before us. It reads: "All devises and legacies to a subscribing witness to a will or codicil shall be void, unless there be three other competent subscribing

witnesses to the same." The court decided, that this statute, in terms, vitiated a bequest to a witness to the will, but did not render the witness incompetent as to the rest of the will. But this is not the case at all before us. This statute making void a legacy to an attesting witness was omitted in the revision of 1857, and the witnesses were required to be "disinterested and credible." In 1857 the phraseology was changed so as to require "three credible attesting witnesses not beneficially interested under the provisions of the will." In 1883 this was condensed to read, "three credible attesting witnesses not beneficially interested under said will." The question here is whether the witness was "beneficially interested under said will" If so, then, by the terms of the present statute, such witness is incompetent and the instrument purporting to be a will becomes nugatory. The witnesses must be competent at the time of the execution of the will. R. S., Chapter 76, Section 2, Castine Church, Appellant, supra, at page 422. They cannot be competent for one purpose and incompetent for another. The statute makes no such division.

In Massachusetts, in an opinion by Grey, J., who was later the Chief Justice and also a member of the Supreme Court of the United State, in which a review is made of both the English and American decisions, this rule of interpretation is fully approved. In *Sullivan* v. *Sullivan,* 106 Mass., 474, the head note states the result of the opinion in a single sentence: "A wife is not a competent attesting witness to a will which contains a devise to her husband." Furthermore, as was said in Castine, Appellant, we think this interpretation of the statute is in harmony with the purpose and intent of the Legislature and in accord with sound public policy. It tends to erect a safeguard against the influence of pecuniary interest, well calculated to bias the testimony of ordinary, and sometimes of very ignorant, persons, who are permitted, as witnesses to the execution of a will, to give their opinion as to the sanity and competency of the testator.

In accordance with the stipulation,

Judgment of the Court of Probate affirmed.

FLORA E. TUTTLE, In Equity

vs.

JOSEPH H. DAVIS, Executor, and NETTIE L. ELWELL.

Androscoggin. Opinion October 21, 1915.

Appeal. Breach. Condition to Support. Damages. Foreclosure. Mortgage. Redemption.

This is an appeal from the decision of the sitting Justice in a cause in equity. The bill is brought to redeem certain real estate from a mortgage given on April 16, A. D. 1900, by one John H. Tuttle, husband of Flora E. Tuttle, to his father and mother, George Tuttle and Mary F. Tuttle, conditioned to support them, or the survivor of them, so long as they might live, on the premises described in the mortgage or at such other place as George Tuttle or Mary F. Tuttle might choose, the same to be at no further expense to John H. Tuttle than on the home farm. Mary F. Tuttle, after the death of her husband, commenced foreclosure of this mortgage on March 22, 1913.

The only question is whether the plaintiff has such an interest in the mortgaged premises as will permit her to redeem.

Held: she has such right.

On appeal from decision of sitting Justice in a cause in equity. Appeal denied. Case remanded.

This is a bill in equity, brought by Flora E. Tuttle against Joseph H. Davis, in his capacity as executor of the last will and testament of Mary F. Tuttle, late of Durham, deceased, to redeem certain real estate described in the bill from a mortgage given by John H. Tuttle, husband of said Flora E. Tuttle, to his father and mother, conditioned to support them during their natural lives, etc. The presiding Justice, before whom the cause was heard, ordered, adjudged and decreed that said bill be sustained, etc. From this decree, the defendant appealed to the next Law Court.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Newell & Woodside, and L. A. Jack, for defendants.

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

SPEAR, J. This is an appeal from the decision of the sitting Justice in a cause in equity. The bill is brought to redeem certain real estate from a mortgage given on April 16, A. D. 1900, by one John H. Tuttle, husband of Flora E. Tuttle, to his father and mother, George Tuttle and Mary F. Tuttle, conditioned to support them, or the survivor of them, so long as they might live, on the premises described in the mortgage or at such other place as George Tuttle or Mary F. Tuttle might choose, the same to be at no further expense to John H Tuttle than on the home farm. Mary F. Tuttle, after the death of her husband commenced foreclosure of this mortgage on March 22, 1913.

A deed of the mortgaged premises was given to Nettie L. Elwell by Mary F. Tuttle in her life time, and she was made a party defendant in this case. It also appeared that the plaintiff, Flora E. Tuttle, joined in the mortgage given by her husband, releasing her right by descent in the premises.

No evidence was introduced by either side and the case is now before the Law Court on an appeal by Nettie L. Elwell from the decision of the presiding Justice in which he found upon the facts stated in the bill and admitted in the answer, that the plaintiff has a "legal right to redeem from the mortgage given by John H. Tuttle to George Tuttle and Mary F. Tuttle in which she joined in release of her descendable rights as the wife of the said John H. Tuttle."

The parties, by agreement filed in court, stipulated that the damages for breach of the covenants of the mortgage should be assessed at the sum of three hundred dollars. This agreement, as we understand, was to go into effect only in case it should be decided that the plaintiff had the right to redeem and was made contingent upon such finding.

It is claimed in the brief of Nettie L. Elwell that the case is devoid of any evidence to show what was done after September 26, 1908, by the plaintiff or her husband towards performing the conditions of the mortgage until the death of Mary F. Tuttle on March 22, 1913.

This objection is immaterial, as the appeal is from the finding of the court, as a matter of law, that the plaintiff had a right to redeem, with an agreement, if the court so found "that the damages for

breach of the covenants should be assessed at the sum of three hundred dollars." The sitting Justice in his decree found the damages to be $300, according to the agreement which covers the very omission of which the defendant complains. The first prayer of the bill is "that an account may be taken of the sum equitably due the defendant." But the taking of an account could be for the purpose only of determining what the plaintiff should pay for the failure of the mortgagor to fulfil the conditions of the mortgage and was supplanted by the agreement that the sum equitably due the defendant for his failure was $300.

The only question accordingly is whether the plaintiff has such an interest in the mortgaged premises as will permit her to redeem. We have no doubt she has. Every principle of equity and justice is in favor of it, as well as the earliest and latest authorities. *Smith* v. *Eustis,* et al., 7 Maine, 41, decided in 1830 and cases cited unequivocally established the rule, and *Fletcher* v. *Griffiths,* et als., 216 Mass., 174, decided in 1913, reaffirms it. These are cases involving dower, but the reason for the rule should be all the stronger under our present statute, where the wife's interest is a fee, upon the death of the husband, and not merely an incohate right.

Appeal denied.
Case remanded.

ELIZA E. FISHER, Applt., *vs.* ARTHUR W. NELKE.

Androscoggin. Opinion October 21, 1915.

Lease. Mutual Consent. Notice to Quit. Rent. R. S., Chap. 96, Sect. 2. Termination of tenancy at will. Tenancy at will. Waiver.

1. In an action for rent under a written lease, an agreement during the life of the lease. that lessee should have the privilege of vacating any time after the expiration of the lease by paying for the actual time of occupation, is not binding.
2. The termination of a tenancy by mutual agreement must be in accordance with R. S., Chap. 96, Sec. 2, and that this section applies only to tenancies at will.

On exceptions by defendant. Exceptions overruled.

An action of assumpsit to recover for use and occupation of a tenement situate on Main street in Lewiston, from December 1, 1914 to January 1, 1915. Plea, the general issue. At the conclusion of the evidence, the Justice presiding directed a verdict for the plaintiff. To this ruling the defendant excepted.

The case is stated in the opinion.

Franklin Fisher, for plaintiff.

McGillicuddy & Morey, for defendant.

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

SPEAR, J. This is an action of assumpsit for rent. On November 1, 1913, the plaintiff gave a written lease of the premises in question to the defendant, for one year. After the expiration of the lease, November 1, 1914, the defendant remained on the premises until December 4th following, and was, at this date, a tenant at will. The plaintiff seeks to recover for the whole month of December, while the defendant contends he was responsible for only the four days he was in actual occupation. The plaintiff filed an affidavit, under the statute, of the amount due her, which made a prima facie case, and

threw the burden upon the defendant to show why she should not recover. This burden he assumes by setting up an oral agreement with the plaintiff's agent whereby he says it was mutually agreed that he should have the privilege of vacating the premises, at any time, after the expiration of the lease, by paying rent for the actual time he occupied them. After the testimony was all in the presiding Justice ordered a verdict for the plaintiff, and the case comes here on exceptions to that ruling. The only issue in the case, accordingly, is whether the defendant upon his own testimony has sustained the burden of proof.

It appears that, during the life of the lease, the plaintiff had an opportunity to sell the premises and had some conversation with the defendant about moving out, and offered him one hundred dollars if he would vacate so she could sell; but the defendant declined, saying it was his intention to buy the property for himself. Following this conversation, the agreement which the defendant claims, regarding notice and vacating the premises, may be found in the following testimony of the defendant. On direct examination this appears. Q. Now, then, what conversation did you have, if any, about moving out without notice, and with whom was it had? A. I leased the property with the intention of buying it. They had it for sale, and he came to me— Q. Who did? A. Mr. Fisher, during that period I had it, and wanted to know if I was going to buy it. I told him I thought I was. "Well" he says, "I have got a chance to sell, and I will give you $100 if you will let me have that chance." Well, my intention was to buy the property, which I didn't buy; but he said after the lease, this property was for sale, and "if you don't buy it I shall expect you to move out any minute that I get a chance to sell it." That was the understanding, that I should have to move any time that he had a chance. Q. What did he say about your giving him notice, or you giving him no notice? A. That I shouldn't give him any notice, and he wouldn't give me any; that I should move out any minute, or I should have the privilege of moving out any minute.

On cross-examination he further says: Q. No, answer the question. I want to know. You testified on direct that you had a conversation with me about terminating your tenancy. Is that

right? A. Isn't it? Q. Is that true? A. That is true. Q. Where did yuo have it with me? A. Up in the office. Q. Whose office? A. My office. Q. And what time? A. When you offered me $100 bonus, you remember. Q. When did I offer that? A. Didn't you offer me that? Q. When did I offer it? A. I can't tell you the date. Q. Was it June, July or August, or when. A. I couldn't tell you the date. Q. Can you tell me whether it was when the lease was still in force. A. Yes, sir. Q. What was the conversation? A. That you had a chance to sell the property, and you offered me $100, or you would give me $100 if I would move. Q. Did you accept? A. It don't look as though I did, does it? Q. Was there any other conversation? A. Yes, sir. Q. What was it. Repeat it. A. If I didn't buy the property you would expect me to move at once. I think that is what you said. Q. Was that during the time of the lease? A. Yes, sir. Q. I expected you to move at once? A. Expected me to move at once, or give me time to move from one building to the other. I expected to buy the property.

It is admitted by the defendant that the conversation or agreement here testified to took place some time during the time covered by the lease. We are in doubt, however, as to whether the agreement as testified to by the defendant, meant that after the expiration of the lease he should have the privilege of moving out at any time, as seems to be stated in the first part of his testimony where he says, "but he said after the expiration of the lease this property was for sale and if you don't buy it I shall expect you to move out any minute that I get a chance to sell it," or whether, as stated in his cross-examination, "If I didn't buy the property you would expect me to move at once." If the latter is the correct version, and the agreement was to terminate the tenancy during the life of the lease, it was clearly nugatory. If the former is the correct version, we think it must fail because the purported agreement was made while the written lease was in force and before any tenancy at will existed. The termination of the tenancy by agreement must be in accordance with the provision of the statute. R. S., Chapter 96, Section 2, provides: "Tenancies at will may be determined by either party, by thirty days' notice in writing for that purpose, given

to the other party, and not otherwise save by mutual consent, excepting cases where the tenant, if liable to pay rent shall not be in arrears at the expiration of the notice, in which case the thirty days' notice aforesaid shall be made to expire upon a rent day. Either party may waive in writing said thirty days notice, or any part thereof."

It will be here noted that this section applies only to tenancies at will. Everything contemplated under it is predicted upon the existence of such a tenancy. It is therefore evident that an agreement made in regard to the manner of vacating certain premises which at the time of the agreement are not a tenancy at will at all, cannot prevail. It would be extending the scope of the statute to a thing not *in esse*. The ruling of the presiding Justice was correct.

Exceptions overruled.

JOHN W. MANSON, Executor of Nathaniel L. Perkins,

vs.

SARAH B. MAXCY, et als.

Penobscot. Opinion October 21, 1915.

Assignment. Consideration. Creditor's Bill. Dividends. Equity. Fraud. Revised Statutes, Chapter 79, Section 6, Paragraph 9.

1. In the present case, the assignment or transfer of the bankbook does not purport to show payment of any consideration. The burden, therefore, rests upon the assignee to prove the consideration actually paid.
2. It is well established under our decisions, under circumstances like those in the present case, that an assignee of the whole amount of the deposit or other property may prove the actual amount due him and become, upon such proof, entitled to such amount.
3. But if the consideration he has paid is inadequate and he still claims the whole, his whole claim will then be denied as a fraud upon other creditors who are entitled to the balance of the fund for the payment of their debts.

On report. Judgment for plaintiff for $2649.67 and interest at 6% from August 21, 1913.

This is a creditor's bill in which it is sought to subject the dividends from a deposit of Sarah B. Maxcy with Tyler, Fogg & Co., of Bangor to the payment of the balance due the plaintiff on notes signed by Sarah B. Maxcy, and is brought under Revised Statutes, Chapter 79, Section 6, Paragraph 9. The Justice hearing this cause, all parties assenting thereto, reported the cause to the Law Court on the foregoing evidence, including the agreed statement of facts; the Law Court to decide all questions of law and facts involved and to render its decision accordingly.

The case is stated in the opinion.

George H. Morse, and Harry R. Coolidge, for plaintiff.

Charles H. Bartlett, pro se.

Edgar M. Simpson, for Frederick H. Parkhurst and F. Marion Simpson, assignees.

Louis C. Stearns, for F. L. Berry.

Matthew Laughlin, for T. R. Savage, guardian.

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

SPEAR, J. This case comes up on report. It is a creditor's bill to subject the dividends, from a deposit of Sarah B. Maxcy in Tyler, Fogg & Company, Bangor, to the payment of the balance due the plaintiff on promissory notes signed by Sarah B. Maxcy. On January 19, 1903, Sarah B. Maxcy and her husband, Frederick E. Maxcy, executed and delivered to the plaintiff's testator four promissory notes. At the date of the bill the amount admitted to be due the plaintiff on the notes was $2649.67 and interest at 6% from August 2, 1913. F. K. Maxcy, the husband was adjudicated a bankrupt and granted a discharge on September 25, 1911. In August, 1911, Sarah B. Maxcy and her husband moved to California. She has no property in this State, except the deposit in Tyler, Fogg & Co. Tyler, Fogg & Co. were put into the hands of a receiver, hence the various defendants, representing the copartner-

ship and the respective members thereof. But so far as this case is concerned, only the deposit of Sarah B. Maxcy is involved. In August, 1911, Sarah B. Maxcy assigned her deposit in Tyler, Fogg & Co., and her claim in Tyler, Fogg & Co., Linwood C. Tyler and Herbert A. Fogg, to Fred L. Berry of San Francisco under the name and designation of Fred L. Berry, the alleged assignment bearing date, however, of May 31st, 1911. Berry proved his claim against the firm of Tyler, Fogg & Co., and against the estate of Herbert A. Fogg, and the claims have been allowed in both cases.

This bill is brought under Chapter 79, Section 6, Paragraph 9 of the Revised Statutes which provides that the court has equitable jurisdiction "in bills in equity, by creditors, to reach and apply in payment of a debt, any property, right, title or interest, legal or equitable, of debtor or debtors, which cannot become apt to be attached on a writ or taken on execution in a suit at law and any property or interest conveyed in fraud of creditors."

No question is raised as to the jurisdiction of the court over the subject matter involved, although the defendant, Sarah B. Maxcy, lives in California and has not been personally served with the process within this State. Formally this statute was available only against debtors, "residing or found within the State," but by the act of 1883, Chapter 169 this clause was eliminated with the evident intention of making the statute apply to non-residents. The real issue is whether the assignment of F. L. Berry shall prevail under the facts appearing in the report. The bill alleges want of consideration and fraud. We are of the opinion it is sustainable upon either allegation. The defendant, Berry, claims title to the entire deposit found in the bank of Tyler, Fogg & Co., in the sum of $5564.35, upon which it was agreed a dividend has been declared, amounting to $3416.51. Upon the admitted facts, that this deposit constituted the entire estate of the assignee, to be found in this State, and that she had large creditors here, for the payment of whose claims this assigned deposit was the only available means, it is incumbent upon the plaintiff to prove a full and adequate consideration for the property he has received. He cannot take every dollar found in this jurisdiction available for the payment of the assignor's debts, without a full consideration therefor. In the pres-

ent case the assignment or transfer of the bank book does not purport to show the payment of any consideration. The burden, therefore, rests upon the assignee, to prove the consideration actually paid.

It is well established under our decisions, under circumstances like those in the present case, that an assignee of the whole amount of a deposit or other property, may prove the actual amount due him, and become, upon such proof, entitled to such amount. But if the consideration he has paid is inadequate and he still claims the whole, his whole claim will then be denied as a fraud upon the other creditors, who are entitled to the balance of the fund for the payment of their debts. In *Haggett* v. *Jones,* 111 Maine at page 352, it is said: "As suggested above, we think the evidence justifies the conclusion that the conveyance from Mr. Jones to his wife was not intentionally fraudulent, but rather entered into it in the mistaken belief that he was actually indebted to her to an amount equal to the full value of the property conveyed. The transaction, however, being without an adequate consideration, is fraudulent by construction of law." See also *Egery* v. *Johnson,* 70 Maine, 258, in which it is expressly held: "Still a grantee is not protected when he has not paid such a consideration, though he may have acted in good faith." The question here involved was squarely raised in *Dennett* v. *Burnham* and Trustees and A. C. assignee and claimant of the funds, in which the court decided that, although A. C. had a bona fide claim of several hundred dollars against the fund assigned, yet his insistence upon a right to claim title to the whole, by virtue of his assignment, was a fraud upon other creditors. See certificate of decision, and rescript in No. 136, received and filed in Kennebec county, January 6, 1897. The court say: "The debt due A. C. would have been sufficient consideration to support the assignment as collateral security; but at hearing in court below, and at argument in this court, A. C. refused to treat the assignment as collateral, and claimed persistently that the entire amount due from the insurance companies belonged to him. . . . The conclusion is irresistible, from the acts and testimony of A. C., that one object of the assignment on his part, was to withdraw this property from the general creditors of Burnham, and hold the excess above the

debts of A. C. D. B. and R. for the personal benefit of himself, or the ultimate benefit of Burnham. Such purpose was illegal and fraudulent as to the general creditors of Burnham." The initials are used by the writer instead of the full names.

In the case at bar the assignee claims title to the whole deposit of Sarah B. Maxcy, amounting, with the present dividend, to $3416.35, with possibly more to come with future dividends. And, as a consideration for this large amount, he simply says he has performed certain legal services for the assignor, the nature or extent of which he refuses to divulge, upon the ground that they involve confidential communications. In other words, he invokes the privilege of an attorney by which he withholds the very evidence upon which the validity of his assignment depends, even upon the theory that he would be entitled to hold a sufficient amount to remunerate him for services actually performed; because he neither places any esitmate upon the value of his services, nor gives testimony upon which even a quantum meruit may be predicted. Conceding that his communications with his client were privileged, and he had a right, or was under the duty, to withhold the nature and extent of the services he had performed, yet such withholding deprives the case of proof, and the assignor must suffer the consequences of his preference or misfortune. Whatever the actual purpose of the assignee, the undisputed facts disclose a case devoid of any adequate consideration and clearly fraudulent as to creditors.

Judgment for plaintiff for $2649.67 and interest at 6% from August 21, 1913.

FRANK H. DRUMMOND *vs.* CHARLES L. GRIFFIN.

Penobscot. Opinion October 21, 1915.

Extinguishing Lien. Knowledge. Lien. Mortgage. Relinquishment of Possession. Replevin. Revesting the Lien.

The defendant, under a contract, furnished food and shelter for a pair of horses for the mortgagor for several months before the date of the execution and record of the mortgage on the horses. The mortgagee had neither actual nor implied knowledge that the horses were boarded at the defendants stable for more than three months after the date of the mortgage. In the meantime, the laundry company was permitted to use the horses in the ordinary way in the prosecution of its business as well after the date of the mortgage as before. The horses were also boarded by the defendant about three months after the plaintiff had knowledge that they were being furnished food and shelter by the defendant. At this time the plaintiff demanded possession of the horses but the defendant refused to deliver them unless the plaintiff paid for their keeping, not only after but before the mortgage was given.

Held:

1. That the letting of the horses go out of the defendant's custody into that of the mortgagor against the plaintiff's right as owner, under a recorded mortgage, was such a relinquishment of possession as extinguished and discharged the defendant's lien up to the time the plaintiff had notice that they were being kept by the defendant.
2. That the defendant could not be held for the sum demanded for keeping the horses prior to the date of his knowledge of their being kept by the defendant.
3. That by demanding the whole and refusing to take a less sum, the plaintiff was excused from making a tender of the amount which might have been due subsequent to the date of his knowledge of the keeping.
4. That the plaintiff having title in the horses had a right to their custody without further ceremony.

On report. Judgment for plaintiff.

This is an action of replevin for two horses claimed by plaintiff by virtue of a mortgage dated and recorded January 8, 1914. The defendant claims a lien on said horses for feeding and sheltering them. Plea, general issue with brief statement, in which it is alleged

that defendant held said horses in his possession to enforce his said lien. 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 court to determine all questions of law and fact and render judgment accordingly.

The case is stated in the opinion.

Morse & Cook, for plaintiff.

B. W. Blanchard, for defendant.

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

SPEAR, J. On report. The case shows that the Franklin Laundry Company of Bangor, on April 11th, 1913, took one horse, and at a subsequent date, another horse, to the stable of Charles L. Griffin, the defendant, under a contract for food and shelter. The horses remained, under the contract, in the defendant's stable until July 20, 1914. Upon this date they were replevied by the plaintiff by virtue of a title conveyed to him by a mortgage from the laundry company to him, dated and recorded January 8th, 1914. No question can be raised as to the plaintiff's right of action, for a breach of the condition of the mortgage. Accordingly the only issue is, whether the defendant had, at the date of the replevin, preserved his lien.

It is admitted that the plaintiff had no actual knowledge that the horses were boarded at the defendant's stable, until April 18, 1914. Nor do we think knowledge can be implied. During all the time the horses were kept in the stable, the laundry company was permitted to use them in the ordinary way in the prosecution of its business. They were used before and after the date of the mortgage in the same way. The issue then is: Did the defendant at the time the horses were replevied have a lien on them for the amount due for their board, which accrued prior to the date of the mortgage? It seems to be well settled that he did not. The taking of the horses, by the company for use in its business, from day to day, while, for the time being, depriving the defendant of his lien, would, nevertheless, revest him in his lien upon the restitution of the horses to his custody for a continuation of food and shelter, under his existing contract for so doing; but this rule does not apply

in case of a mortgagee with whom no such contract exists, and without notice. By the mortgage to him the plaintiff acquired a good title to the horses, subject to the defendant's lien. But, after this time the defendant let the horses go out of his custody into that of the company. This, against the plaintiff's right as owner, under a recorded mortgage, was such a relinquishment of possession as extinguished and discharged the defendant's lien. The theory is, that the surrender of the lien temporarily by the defendant, gives the mortgagee a prior right, which from that time on continues without interruption or discharge. *Perkins* v. *Boardman,* et al., 14 Gray, 481, seems to be directly in point. In this case the presiding Justice ruled, under a contract between the owner and keeper of the horse, that the keeper should have a lien on the horse until "she had eaten herself up," although used from day to day in the laundry business, that the temporary relinquishment of custody for the purpose of use, did not defeat the lienor's right against a mortgage. But the court held otherwise, stating that permission to the mortgagor to take the horse into his possession and use it as he pleased in carrying on his business "as againt the plaintiff having rights under his duly recorded mortgage was such a relinquishment of possession as extinguished and discharged the previously existing lien. The mortgage then became prior in right and the incumbrance created by it continued without interruption, disturbance or discharge from and after the time when this lien was lost; and the mortgagee thereby acquired a paramount right and title to the property."

Upon April 18th, as before stated, the plaintiff had knowledge that the horses in which he held title under his mortgage were being boarded at the defendant's stable from which his consent that they might be so boarded might be properly implied. But when the plaintiff demanded the horses under his mortgage just prior to July 20, the date of his writ, upon inquiry as to the amount due, the defendant claimed not only the amount due for keeping the horses subsequent to April 18th, when the plaintiff may be regarded as having consented to their being kept by the defendant, but also the full amount due for keeping prior to that date and refused to accept any less sum.

As before determined, it appears that the plaintiff could not be held for the sum demanded for keeping the horses prior to April

18th. The defendant refused to deliver the horses to the plaintiff on demand unless he paid this sum. The plaintiff was, therefore, excused from making any tender of the amount which might have been due subsequent to April 18th before serving his writ. *Bowden* v. *Dougan,* 91 Maine, 141. The plaintiff, accordingly, having title in the horses, had a right to their custody without further ceremony.

Judgment for the plaintiff.

VERSON D. COOMBS *vs.* JAMES E. HOGAN, Excutor.

Cumberland. Opinion October 21, 1915.

Agent. *Defendant.* *Executor.* *Writ.*

1. An executor, in an action against him, is a defendant.
2. The estate is in the hands of the executor and he is the only person against whom an action is authorized, or can be instituted for a claim against the decedent.
3. The executor and the person named as executor are always one and the same.

On report upon an agreed statement of facts. Case remanded to nisi for trial.

This is an action of assumpsit on an account annexed to recover for board of Hannah B. Hogan, of Bath, in county of Sagadahoc, during her lifetime. The defendant appeared specially on the first day of January Term, 1915, and filed a motion to quash. The case was reported to the Law Court upon an agreed statement of the parties the Law Court to determine whether the motion to quash shall be sustained or denied. If sustained, the writ is to be quashed and the action dismissed. If denied, the action is to be remanded to the trial court and to stand for trial with costs to the prevailing party.

The case is stated in the opinion.

William A. Connellan, for plaintiff.

William T. Hall, Jr., and Frederic J. Laughlin, for defendant.

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

SPEAR, J. As appears by the agreed statement, this is an action on an account annexed brought by Verson D. Coombs against the goods and estate of Hannah B. Hogan, late of Bath, in the county of Sagadahoc.

As appears by the writ, the officer was directed to "attach the goods and estate which were of Hannah B. Hogan, late of Bath in the county of Sagadahoc and State of Maine, deceased, in the possession of James E. Hogan, of said Bath, executor of the last will and estate of said Hannah B. Hogan, to the value of one thousand dollars, and summon *the said defendant* in his said capacity as executor."

A special appearance in this action was entered by attorneys for the executor of the last will and testament of Hannah B. Hogan, who, as it also appears by the agreed statement, is James E. Hogan, of Portsmouth, in the state of New Hampshire.

The first question at issue, under the agreed statement, is whether any defendant is named in the writ. We are unable to discover any good reason why there is not. A reading of the declaration does not leave the least doubt upon the mind, that the plaintiff has sued the executor of the estate for a bill due from the estate to the plaintiff. No misunderstanding regarding this question seems possible. The objection therefore to the form of the pleading is purely technical and, if sustained, it must be for want of statutory requirement in the pleadings. Does the writ, then, omit any word which the statute requires to give it validity? It is conceded by the defendant that the statute prescribes no special form of action, but cites the civil officer as containing a form usually employed. While this form is undoubtedly correct and to be approved, it nevertheless has not the legal merit of being the only form. Any other form, embracing all the legal requirements, would do equally as good. The statute simply provides that an executor may be sued, but prescribes no form of action.

The first inquiry to be made is, is an executor, in an action against him, a defendant? An affirmative answer is irresistable. The decedent, whom he represents, is beyond the jurisdiction of the court. The estate is in the hands of the executor. He is the only

person against whom an action is authorized or can be instituted for a claim against the decedent. The officer is directed to attach the goods and estate, not of the executor, as his property is not liable; but of the decedent, which has come into his hands as executor. In other words, the executor is the only person under the law against whom an action can be brought, and accordingly he is the defendant, and the only defendant, who can be named in a case of this kind. There is no myth about the term, executor. It always meant some individual who has the legal administration of an estate under a will. Where only one executor is named, he alone is the only individual who can represent the estate; who can sue and be sued. In such case the executor, and the person named as executor, are always one and the same. Hence it follows as a corollary, if the executor is a defendant, the person named as executor is the same defendant.

If we apply this reasoning to the case at bar, it reveals a writ whose form will meet the requirements of the law. We have shown in this case that the executor is the defendant; that James E. Hogan is the executor; hence James E. Hogan is the defendant. It necessarily follows that "the said defendant in his said capacity as executor" referred directly to James E. Hogan, and meant him and nobody else, as there is nobody else to whom it could refer. We have no doubt that James E. Hogan is properly named as defendant, and that all legal processes may be issued accordingly. Under this interpretation, all the argument relating to an amendment becomes immaterial.

The second question raised by the defendant is without merit. The writ named the executor as of Bath, Maine, when, as a matter of fact he resided in Portsmouth, N. H. Wm. T. Hall was his agent in Maine. The writ was duly served upon Wm. T. Hall as agent, and is clearly amendable under the liberal rule now found in the statute, as construed by the court. In accordance with the stipulation,

Case remanded to nisi for trial.

M. WALTER TOBEY *vs.* JAMES R. B. DINSMORE.

Kennebec. Opinion October 21, 1915.

Possession. Title. Trespass.

In an action of trespass quare clausum, when the defendant pleaded title in himself,

Held:

1. That plaintiff must rely on the strength of his own title.
2. The defendant, not proving any title in himself, possession of the locus by plaintiff at time of trespass will sustain an action against a mere trespasser.

On exceptions by defendant. Exceptions overruled.

This is an action of trespass quare clausum against James R. B. Dinsmore, defendant, for entering the plaintiff's land, situate in China, Maine, and cutting certain wood thereon. Plea, general issue with brief statement claiming title to the land described and denying that plaintiff had any title thereto. The case was tried before a single Justice, who found in favor of plaintiff. To this finding, the defendant took exceptions.

The case is stated in the opinion.

Harvey D. Eaton, for plaintiff.

Williamson, Burleigh & McLean, for defendant.

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

SPEAR, J. This is an action of trespass quare clausum, and turns upon the inquiry, whether the plaintiff proved any title to the locus, or, in the last analysis, possession at the time of the alleged trespass, as the defendant pleaded title in himself.

It is a familiar rule that, under this plea, the plaintiff must rely upon the strength of his own title. The case was tried before a single Justice who found in favor of the plaintiff. To this finding the defendant takes exceptions upon the only ground open to him.

that it was a necessary inference of law, from the evidence, that the plaintiff had shown neither title nor possession. At the outset it may be said the defendant proved no title in himself. It therefore comes to the inquiry whether there was any evidence, upon which the sitting Justice was authorized to find either title or possession in the plaintiff. We think there was. While the description of the locus in the deed does not correspond with that in the declaration, it yet appears that the plaintiff bought what he knew and what was known as the Briggs' lot. He says: "When I bought the heirs out I was to have exactly what my father had." A. It is the Briggs' lot. This plaintiff, as it seems, was perfectly familiar with these premises, as his father had owned them. But it is unnecessary to decide whether he proved title by his deed. It is quite clear that his understanding, that his deed had conveyed to him the locus, the Briggs place, coupled with the further facts, as testified to by the defendant, that the plaintiff "has cut several years, three or four years past on and off" and that he had "about 150 trees, mostly pine, and about 300 to 500 hard wood trees" warranted the inference that the plaintiff was in possession of the locus claimed by him at the time of the alleged trespass. Such inference being warranted the exceptions cannot prevail. Possession will sustain an action against a mere trespasser.

Exceptions overruled.

CHARLES A. PLUMMER

vs.

INSURANCE COMPANY OF NORTH AMERICA.

Cumberland. Opinion November 8, 1915.

Marine Insurance Policy. Premium. Rider. Seaworthiness. Waiver. Warranty.

This action of assumpsit is brought upon a policy of marine insurance, whereby the steam yacht Navis of plaintiff was insured by defendant for the period of one year from the date of the policy, for the recovery of the loss or damage suffered by plaintiff by reason of the yacht filling with water while moored in the harbor of Portland, on the nineteenth day of June, 1909. The policy was issued by defendant on the twentieth day of October, 1908. On this day the plaintiff was sole owner of the yacht, which was then lying in the Port of Portland, and continued to be its sole owner until after the filling of the yacht on the day stated. To the policy was attached a rider at the end of which it is provided that "the terms and conditions of this form are to be regarded as substituted for those of the policy to which it is attached; the latter being hereby waived."

Held:

1. Where a "rider" is attached to a policy of marine insurance in the usual printed form which, being executed by the insurer, contains merely the name of the person and vessel insured and the amount of insurance, and the rider provides that the terms and conditions of the rider are to be substituted for those of the policy and that the latter are waived, the terms and conditions of the rider constitute the contract.

Excepting where the vessel is at sea at the inception of the risk, there is an implied warranty of seaworthiness in time policies of marine insurance.

2. The technical warranty of seaworthiness is satisfied, as a condition precedent, if at the inception of the risk the vessel be staunch, strong, tight and properly equipped and provided to meet the ordinary perils of the adventure in contemplation.

3. Whether a policy be for a voyage or period of time, the construction of the warranty of seaworthiness is the same as to compliance being a

condition precedent at the outset, and as to non-compliance at intermediate stages of the risk.

4. Where the policy has once attached the obligation still rests upon the assured to keep the vessel seaworthy, if practicable, so far as it depends upon himself.

5. The obligation of the assured, after the policy has once attached, to make his vessel seaworthy, as far as practicable, at each stage of the voyage, is not a technical warranty, the breach of which will wholly terminate the policy, but merely a duty, the failure of which will discharge the underwriter from any loss arising from such want of repair.

6. Where a policy has once attached and the risk is entire, there can be no recovery of the premium paid in the event that the insurer is found not liable on the policy.

On report. Judgment for defendant.

This is an action of assumpsit on a policy of marine insurance issued by the defendant to plaintiff on the 20th day of October, A. D. 1908, in which it insured the steam yacht Navis against certain perils therein stipulated, for the period of one year. The plaintiff, at time of the issuance of said policy and at time of damage thereto, was the sole owner of said steam yacht and said policy was in full force. To this policy was attached a so called rider, the terms and conditions of which are to be regarded as substituted for those of the policy to which it is attached, the latter being thereby waived. The yacht, by the terms of the policy, was to be laid up from November 1 to May 1 following, without return of premiums during the period.

Plea, the general issue and brief statement. At the conclusion of the evidence, the case was reported to the Law Court, and upon the evidence so far as competent and admissible, to render such judgment as law and justice require; and if judgment is for the plaintiff, the action is to be referred to the Honorable George E. Bird to assess the damages.

The case is stated in the opinion.

Guy H. Sturgis, Gurney, Sturgis & Chaplin, and Connellan & Connellan, for plaintiff.

Blodgett, Jones, Burnham & Bingham, and Benjamin Thompson, for defendant.

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

BIRD, J. This action of assumpsit is brought upon a policy of marine insurance, whereby the steam yacht Navis of plaintiff was insured by defendant for the period of one year from the date of the policy, for the recovery of the loss or damage suffered by plaintiff by reason of the yacht filling with water while moored in the harbor of Portland, on the nineteenth day of June, 1909. The policy was issued by defendant on the twentieth day of October, 1908. On this day the plaintiff was sole owner of the yacht which was then lying in the port of Portland and continued to be its sole owner until after the filling of the yacht on the day stated. To the policy was attached a rider at the end of which it is provided that "the terms and conditions of this form are to be regarded as substituted for those of the policy to which it is attached; the latter being hereby waived."

The case is reported to this court upon evidence and admissions, so far as the same are competent and admissible, such judgment to be rendered as law and justice require; the damages, if judgment be for plaintiff, to be assessed by a referee.

It is agreed or admitted "that the above policy was in full force and effect at the time said yacht filled, as set out in the plaintiff's writ and declaration; and for the better understanding of the contract, the original policy may be produced at the argument by either party.

"The premium provided for in said policy was duly paid by the plaintiff to the defendant, and said yacht was at all times confined to the waters stipulated therein; and from November, 1908, to May 1, 1909, she was laid up and out of commission.

"In the fall of 1908, when said yacht went out of commission, she was put on a cradle and hauled up into the yard of Joseph T. Davidson, a yacht-builder, on the South Portland side of Portland Harbor, and then certain of her furnishings were removed, and the yacht was covered up for the winter; and she so remained until some time early in June, 1909, when the plaintiff gave said Davidson orders to do certain work upon the yacht, and then launch her and tow her to the plaintiff's mooring, which was located nearly abreast of Union Wharf on the South Portland side of Portland Harbor, which is the inner or upper part of Portland Harbor, and the general location for the anchorage of yachts and small boats.

"The yacht was launched by Davidson in the evening of June 16th, and towed to the plaintiff's mooring, where she remained until the morning of June 19th, when she was observed to be partially full of water.

"The weather between the time of the launching on the evening of June 16th, and the morning of June 19th was ordinary summer weather, and the water at the place where the yacht was moored was smooth; and during that time the yacht's machinery, and piping, were not connected up, but remained just as they were on the evening of June 16th, when she was launched. The yacht while lying at the plaintiff's mooring did not have any one on board, and she did not have any pump aboard that could be used in pumping her out; and no efforts were made to pump her out after she was placed at the mooring until the morning of June 19th, when she was pumped out by the steam-tug Startle.

"In consequence of the filling, the plaintiff suffered damage far in excess of the sum of $25.00 mentioned in the policy, and he gave prompt notice to the defendant company of the filling of said yacht, and the damages thereby occasioned, but the defendant immediately denied all liability for the loss and damage thus sustained."

The terms and conditions of the contract of the parties must be drawn from the rider which, by the terms of the latter, was substituted for the policy. The rider and it alone became the contract. *New York etc., Co.* v. *Aetna Ins. Co.*, 204 Fed., 255, 257 and cases cited.

Ordinarily seaworthiness at the inception of a risk is presumed, but where a vessel without being subjected to any stress of weather, or to any unusual buffeting of the seas or other extraordinary peril founders the burden of showing seaworthiness is cast upon the assured; *Treat* v. *Un. Ins. Co.*, 56 Maine, 231; *Dodge* v. *Ins. Co.*, 85 Maine, 215; *Hutchins* v. *Ford*, 82 Maine, 363, 370; *Starbuck* v. *Ins. Co.*, 54 N. Y. Supp., 293. It is, however, unnecessary to consider in this case where the burden lies or whether the plaintiff has met the burden, since it is apparent that there is no serious question between the parties that the taking of water by the yacht, while at her moorings and in smooth water, followed to a failure to close a sea cock or sea cocks, the inboard and outboard ends of which were below the water line and which had been opened when the vessel

was laid up the preceding fall, when the plaintiff and Davidson entered into the verbal arrangement for the hauling out of the yacht in the fall and her launching in the following spring.

It is undoubtedly the law of England that in time policies of marine insurance there is no implied warranty whatever of seaworthiness. *Gilson* v. *Small,* 4 H. L. C., (1853) 353; *Thompson* v. *Hopper,* 6 El. & Bl., (1856) 172, 177; *Fawcus* v. *Sarsfield,* 6 El. & Bl., (1856) 192; *Dudgeon* v. *Pembroke,* App. Cases, 1876-7, 284. In the United States the great weight of authority is to the effect that, except in cases when at the inception of the risk the vessel is at sea, there is an implied warranty of seaworthiness in time policies. *Capen* v. *Washington Mut. Ins. Co.,* 12 Cush., (1853) 517; *Rouse* v. *Ins. Co.,* 3 Wall Tr., (1862) Fed. Cas. No. 12,089; *Hoxie* v. *Home Ins. Co.,* 32 Conn., (1864) 21; *American Ins. Co.* v. *Ogden,* 20 Wend., (1838) 287; see also *Pope* v. *Swiss Lloyd Ins. Co.,* 4 Ind., 153, 154. See, however, *Merchants' Ins. Co.* v. *Morrison,* 62 Ill., 242, 93 Am. Rep., 93.

The technical warranty of seaworthiness is satisfied as a condition precedent, if at the inception of the risk the vessel be staunch, strong, tight and properly equipped and provided to meet the ordinary perils of the adventure in contemplation. The Edwin I. Morrison, 153, U. S., 199, 210; The Caledonia, 157 U. S., 124, 134; The Irawaddy, 171 U. S., 187, 190; The Southwark, 191 U. S., 1, 5-6; *Hoxie* v. *Pac. Mut. Ins. Co.,* 7 Allen, 211, 224; The Silvia, 171 U. S., 462, 464.

Speaking of the implied warranty of seaworthiness, it is said in The Caledonia, 157 U. S., 124, 134; "As the same warranty implied in respect of policies of insurance exists in respect of contracts of affreightment, that warranty is necessarily as absolute in the one instance as in the other.

"In *Putnam* v. *Wood,* 3 Mass., 481, 485, the Supreme Court of Massachusetts, speaking through Parker, J., said: 'It is the duty of the owner of a ship, when he charters her or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety; and he is to keep her in that condition, unless prevented by the perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the

freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. This principle governs, not only in charter parties and in policies of insurance; but it is equally applicable in contracts of affreightment.'"

And upon the same subject, Mr. Phillips declares, "Whether a policy is for a voyage or period of time, the construction of this warranty is the same as to compliance being a condition precedent at the outset, and as to non compliance at intermediate stages of the risk." I Phil. Ins. (4th Ed.) § 729 (See also *Dixon* v. *Sadler,* 5 M. & W., (1839) 405, 415; *Sadler* v. *Dixon,* 8 Id., (1841) 894, 898; *Copeland* v. *N. E. Mar. Ins. Co., 2* Met., 438, 444); II Arn. Ins. (11th Ed.) § 695. "After the policy has once attached, a compliance with this warranty ceases to be a condition precedent to the liability of the insurers for any loss." I Phil. Ins. § 730. "The obligation still rests upon the assured to keep the vessel seaworthy if it be practicable, so far as it depends on himself." Id. § 731; see also *Morse* v. *Ins. Co.,* 122 Fed., 748, 749. And it is laid down by Emerigon, "It is then certain that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be, in fact, intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded upon first principles. It is applied to the contract of insurance by the Guidon and is respected in all our books. *Si casus evenit culpa assecurati, non tenentur assecuratores."* Emer. Ins. (Meredith, Am. Ed.) 290.

It has been held by this court that if the owner himself was not guilty of carelessness, the negligence of his servants will not deprive him of the benefit of his insurance. *Hagar* v. *N. E. M. M. Ins. Co.,* 59 Maine, 460, 463. This was an action upon a time policy under which the loss occurred some months after the policy must have attached. The loss was claimed to have occurred through the negligence of the master in the navigation of the vessel, and *Copeland* v. *Ins. Co.,* 2 Met., 432 is relied upon. It is, however, not necessary in this case to discuss the limitations stated in the case of *Hagar* v. *Ins. Co.,* supra. See *Copeland* v. *Ins. Co.,* supra at pages 443, 444; *Morse* v. *Ins. Co.,* supra.

As to the nature and effect of this obligation it was said *obiter* in *Paddock* v. *Franklin Ins. Co.,* 11 Pick., (1831) 227, 234. "it

would seem to be more consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold that after the policy has once attached, the implied warranty should be so construed, as to exempt the underwriter from all loss or damage, which did or might proceed from any cause, thus warranted against; but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty."

In *Capen* v. *Washington Ins. Co.,* 12 Cush., (1853) 517, 540, after citing *Paddock* v. *Franklin Ins. Co.,* supra, it is said "The rule there suggested was that it was the duty of the assured, after the policy had once attached, to make his vessel seaworthy, that is, tight, staunch and strong, as far as practicable, at each stage of the voyage; but that such duty was not a technical warranty, the breach of which would wholly terminate the policy; but merely a duty, the failure of which would dicharge the underwriter from any loss arising from such want of repair. But that opinion not being necessary to the decision of that case, was left open to future consideration. The court are now of opinion that this view was correct, and that it is strictly applicable to the present case." See also *Amer. Ins. Co.* v. *Ogden,* 20 Wend., (1838) 287, 294-296.

It may be noted that in England even in voyage policies the implied warranty of seaworthiness is satisfied if the vessel be seaworthy at the commencement of the risk and negligence of the assured is no defence unless so gross as to amount substantially to fraud, or in other words unless the assured knowingly, wilfully and wrongfully committed acts whereby the loss be occasioned.

The plaintiff contends that under his verbal contract with Davidson in the fall of 1908, the latter was not only to make repairs and launch the yacht in the spring but also make her tight, staunch and seaworthy. This undertaking between the plaintiff and Davidson was considered by the District Court of the United States for the District of Maine upon a libel of the latter brought to recover his agreed compensation. That court found that the contract did not obligate Davidson to make the yacht tight, staunch and seaworthy. The Navis, (Hale, J.) 196 Fed., 896. We see no reason upon the evidence in this case to differ from the conclusion reached by the learned Judge of the District Court.

The only other agent employed by plaintiff to do any work upon the yacht prior to her launching in the spring of 1909 was one Lyon. There is no claim on the part of plaintiff that he was ordered to do more than he actually did—connect the keel condenser which he did from the outside of the hull.

The issue therefore is resolved into the inquiry whether the plaintiff did or did not perform his duty "to make his vessel seaworthy, that is tight, staunch and strong as far as practicable." *Capen* v. *Washington Ins. Co.*, supra.

The plaintiff was at the date of the issuance of the policy and since has been a resident of Portland. At the time he ordered that the yacht be launched by Davidson, he intended to go to Sebago lake for a vacation and did go the day before the yacht was launched. It is apparent that he was anxious to get away upon his vacation as early as possible. It is in evidence that in the fall of 1906 he contracted with one Griffin to lay up the same vessel during the winter of 1906-7 and that in the fall of 1906 and the spring of 1907 he personally directed an engineer to prepare the boat for laying up and for launching by making in the spring and fall respectively all the necessary disconnections and connections within. In the fall of 1907 she was not laid up. In the fall of 1908 after the yacht was hauled out at the yard of Davidson, plaintiff directed an engineer to make the necessary disconnection. When the boat was about to be launched in June, 1909, plaintiff informed Davidson that it was not his intention to place the yacht in commission but might allow her to lie at her moorings for an extended period. The fact that the sea cocks were open was readily discerned by inspection within the yacht and the devices for closing them were conveniently at hand.

We conclude that in his anxiety to leave Portland and from the fact that he did not intend to put his yacht in commission as before, he carelessly assumed that the sea cocks would be closed by Davidson contrary to the usual practice; that he was negligent in causing no examination and test of the boat's appliances to be made either before, or at once after, launching and such not being made, to have an anchor watch or caretaker on board until, at least, it was found she was in seaworthy condition. See The Elwin I. Morrison, 153 U. S., 199, 215; The Caledonia, 157 U. S., 124, 134; The South-

wark, 191 U. S., 1, 13, 15-16. *Cleveland & B. Transit Co. v. Ins. Co. of North America,* 115 Fed., 431, 434, 436; II May on Ins., (3rd Ed.) § 411A and note 3; *Hager* v. *N. E. Mut. Mar. Ins. Co.,* 58 Maine, 460, 463; The Giulia, 218 Fed., 744, 748; The Dunbritton, 73 Fed., 352, 366; see also *Canton Ins. Office* v. *Independent Transp. Co.,* 217 Fed., 213, 216-7. See also *Dupeyre* v. *Western M. & F. Ins. Co.,* 2 Rob. La., 457; 38 Am. Dec., 218. In case of temporary unseaworthiness imputable to the assured, whereby the perils insured against are generally affected, it has been stated, that the risk is suspended and revives on the navigability of the vessel being restored. I Phil. Ins. § 734. See however *McLanahan* v. *Universal Ins. C.,* 1 Pet. 170, 184; *Quebec Mar. Ins. Co. v. Commercial Bank of Canada,* L. R. 3 P. C., 234, 243-4.

It is unnecessary, however, for the purposes of this case to adopt this rule of Mr. Phillips. The result of such lack of care on the part of the insured is, as we have seen, to relieve the insurers from any liability for a loss which is the consequence of such want of prudence or diligence. See *Copeland* v. *N. E. Mar. Ins. Co.,* 2 Met., at page 439; see also *Union Ins. Co.* v. *Smith,* 124, U. S., 405, 427. We must, therefore, regard the actual cause of the loss to have been the unseaworthy condition of the vessel insured, for which the assured is responsible. *Gen. Mut. Ins. Co.* v. *Sherwood,* 14 How. 351, 366; The Titania, 19 Fed., 101, 104.

We do not understand that the plaintiff seeks, in the event that defendant is not found liable on the policy, to recover back the premium paid defendant, either in whole or in part, as suggested may be the case by plaintiff. We need only state that where the policy has once attached, (it is admitted that the policy was in full force and effect at the time the yacht filled) and the risk is entire, there can be no such recovery. *Taylor* v. *Lowell,* 3 Mass., 331, 343, 344.

Judgment for defendant.

ALBERT THERRIAULT, pro ami, *vs.* WILLIAM BRETON, et al.

ERNEST DRAPEAU, pro ami, *vs.* WILLIAM BRETON, et als.

Androscoggin. Opinion November 17, 1915.

Arrested. Complaint. Discharged. Exceptions. False Imprisonment. Guardians. Minors. Police Officers. Waiver.

In an action for false imprisonment of two minors who were discharged without taking them before the court, upon signing a release to the officers, with the knowledge and consent of the parents,

Held:

1. The parent is the legal custodian of the minor children and is entitled to their custody.
2. So far as the boys are concerned, if they or their parents solicited their release, and it was done with their full knowledge and consent, then the officers can justify.
3. Unless the officers either take the boys into court to be discharged there, if necessary, or have let the boys go at their own request or the request of their parents, with their knowledge and consent, then they cannot justify, but are liable in such case for the original arrest.
4. If the officers had arrested the plaintiffs for a misdemeanor, then it would have been their duty to have procured a warrant within a reasonable time for the alleged offense and take them before the court and place them on trial, and for neglect to do so would have been liable in damages, unless the plaintiffs released them from that obligation or they waived their rights to be taken before the court.
5. The law is well settled that an officer may arrest upon reasonable grounds of suspicion that a felony has been committed and that the person arrested was guilty of a felony, and hold the party arrested for a reasonable time until he can procure a warrant to investigate the case, and if within a reasonable time his investigation shows that there is not reasonable grounds to believe that the party arrested has committed a felony, then he may discharge him without taking him before the court and not be liable.

On exceptions by plaintiff. Exceptions overruled.

These are actions of trespass for false imprisonment against the defendants, police officers of the city of Lewiston, and Frank

Martin, Jr., who made the complaint. The plaintiffs, being minors, at the solicitation of their parents and with their knowledge and consent, signed a release to said defendants. Plea, the general issue with brief statements. The verdicts were for plaintiffs in both cases for nominal amounts. The plaintiffs excepted to the admission of the release, and to certain instructions by the court.

The case is stated in the opinion.

J. G. Chabot, for plaintiffs.

McGillicuddy & Morey, for defendants.

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

HALEY, J. Two actions for false imprisonment of the minor plaintiffs against two police officers of the city of Lewiston, and Frank Martin, Jr., who made a complaint to the other defendants, as police officers of the city of Lewiston, that the plaintiffs had stolen a pig from his pen, whereupon the plaintiffs were arrested in the night time by the defendant officers, and the next forenoon the complainant, claiming that his pig had been put back in the pen, refused to sign a complaint for a warrant, and the parents of the boys being present at the marshal's office, the plaintiffs were discharged after signing the paper introduced in evidence at the trial. The cases were tried together and the jury returned a verdict for the plaintiff in both cases and assessed nominal damages. The plaintiffs bring the cases to this court upon exceptions.

The first exception relates to the discharge of the plaintiffs by the defendants without bringing them before the court, at their request and with the consent and knowledge of their parents, as claimed by defendants. This exception is urged by the plaintiffs in their brief as follows: "If these boys, plaintiffs, were for any cause wrongfully arrested by the defendants, a right of action accrued in their favor against the party making or causing the arrest to be made. A right of action is a property right. The parents of the minors, as natural guardians, had no authority or legal right to discharge, waive or release any property right of their wards. The boys being minors could not legally discharge, waive or execute and give any valid release, binding against themselves."

The claim of the plaintiffs is undoubtedly the law, and the court so ruled, stating, "Well, they may show all the circumstances of the release. If the release was with the consent of the boys or their natural guardians it was effective, so far as that part of it goes. Of course that would not excuse any unlawful arrest in the first place." In the charge the jury were instructed: "In the first place, the boys were minors, and their releases would not be good for anything, anyway. They would not be barred by them. In the next place, the parents had no right to release a property right of a minor child. If it becomes necessary in a case that a property right, like a right of action at law, should be released, the probate court should be applied to and a guardian appointed. The guardians would have full power; but the parents are only the natural guardians and have the custody of the person, education and maintenance of the child. But in property matters, they can no more release a cause of action than they can convey a farm that happens to stand in the child's name. So that as barring the action as a settlement the releases are not to be considered."

The plaintiffs having testified as to what took place at the time of their release, it was proper for the defendants, as stated by the court, to "show all the circumstances of the release," and the plaintiffs could not, by their version of what took place, prevent their testimony being given as to the release. The court having ruled upon the admissibility of the evidence, and instructed the jury as the plaintiffs claimed the law, there is no merit in this exception.

The second exception was to the admission of the signed releases offered by the defendants and signed, in the Terriault case by the plaintiff's father only, and in the Drapeau case by the plaintiff and his mother, which it is claimed released and discharged the officers from all right of action for the injuries suffered and sustained by reason of the arrests. They were not admitted as barring the plaintiffs' claims for injuries prior to their release, but as bearing upon the question whether the plaintiffs were allowed their liberty with their request or consent? The court instructed the jury: "Now, so far as the releases are concerned, I have this to say. I have admitted them in evidence against objection. They are objectionable in some features, that is to say, they cannot be weighed for

all that appears upon them. But for one purpose they are admissible, and that is as evidence that the release of the boys was voluntary, that is, the letting go by the officers of the boys was voluntary and consented to, or on request. In the first place the papers themselves contained the expression that it was done at their request; and the officers say that the purport of the papers was communicated to the father and mother and perhaps in the presence of the boys, before the signatures. The father and mother denied it. But in any event, so far as these papers were understood by the parties that signed them, so far as they can be weighed as bearing upon the question whether the boys were let go at the request of their parents, or with the knowledge and consent of their parents that they should go under those circumstances, and not be brought into court."

The court having ruled that if the arrests were unlawful, the property rights of the plaintiffs were not affected by the releases, if the jury found that the arrests in the first instance were lawful, then there was the other branch of the case whether the giving of the boys their liberty was with their consent, and for that purpose of course the releases were admissible for what the jury might find them worth under the instructions of the court. But there is a fatal objection to the exception. The releases are not printed in the record, and we have no knowledge of their contents except that one was signed by one of the plaintiffs and his mother, and the other by the father of the other plaintiff. We have no right to rule upon the admissibility of evidence that is not printed in the record, or the substance of it given so that we can intelligently pass upon its admissibility. The court cannot consider an exception to the admission or exclusion of a writing unless the writing is made a part of the bill of exceptions. Of course formal parts of deeds, executions and duplicates, writings, etc., need not be printed. An admission by counsel in the bill of exceptions, as stated in *Dyer* v. *Tilton,* 71 Maine, 413, 414, will preserve the rights of the parties, but this court cannot, by a mere reference to a paper as a deed, bond, release, or any other writing by it's common name, pass upon its admissibility. As said in *Webster* v. *Folsom,* 58 Maine, 233, "Whatever a party expects to have considered as part of the case, must be copied. We have nothing before us to show

what the testimony deemed objectionable was. The presumption is that the rulings were correct. It is for the excepting party to show it if they were not so. Counsel cannot present in this court an objection to the admissibility of testimony by a naked reference to papers remaining on file in the court below." We cannot rule, without an inspection of the releases, whether they were admissible or not. They are not in the record and therefore this exception is without merit.

The third and last exception was to an instruction to the jury as to the effect of a release from arrest of the plaintiffs without taking them before the court, as contained in the following extract from the Judge's charge: "And that brings up the second part of this case which has been tried here, whether these boys were let go by the officers under such circumstances as to justify them. They would be so far as the plaintiffs were concerned, the boys, they would be justified in letting them go if the boys asked it, or their parents asked it. Because the parent is the legal custodian of the boy, and is entitled to his custody. Whether they were doing their duty to the State would be another proposition. But so far as the boys are concerned, if the boys or their parents solicited their release, and it was done with their full knowledge and consent, irrespective of the releases which were made and which have been introduced in the case, then the officers can justify. But unless they have either taken the boys into court to be discharged there, if necessary, or have let the boys go at their own request, or the request of their parents, with their knowledge and consent, then they cannot justify, but are liable in such case for the original arrest."

The plaintiffs contend that it was the duty of the officers, having arrested the plaintiffs, to take them before the court within a reasonable time, and that, as they were not taken before the court, and no warrant procured against them for the offense for which they were arrested, the officers are liable for the arrests. This proposition is not sound. If the officers had arrested the plaintiffs for a misdemeanor, then it would have been their duty to have procured a warrant within a reasonable time for the alleged offense and taken them before the court and placed them on trial, and for a neglect to so do unless the plaintiffs released them from that

obligation, or they waived their rights to be taken before the court, the defendants would be liable in damages. But the offense for which the plaintiffs were arrested was a felony, and the law is well settled that an officer may arrest upon reasonable grounds of suspicion that a felony has been committed and that the person arrested was guilty of the felony, and hold the party arrested for a reasonable time until he can procure a warrant to investigate the case, and if, within a reasonble time before he does procure the warrant, his suspicions vanish, or, in other words, if his investigation shows that there is not reasonable grounds to believe that the party arrested has committed a felony, then he may discharge him without taking him before the court, and not be liable. The authorities sustaining this proposition are too numerous to mention. *Burke* v. *Bell,* 36 Maine, 317; *Palmer* v. *Maine Central R. R. Co.,* 92 Maine, 399. And even if it was the duty of the defendants to procure warrants and have the plaintiffs taken before the court, the defendants could waive the performance of that duty, for, as said in *Coffrey v. Drugan,* 114 Mass., 294, "If a party is ready to waive this provision made for his protection, and release any damages to which he might be entitled if the duty of the officer in this respect is not performed, there is no reason, as between himself and the officer, why he should not be permitted to do so. It is obvious that, in many instances, persons arrested thus save themselves from a painful and disagreeable exposure of acts which may even if disorderly and turbulent, were rather those of weakness and folly than of serious criminality. We therefore are of opinion, that, if the plaintiff requested or consented to his discharge, intending thereby to release any damages on account of a failure to make a complaint, and such agreement was fairly and intelligently made, he is not entitled to damages on account of such failure; and that the jury should have been so instructed."

In this case, under the instructions of the court, the plaintiffs lost no rights by the officers discharging them without taking them before the court, for, if the arrests were unlawful in the first instance, there was no release of their rights. If it was lawful, up to the time they were released there were no damages, and to have continued to hold them in custody, procured a warrant and taken them before the court for a hearing, after the suspicion of

the officers that they were guilty had vanished, would have rendered the officers liable for all their acts after their suspicions had vanished, and surely the plaintiffs cannot recover damages because the officers did not wrongfully detain them or wrongfully procure warrants and take them before the court. If the arrests were unlawful, the defendants had the right to end the unlawful arrests at any time, and no damages could be recovered for the unlawful arrests after they had ceased; the damages would be limited to the injuries sustained by the plaintiffs to the time of their release. As the instructions excepted to were more favorable to the plaintiffs than the evidence warranted, they were not injured, and these exceptions must be overruled. The real grievance of the plaintiffs is the amount of damages awarded, but that question is not raised by the exceptions.

Exceptions overruled.

ANNIE C. LOVEITT, et al., *vs.* CLIFFORD WILSON.

Cumberland. Opinion November 22, 1914.

Breach. Contract. Debt. Forfeiture. Justification. Life Estate. Sale. Warranty Title. Will.

In an action of debt brought by the vendors against the vendee to recover the forfeiture stipulated in a written contract for the sale and purchase of real estate, the plaintiff therein agreeing to convey "by good and sufficient warranty title;"

Held:

1. That the plaintiffs were bound to furnish a title free from incumbrance.
2. That the plaintiffs' title was based upon a devise in the will of John Fred Loveitt to his son, Edwin W. Loveitt, one of the plaintiffs, which was conditional upon the performance by said Edwin of the terms of a certain agreement whereby he was bound to suitably support and care for his father and mother during their life, and at their decease pay all burial expenses, &c.
3. That this constituted a condition subsequent and the plaintiffs' estate was subject to forfeiture for neglect of performance.

4. That as this condition as to payment of burial expenses both of the father and mother had not been complied with, the title was not free from incumbrance and the plaintiff did not offer "a good and sufficient warranty title."

On report. Judgment for defendant.

This is an action in a plea of debt upon a written contract for the sale of land, executed on the 24th day of February, A. D. 1914, to recover from defendant the sum of two hundred dollars as liquidated damages because of the alleged inability of plaintiffs to convey good title to the land as called for by the contract.

At the conclusion of the hearing, the parties agreeing thereto, the case was reported to the Law Court at Portland. The writ, declaration, pleading and copies of vouchers to make the report of the case as far as admissible.

The case is stated in the opinion.

D. A. Meaher, for plaintiffs.

W. L. Waldron and C. B. Skillin, for defendant.

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

CORNISH, J. Action of debt upon a written contract for the sale and purchase of real estate, brought by the vendor against the vendee to recover the sum of two hundred dollars, the stipulated forfeiture in case of a breach by either party.

The contract was executed on February 24, 1914, and under it, in consideration of the sum of $2600 to be paid as therein stated, the plaintiff agreed to sell and convey to the defendant "by good and sufficient warranty title" certain real estate in South Portland, "titles to be passed on or before April 15, 1914."

The defense is two fold,—first, justification because of the defective condition of the title, and second, non-tender of the deed within the time specified.

After the contract was made the defendant employed an attorney to investigate the plaintiffs' title and he found that it was based upon the will of John Fred Loveitt, father of Edwin W. Loveitt, one of the plaintiffs. The first item in the will gave a life estate

in the premises to Betsey M. Loveitt, the wife of John Fred. Then followed this provision:

"Second: I give and devise to my son, Edwin W. Loveitt of South Portland, who lives with me, the house and land where I live, at 372 Preble street, South Portland, in consideration of and in satisfaction of his carrying out a certain agreement made with me this day that he will at all times during my natural life, and that of my wife Betsey M. Loveitt and the survivor, well and sufficiently support and maintain, and clothe and in all respects suitably care and provide for us and each of us in the home at 372 Preble street, South Portland, and at our decease give us a respectable burial and pay the expenses of the same in accordance with the agreement above named and contract entered into between myself and the said Edwin W. Loveitt for this purpose."

John F., the father, died on October 9, 1912, and Betsey M., the mother, on January 16th, 1913. Edwin W. was appointed administrator of his father's estate with the will annexed on November 22, 1912, but at the date of these negotiations had filed no account and apparently had taken no steps toward a settlement of the estate. The attorney, finding these facts and ascertaining further that certain of the expenses specified in the devise had not been paid, reported to the defendant that the title was not clear, and the Trust Company from which the defendant was to obtain a mortgage loan refused to make it for the same reason.

Clearly the defendant was justified in declining to complete the purchase under these circumstances. The plaintiffs were bound under their agreement to furnish a "good and sufficient warranty title." What is the fair construction of that term in this action at law to recover damages for alleged breach of the contract? It evidently means a title free from encumbrance. That is the title which the vendor in this case is bound to convey and nothing short of that is the vendee bound to accept. Applying this test we think the defendant had the legal right to refuse the title offered. The title was not free from encumbrance. It was encumbered by a condition subsequent and was subject to forfeiture for neglect of performance. *Marwick* v. *Andrews,* 25 Maine, 525; *Morse* v. *Hayden,* 82 Maine, 227. Admittedly, this condition had not been fully performed. The funeral expenses of the father, who had

died in 1912, as well as the expenses of the last sickness and funeral of the mother who died in 1913, had not been paid on April 15, 1914, the agreed date of transfer.

The defendant acted in the utmost good faith. He had employed a competent attorney to search the records, and the attorney reported to him the result and informed him that in his opinion the title was defective. He had applied to a Trust Company for a loan, and the company on learning the facts had declined to accept the title as a basis for a mortgage loan. He seasonably notified the plaintiffs or their agents, but no steps were taken by them to cure the defects and validate the title. Even when the deed was tendered on May 7, 1914, three weeks after the specified time, the situation remained unchanged. Had the condition been fulfilled even then, the defendant says he would have waived the delay and completed the purchase. But it was not until the following August that the claims were paid and the cloud removed.

The plaintiffs lay stress upon the fact that the defendant, on February 27, 1914, three days after the agreement was made, loaned them two hundred dollars and took a mortgage of these same premises as security. We fail to see the force of this contention. It appears that the defendant had at that time made no investigation of the records whatever, and was assured by the plaintiffs' agents that the title was clear. There is a vast difference between taking a mortgage for the small sum of two hundred dollars, and purchasing the premises for the sum of two thousand, six hundred dollars. The risk connected with the former would be small as compared with that attendant upon the latter.

We therefore conclude that the plaintiffs did not tender to the defendant a "good and sufficient warranty title" as they had contracted to do and that this action cannot be maintained.

This view of the case renders unnecessary a consideration of a non-tender of the deed on or before the specified date, April 15, 1914. The defendant would not have accepted it if tendered, and he would not have been obliged to accept it, because of the defective condition of the title.

Judgment for defendant.

CORNELIA G. FESSENDEN *vs.* HENRY E. COOLIDGE, Admr.

Androscoggin. Opinion November 22, 1915.

Affidavit. *Exceptions.* *"For value received."* *"Money loaned."* *Promissory Note.* *Revised Statutes, Chapter 89, Section 14.*

The holder of a promissory note purporting to be for value received against the estate of the deceased maker, seasonably filed her claim, supported by affidavit, in the probate court, stating therein that her claim was for "money loaned by me to William C. Coombs (the maker) as evidenced by the note hereto annexed."

In a suit on the note it is held,

1. That the note was admissible in evidence without extraneous proof that the consideration was for money loaned.
2. That, upon the introduction of the note, no evidence having been offered by the defendant, a verdict was properly ordered for the plaintiff.

On exceptions by defendant. Exceptions overruled.

This is an action of assumpsit upon a promissory note given by William C. Coombs, the defendant's intestate, to the plaintiff. The plaintiff filed in probate court proof of his claim as provided by statute. Plea, general issue with specifications. The affidavit recited that the claim was for "money loaned" and was evidenced by the note. The plaintiff offered the note with proof of claim and affidavit, which was admitted, and the defendant objected to their introduction. Defendant offered no proof and the presiding Justice directed a verdict for plaintiff. To these rulings, defendant excepted.

The case is stated in the opinion.

R. W. Crocket, for plaintiff.

Oakes, Pulsifer & Ludden, for defendant.

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

SAVAGE, C. J. Assumpsit on a promissory note signed by the defendant's intestate, William C. Coombs. The plaintiff seasonably filed her claim, supported by her affidavit, in probate court as pro-

vided by statute, R. S., ch. 89, sect. 14. Her claim was stated to be for "money loaned by me to William C. Coombs and evidenced by the note hereto annexed and marked Exhibit A." etc.

At the trial, the plaintiff was permitted to introduce the claim filed in the probate court, with the note attached. The defendant objected to the introduction of the note without extraneous proof that the consideration was "money loaned" as stated in the claim filed. The plaintiff rested, without offering proof of that fact. The note purported to be given "for value received."

The defendant offered no evidence, but requested the Justice presiding to instruct the jury "that on the proof filed in probate court and offered, the plaintiff cannot recover without proof that the consideration was for money loaned and not for any other consideration, and that the production of the note alone is not sufficient proof of the fact." This requested instruction was refused and a verdict was directed for the plaintiff. To the rulings exceptions were taken.

The words "for value received" in a promissory note import a valuable consideration. *Browne* v. *Ward,* 51 Maine, 191. But they do not import a valuable consideration of any particular kind. They are evidence prima facie of a valuable consideration of some kind. The single question then is whether, having stated in her claim filed in probate court that the claim was for "money loaned as evidenced by a note," etc., the burden was on the plaintiff to show in the first instance, or even at all, that the consideration for the note was money loaned, or whether the introduction of the note, it being stated therein that it was given "for value received," made out a prima facie case for the plaintiff. In other words, having stated the claim to be for "money loaned," must the plaintiff prove that particular consideration, or will evidence of any valuable consideration sustain the actions.

The statute merely requires the claimant to present in writing, or file his "claim." It does not require him to state the particulars of the claim, further than he would in a declaration in a writ. *Hurley* v. *Farnsworth,* 107 Maine, 306. He need not state the consideration. The statute does not contemplate that the claimant must in the claim filed advise the administrator as to these things. If it be an account, the claimant may file it. If it be a note, he may file it, or a copy of

it, or without doing either, he may definitely describe it. If this plaintiff had filed this note, or had filed an accurate description of its date, tenor, amount, and so forth, it would have been a compliance with the statute. The claim filed was for "money loaned as evidenced by a note." An exactly equivalent statement would have been "a note for money loaned." But in either case the note was the claim. It was the form into which the decedent had put his indebtedness. It was the claim to be sued; it was the claim to be paid. If the plaintiff in her claim as filed had omitted the unnecessary reference to the consideration, at the trial her case would have been made out prima facie by offering the note which puported to be "for value received." Having stated in the claim filed more than the statute required, is the burden on the plaintiff to prove the unnecessary matter? We think not.

This is not a question of pleading, in which the rule probata secundum allegata holds. The plaintiff held a note against the estate. As a condition precedent to the right to bring suit on that note the statute required her to present or file her claim on the note. She did so. Had she misdescribed the note, it might have been fatal. But an unnecessary, or even erroneous, statement of the circumstances out of which the claim arose should not be regarded as fatal. It certainly should not be so held unless it be shown that the administrator was misled thereby to his injury, and that an equitable estoppel was created. The decedent gave a note. Over his signature he said it was for "value received." The administrator had the statutory notice of the note, which is the claim. We see no good reason why the proof of these elements did not make out a prima facie right to recovery. If there were any defences, it was open to the administrator to make them.

Exceptions overruled.

SAMUEL M. BOWDEN, in Equity, *vs.* YORK SHORE WATER COMPANY.

York. Opinion November 22, 1915.

Bill in Equity. Condemnation proceedings. Easement. Eminent Domain. Fee. Injunction. Private and Special Laws of 1911, Chapter 256. Vested Interest.

1. A public service corporation may be authorized to take lands by the power of eminent domain, for public purposes, but it cannot so take them for private purposes.
2. To protect the water shed of a pond from which a water company takes its water, so as to protect the purity and conserve the quantity of the water, is a public use.
3. To protect the timber growing on the lands of a water company from possible ravages of fire is a private use, unless the purity and quantity of the company's water supply is thereby protected; and being a private use, the taking of other timber lands, from which a fire might spread, is not authorized.
4. The Legislature is the sole judge of the exigency or necessity for the exercise of the power of eminent domain.
5. Whether the uses for which land is attempted to be taken by the power of eminent domain are public, or are private, is a judicial question.
6. Whether a taking by the power of eminent domain has been in good faith for a public use, or whether it is but a guise for an intended private use, is a judicial question.
7. It appearing that the real purpose of a water company in undertaking to acquire, by the power of eminent domain, a timber lot, a mile distant from the crest of the water shed of its water supply, was to protect from the danger of fire its own timber growing on the intervening territory and on its land adjacent to the foot of its pond, it is held that the attempted taking was invalid.
8. The owner of land against which eminent domain proceedings have been commenced may test the validity of the taking, although he did not become owner until after the notice of taking had been filed in the office of the county commissioners, in accordance with the statute.

On report. Bill sustained with costs. Writ of permanent injunction to issue.

This is a bill in equity brought by Samuel M. Bowden against the York Shore Water Company, a corporation, asking for an injunction against said York Shore Water Company restraining it and its successors, assigns, attorneys, agents and officers from taking said real estate of said plaintiff, as in said bill set forth, etc.

Answer and replication were respectively filed. At the conclusion of the evidence in this cause, the same was reported to the Law Court, to be determined upon so much of the foregoing evidence as is admissible, the Law Court to order such decree as justice and equity require.

The case is stated in the opinion.

E. P. Spinney, for plaintiff.

Leroy Haley and Ralph W. Hawkes, for defendant.

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

SAVAGE, C. J. Bill in equity praying for an injunction to stay condemnation proceedings by which the defendant is attempting to take the plaintiff's land by an exercise of the power of eminent domain. The case comes up on report.

The defendant is a water company chartered by the Legislature for the purpose "of supplying the towns of York and Wells, or any part thereof, or residents therein, with pure water for domestic, manufacturing and municipal purposes." For these purposes, the corporation is authorized by its charter (Private and Special Laws of 1911, ch. 256) "to take, hold, protect and use the water of Chase's pond in the town of York, and of all other ponds and streams tributary thereto, or running therefrom," and, to "take and hold by purchase or otherwise any lands or other real estate necessary for any of the purposes aforesaid, and for the protection of its water mains and pipes and the water shed of said Chase's pond." The defendant takes its water from Chase's pond, which is one and one-third miles long, and it has acquired the ownership of some land within its watershed. The plaintiff owns a heavily timbered tract of land lying one and one-fifth miles easterly from Chase's pond. The tract contains one hundred and four acres. The deed to the plaintiff bears date March 8, 1913, and was executed on that day.

But it was not delivered to the plaintiff until March 17. In the meantime, on March 12, the defendant filed in the office of the county commissioners, in accordance with statute, R. S., ch. 56, sect. 11, a notice of taking the land with plan and description of the same. It is alleged in the bill and admitted by the answer that in the notice the defendant stated that "it finds it necessary for its purposes and uses in the protection of the water of Chase's pond in said town of York to take certain land within said town of York, and being duly authorized by law to take such land whenever it is necessary for its purposes and uses. Therefore said York Shore Water Company has taken and does hereby take" certain described land, which is the land in question. The filing of the notice was a taking of the land for the purpose described therein. *Penobscot Log Driving Co.* v. *West Branch D. & R. D. Co.*, 99 Maine, 452.

The plaintiff contends that the taking was not a constitutional exercise of the power of eminent domain, and hence that it was invalid and void. But before discussing this question, we must first consider one of the points in defense, namely that the plaintiff was not owner of the land at the time of the taking, and therefore has no such interest as entitles him to maintain this bill. We do not think the point is tenable. It is true the plaintiff did not obtain title until after the taking. It appears that both the plaintiff and the defendant had been negotiating with the then owners for the purchase of the land. The plaintiff offered a little more than the defendant and a deed to him was made and executed March 8. But it was left with the cashier of a bank to be delivered to the plaintiff when it should be ascertained that his check on another bank was good. It was not actually delivered to the plaintiff until March 17, five days after the taking by defendant.

If the taking by the defendant was valid, and if, thereby an absolute fee was vested in the defendant, its present contention might be sound. Whether an eminent domain taking vests an absolute fee is a question concerning which the courts are not in entire accord. In some cases, the character of the use seems to be the determining factor; in others, the provisions of the statute under which the taking is made. In some statutes it is expressly provided that the fee shall vest in the taker; in others, provision is made merely for taking and holding for specified public uses. The charter of this

defendant is of the latter class. The greater weight of authority, we think sustains the proposition that unless a legislative intent is discoverable that an absolute fee shall vest, the taker takes only an easement, or, at most, a qualified, conditionable and determinable fee. And in such case, if the use be abandoned, the entire title is revested in the owner. See for various views, *Harback* v. *Boston,* 10 Cush., 295; *Dingley* v. *Boston,* 100 Mass., 544; *Page* v. *O'Toole,* 144 Mass., 303; *Conklin* v. *Old Colony R. Co.,* 154 Mass., 155; *Troy & B. R. Co.* v. *Potter,* 42 Vt., 265; *People* v. *Blake,* 19 Cal., 579; *Lockie* v. *Mutual Union Tel. Co.,* 103 Ill., 401; *Harris* v. *Chicago,* 162 Ill., 288; *Hagaman* v. *Moore,* 84 Ind., 496; *Shawnee County Comr's* v. *Beckwith,* 10 Kan., 603; *Fairchild* v. *St. Paul,* 46 Minn., 540; 1 Lewis on Eminent Domain, 188.

It is unnecessary in this case, however, to determine the precise character of the interest in the land, which remained in the owner, if the proceedings were valid, and which came to the plaintiff by deed from the owner. If it shall be found that the condemnation proceedings were valid, he cannot on the facts maintain his bill. On the other hand, if the proceedings were invalid, he owns the entire interest in the land, and may have unauthorized and unlawful attempts to take it restrained. The contention of the defendant begs the question. It assumes that the taking was valid. Whether it was is the precise question in issue. In this respect it is immaterial whether the plaintiff took title before, or after March 12. He now has such an interest as enables him to try his rights.

The defendant relies upon the rule stated in *Hayford* v. *Bangor,* 103 Maine, 434, that only the owner at the time of taking can complain. But that case was not like this one. That was an appeal from assessment of damages on account of an eminent domain taking. And it was properly held that, as the damages occasioned by an eminent domain taking belong to whoever is owner at the time of taking, so no one can be aggrieved by the assessment except that owner. This case is not one of damages. This plaintiff would have no standing in a hearing on that question. But he has a standing in a proceeding to determine his rights in the land itself, and to prevent an encroachment upon the same.

Recurring now to the main proposition, we think the discussion will be clearer, if we describe the situation of the land with refer-

ence to Chase's pond, and the contour of the land between them. As already stated, the land is one and one-fifth miles from the pond. Between the land and the pond are two ridges running northerly and southerly in the same general direction as the pond extends. The westerly ridge forms the crest of the water shed of the pond. From that ridge to the plaintiff's land the distance is nearly one mile. Between the ridges is a valley. The ridges are higher, and the valley is lower, than the pond. Through the valley flow three brooks which ultimately empty into Cape Neddick stream, which has its source at the outlet of Chase's pond. By no possibility can water from the plaintiff's land flow into the pond. So much of the water shed of the pond as lies between the pond and the lot in question is only a few hundred feet in width, and it is not shown that it supplies any water to the pond, except suface water. The land in question lies on the easterly slope of the easterly ridge, and drains into a brook, which rising in a swamp on the lot, is dry in dry seasons of the year, and, when it has any water, empties into Cape Neddick stream. This brook not running from Chase's pond, and not tributary to it, is not within the scope of the defendant's charter as a source of supply. And if it was, it could not be made practically useful. Between the lot in question and the pond, there is some land that is covered with timber, some open land which is being, or has been, used for tillage or pasturing, and some area that has been stripped of timber in recent years, with the slash in varying degrees of decay lying on the ground. The defendant owns timber land adjoining plaintiff's lot on the west, and towards the pond, but not within its water shed. It also owns a tract near the foot of the pond, and another near the head. The latter is within the water shed. It has negotiated for other tracts of timber land situated, as we understand the testimony, in the valley between the ridges, and not within the water shed. These facts are all proper for consideration later in determining the real purpose of the taking, and whether the taking was for a public use, or for a private one.

The plaintiff charges that the taking was not made in good faith for the purpose of protecting the water in Chase's pond, or even of protecting the water shed of the pond, or for any purpose for which the defendant was authorized to exercise the right of eminent domain; but that it was, on the other hand, an attempt in the guise of

an eminent domain proceeding to acquire the private property of another, a valuable timber lot, to be held and operated for the profit thereof. We have noticed that the purpose stated in the taking itself is "the protection of the water in Chase's pond." Nothing is said about protecting the water shed. But, passing this omission, we think that the real purpose of the taking, as averred by the defendant at the hearing before the single Justice, is best stated in the language used in testimony by Mr. Josiah Chase, president of the company, and its manager, and principal stockholder. He said:—"Our company has had a great deal of trouble with fires and we have spent a great deal of money fighting fires, and the fires that we have had trouble with have all begun in lots that have been stripped and not far from our lots that are covered with growth; and as we owned and were negotiating for quite a large lot, several lots near there and adjoining, we made up our minds that it was actually dangerous for us to allow that lot to be stripped. The lots beyond there had been burned over and there was no danger practically from that, but if we allowed that to be stripped there was almost, according to our experience, almost a certainty that fire would be in there within a few years, and if fire got in there, there was nothing to stop it from there to Chase's pond, not a thing to stop it, and you couldn't stop it. The growth was nearly all pine there, and we have a 40 acre lot of good, thick pine at the foot of the pond, and it reaches up about half a mile, and which is connected without any road between it, and the only road is just one narrow road in the woods between that lot and the pond." The avowed purpose, then, of taking this land is, by keeping it unstripped, to protect from fire other property of the defendant in the valley and at the foot of the pond, some of which may be within the watershed.

The Legislature conferred upon the defendant the right of eminent domain for public uses. It could confer it for no other kind of use. Of the exigency or necessity for its exercise the Legislature was the sole judge. It is a political or governmental question. Eminent domain is the right of the sovereign state. The State by the Legislature may determine the necessity for itself as to a particular piece of property, or it may determine the general question of necessity, and commit to the corporation to which the power is granted, or to its officers, the right to determine the extent to which

it is necessary to exercise the power. *Riche* v. *Bar Harbor Water Co.*, 75 Maine, 91; *Moseley* v. *York Shore Water Co.*, 94 Maine, 83; *Brown* v. *Gerald*, 100 Maine, 351; *Brown* v. *Kennebec Water District*, 108 Maine, 227; *Hayford* v. *Bangor*, 102 Maine, 345. Under the grant of the power of eminent domain, this defendant had the right to determine in good faith to what extent necessity required the taking of the lands of others, for such public purposes as were specified in the charter. With that question, when the power is exercised in good faith, the court has nothing to do.

But whether the uses for which land is taken by eminent domain are public is a judicial question which must be determined, in case of controversy, by the court. *Riche* v. *Bar Harbor Water Co.*, supra; *Moseley* v. *York Shore Water Co.*, supra. So, it is a judicial question whether the taking has been in good faith for a public use, or whether the professed public use is but a guise or cover for an intended private use; whether, in short, the exercise of eminent domain in a particular case, is not an abuse of power, a perversion of authority. *Brown* v. *Gerald*, 100 Maine, 351; *Brown* v. *Kennebec Water District*, supra. These questions in this case are open for our consideration.

To protect the purity and conserve the quantity of a public water supply is undoubtedly a public use. To protect the water shed of a pond or stream, which is a public water supply, so as to preserve the purity and quantity of the supply is likewise a public use. Such was the case contemplated by the Legislature when it authorized this defendant to take land for the protection of the water shed of Chase's pond. The public have no interest in any other use. But we have seen that no water, and no impurity of any kind, can pass from the plaintiff's lot to Chase's pond, and that such water as flows off the lot is not within the scope of the defendant's charter. It follows that neither the purity nor the quantity of water in Chase's pond can be protected, nor in any way affected by the uses to which this land may be put. It is difficult to believe that the ostensible purpose stated in the notice of taking was the real purpose. Our disbelief is aided by the testimony of Mr. Chase that the taking was for protection against fire. The case contains nothing to show that the ability to control the Bowden lot would in any way tend to the protection of the purity or quantity of the water in Chase's pond.

And we must hold that the purpose declared in the notice of taking was not the true purpose.

Whether a taking for a declared specific public use is invalid, when the declared use is not the true purpose of taking, but when some other public use is served, need not be decided now. For we think the real purpose of the taking, if not to hold and operate the land for profit, was to serve a private, and not a public use. If we take the testimony of Mr. Chase, we are compelled to conclude that the land was sought to be taken as a protection from fire of other timber lands owned by the defendant. And in this connection, we may add that these other timber lands are not shown by the case to be of public use for the protection of the purity or quantity of the water in Chase's pond. If this taking for the avowed purpose can be upheld, there would seem to be no constitutional reason why adjoining lands still further away, if any there were, might not be so taken, and so on. The use of land by the defendant for the protection of its other lands from the spread of fire, at least, when the other lands are themselves not of public use, is clearly a private use. In this case we do not need to define more narrowly.

It is universally held that private property cannot be taken by another under governmental power for private uses. The State can neither do it, nor authorize it to be done. The principle applies as well to a taking by a public service corporation as to one by another corporation or individual. Public service corporations may be authorized to take for public, but not for private, uses. The prohibition is not expressed in the constitution, but it is necessarily implied. 1 Lewis on Eminent Domain, 406. Our Constitution, Art. I Section 21, provides that "private property shall not be taken for public uses, without just compensation, nor unless the public exigencies require it." In discussing this provision, the court, in *B. & P. R. R. Co.* v. *McComb,* 60 Maine, 290, said: "This exercise of the right of eminent domain is, in its nature, in derogation of the great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess and defend property. As between individuals, no necessity, however great, no exigency, however imminent, no improvement, however valuable, no refusal, however unneighborly, no obstinacy, however unreasonable, no offers of compensation, however extravagant, can

compel any man to part with an inch of his estate. The constitution protects him and his possessions, when held on, even to the extent of churlish obstinacy. It is only when the sovereign power declares that a public exigency, to carry out a public purpose, requires that the individual right to possess must yield to the higher demands of the sovereign power, that private property can be taken without consent."

However useful it may be to the defendant to protect its other timber lands from the ravages of fire, it cannot constitutionally do so under the conditions shown in this case, by the exercise of the right of eminent domain. The plaintiff is entitled to the relief prayed for.

Bill sustained with costs.
Writ of permanent injunction to issue.

HARRISON FLYE, in Equity,

vs.

FIRST CONGREGATIONAL PARISH OF NEWCASTLE, et als.

Lincoln. Opinion November 26, 1915.

Conveyance. Conveyance for pious purposes to person not in esse Fraud. Injunction. Ministerial Lot. Ownership. Sale. See 1 Maine Report, 271.

In a bill in equity brought to prevent the consummation of the sale by the Parish of all the stumpage on a ministerial lot, or glebe, to restrain the cutting of lumber therefrom and to have the conveyance declared void, *Held:*

1. That the conveyance of this lot by Christopher Tappan in 1739 "unto the inhabitants now settled on Sheepscot river at a place called Newcastle.....their heirs and assigns.....to be and remain in said settlement now called Newcastle for a glebe or parsonage forever," was a valid conveyance as a grant for pious uses, although no person or corporation was then in esse capable of taking.

2. That the town of Newcastle when subsequently incorporated in 1753 held the custody of the lot in its parochial capacity awaiting the settlement of a minister.
3. That upon the settlement of the first minister in 1754, he became seized of this lot in right of the town, in its parochial capacity, and held the same as a corporation sole to himself and his successors.
4. That after the organization of the First Congregational Parish in 1823, the ministers in succession held the title to this lot in right of the parish, and could convey the same with the assent of the parish.
5. That during the vacancies in the ministerial office, the fee was in abeyance, but the parish was entitled to the custody of the lot and to the rents and profits therefrom.
6. That since the last settled minister in 1874 the fee has been in abeyance awaiting a successor, and the parish has had the legal right to manage the lot and receive the income therefrom; but at no time has the title vested in the parish and at no time could it legally sell and convey the same.
7. That the corporation organized under the general law in 1913 as the First Congregational Parish is not a distinct and independent parish but merely a reorganization and rehabilitation of the old parish for the purpose of perpetuating its existence, and therefore as the successor of the old parish has the same rights in this lot as the old parish, but no more.
8. That this parish has no legal right to sell all the standing timber and thereby strip this lot, and the deed purporting to convey the same was invalid.
9. That the Methodist Church at Sheepscot, the would-be intervenor, has no rights or interest in this property.

On report. Bill sustained with single bill of costs.

Temporary injunction to be made perpetual.

Decree in accordance with this opinion.

This is a bill in equity to prevent the consummation of a sale of certain church or ministerial property, a lumber lot located at Sheepscot, in the town of Newcastle; to restrain the cutting of lumber therefrom by the grantee, and to have the sale declared void and for an adjudication as to the present ownership and rights in the property. The requisite answers and replications were filed.

At the conclusion of the evidence, questions of law of sufficient importance having arisen to justify the same, and by consent of the parties, this cause was reported to the Law Court to be determined upon such evidence as is legally admissible.

The case is stated in the opinion.
Arthur S. Littlefield, for plaintiff.
Weston M. Hilton, for defendant.

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

CORNISH, J. This is a bill in equity brought to prevent the consummation of the sale of all the stumpage on a ministerial lot located at Sheepscot in the town of Newcastle, to restrain the cutting of lumber therefrom by the grantee, to have the conveyance dated September 1, 1914, declared void and to adjudicate the present ownership of the property.

The plaintiff is one of the three surviving members of the original Congregational parish in Newcastle, and he alleges that he brings the bill on behalf of himself, of other members of the parish, and of the Congregational church at said Sheepscot.

J. D. McGraw, the minister of the Methodist church in Sheepscot asks the right to intervene, claiming that he is the person in whom the title to the property is now vested, in the right of the only parish existing at that place at the present time.

A recital of the historical facts connected with this ministerial lot is necessary to a clear understanding of the issue.

On May 15, 1739, Christopher Tappan of Newbury, Massachusetts, the then or prior owner of nearly all the land within the limits of the present town of Newcastle, granted "Unto the inhabitants now settled on Sheepscot river, at a place called New Castle in the County of York . . . their heirs and assigns forever for the uses hereinafter mentioned, two hundred acres of land, situate, lying and being in New Castle and is the lots No. fifteen and sixteen, also two thirty-sevenths of all the marsh and meadow lying within the bounds &c. . . . to have and to hold the said granted and gifted premises with all the appurtenances &c. . . . to the said inhabitants, their heirs and assigns to be disposed of in manner following, viz: one-half of said land and marsh to be disposed of to the first minister that shall be settled amongst said people at said place, either by ordination or instalment, to him, his heirs and assigns forever. And the other moiety or half to be and remain in said settlement now called New Castle for a glebe or parsonage forever."

1. MINISTER. The town of New Castle was incorporated fourteen years later, in 1753, by the General Court of Massachusetts, and included the settlement at Sheepscot. The town in its parochial capacity then assumed control of lots 15 and 16, and caused Rev. Alexander Boyd, a Presbyterian, to be ordained as the first settled minister on September 19, 1754. His pastorate continued until December, 1758. In that year a committee was appointed by the town to "lot" with Mr. Boyd and determine which of the lots conveyed by Christopher Tappan should be his under the terms of the grant, he being the first settled minister, and he received lot 15. In this his title was absolute. Lot 16 was therefore left as the glebe, or parsonage lot, and over that the present controversy has arisen.

The next minister was Thurston Whiting who on March 9, 1776, in town meeting, was given the choice to settle as a Presbyterian or Congregationalist. He chose the latter, was ordained as a Congregational minister in July, 1776, and was dismissed in March, 1782. From that time a succession of Congregational ministers was ordained or installed, the last being the Rev. John Haskell, who served from May 26, 1872, until October 1, 1874. Since that time there has been no settled minister, but services have been held at various times, and with more frequency and regularity in the summer season.

2. CHURCH. The Sheepscot Congregational church, the first church to be established in the town, was organized in 1776, the same year in which Mr. Whiting, the first Congregational minister, was settled, and was reorganized in 1799. The last record in the church record book bears the date of 1875, the year following the last pastorate, that of Mr. Haskell. The church reported to the State conference of 1892 for the year 1891, a membership of six. No reports were made after 1892. Two members still survive, one of whom has taken letters of dismissal to another church.

3. PARISH. The First Congregational Society or Parish appears to have been organized in 1823. Its records begin at that time. On October 4, 1797, when Rev. Kiah Bailey was ordained as the successor of Mr. Whiting, the town still constituted the parish, but it was not officially represented at the council which recommended the dissolution of the connection September 24, 1823, and the next minister, Jotham Sewall, Jr., who was ordained November 3, 1824, was called by a vote of the church, concurred in by the parish.

The parish at some time after its organization took charge of this ministerial lot No. 16, received the income therefrom and expended it either for the general purposes of the church or in the maintenance and repair of the church property. The parish records were kept only to 1877, but its members continued to exercise the same oversight and control and paid the taxes on the lot up to the year 1913.

4. CHURCH BUILDINGS. According to the History of Ancient Sheepscot and Newcastle by Rev. David Q. Cushman, made a part of the evidence by agreement, the Congregationalists had two meeting houses, one on the west side of the town (the Sheepscot side) and the other on the east side (the Damariscotta river side) and preaching was divided between the two places until 1844, when a new or second Congregationalist church was organized on the Damariscotta side. The Garrison Hill meeting house in Sheepscot was built by an association with records distinct from any church or society and known as the "Proprietors of Sheepscot Meeting House," and it was "voted that this house shall be dedicated a free house to all religious denominations." This was occupied as a union church, the Congregationalists being allowed one-half the time, the Methodists one-third and the Baptists one-sixth, until 1868, when the Congregationalists became the sole owners of the property. It is in this building that their services have since been held.

5. INCORPORATION OF PARISH. .The membership of the parish or society dwindled until in 1913 only three members survived, Harrison Flye, the plaintiff, Edwin Flye and William F. Chase. These three with thirty-three others, on June 26, 1913, in writing over their own signatures, signified their desire and purpose "to form a society to be known as the First Congregational Parish Society of Newcastle, the purpose of said society being the preservation and care of the property now vested in the First Congregational Society and the maintenance of public worship to such extent as may seem practicable." In furtherance of this desire and purpose, on August 7, 1913, an application was made to a Notary Public by the three surviving members of the Parish and five others, requesting him to issue his warrant in order that they might become incorporated as a religious society under the provisions of Chapter 57 of the Revised

Statutes. The necessary legal steps were taken and the corporation was formed on September 6, 1913, under the name of the First Congregational Parish, its stated purposes being "to hold and care for all real and personal estate of said parish and the maintenance of public worship to such extent as may seem expedient." The certificate of incorporation was approved September 22, 1913. At this meeting the necessary officers were chosen, including trustees.

6. SALE OF TIMBER. After the incorporation of the parish its officers contracted for the sale of all the standing timber on the ministerial lot to Clair W. Freeman for the sum of five thousand five hundred dollars, and at a corporate meeting held on July 27, 1914, the parish voted to ratify and confirm the acts of its officers in this respect and the trustees were directed to execute and deliver the necessary conveyance. On September 1, 1914, this vote was rescinded so far as it related to the execution of the deed and Edwin Flye was authorized to execute and deliver the same on behalf of the parish. On that day the deed was executed and delivered and the balance of the purchase price of $5,500 was paid to the parish treasurer. This bill in equity was brought nine days later.

The legal questions arising from the foregoing facts are rarely encountered at the present day, but were of not infrequent occurrence in the early history of New England, and certain well defined rules of law were then established governing the creation of parishes and the vesting and management of parish or ministerial lands. These are decisive of the issues here involved and a re-statement of these principles is therefore necessary.

At the time of the original grant from Christopher Tappan "unto the inhabitants now settled at Sheepscot river at a place called New Castle," neither town, nor church, nor parish was in existence. There was no person nor corporation then capable of taking.

But the conveyance was still effective. It was held in *Proprietors of Shapleigh* v. *Pillsbury,* 1 Maine, 271, that such a grant is valid and if lands be so granted for pious uses to a person or corporation not in esse, the right to the possession and custody of the lands remains in the grantor until the person or corporation intended shall come into existence at which time the estate vests. See also *Rice* v. *Osgood,* 9 Mass., 38; *Brown* v. *Porter,* 10 Mass., 93, and *Pawlet* v. *Clark,* 9 Cranch, 292.

When, therefore, the town was incorporated in 1753, all rights of the grantor, or of his heirs, ceased and the town took and held the lot in its parochial capacity awaiting the settlement of a minister. At that time towns exercised both municipal and parochial powers, all the inhabitants of the town being members of the parish, and they continued so to exercise both until a separate parish was formed, and then the parochial powers and duties of the town ceased.

Upon the settlement of the first minister, Rev. Alexander Boyd in 1754, he became seized of this lot in right of the town. Had the parish then existed independent of the town he would have held in right of the parish. When the parish was subsequently formed, it succeeded to the rights of the town theretofore acting in a parochial capacity, and the ministers from that time forward held the title in right of the parish. In this connection it is interesting to note that in 1839, precisely one hundred years after the original grant was made, Rev. Jotham Sewall, Jr., the then settled minister of this church and parish brought an action for an alleged trespass upon this lot 16, and his legal title to the lot and his right to maintain the action were upheld in these words: "We are not aware that any principle of local law will prevent the passing of this estate for a glebe or parsonage to the inhabitants of Newcastle, incorporated subsequently to the grant. We have heard no complaint for nearly a century from Christopher Tappan or his heirs, that the corporation of Newcastle has committed any disseizin or that they had failed to appropriate the land according to the intent of the donor. The town has taken and held it in their parochial character and as soon as the minister was ordained in 1776 he held it in the right of the parish. After his connection with the parish ceased they again proceeded to take charge of it till the settlement of Mr. Bailey who held it till 1824. The present plaintiff on his ordination became entitled to hold it." *Sewall* v. *Cargill,* 15 Maine, 414. See also *Cargill in error* v. *Sewall,* 19 Maine, 288.

The well settled rules governing the title and custody of parsonage lands are most succinctly stated in an early Massachusetts case, affecting property then situated in Massachusetts but now in Maine:

"When a minister of a town or parish is seized of any lands in right of the town or parish, which is the case of all parsonage lands, or lands granted for the use of the ministry, or of the minister

for the time being, the minister for this purpose is a sole corporation, and holds the same to himself and his successors. And, in case of a vacancy in the office, the town or parish is entitled to the custody of the same and for that purpose may enter and take the profits until there be a successor. Every town is considered to be a parish until a separate parish be formed within it, and then the inhabitants and territory not included in the separate parish form the first parish; and the minister of such first parish, by law, holds to him and his successors all the estate and rights which he held as minister of the town, before separation." *First Parish in Brunswick* v. *Dunning,* 7 Mass., 445. See also *Jewett* v. *Burroughs,* 15 Mass., 464, and *Richardson* v. *Brown,* 6 Maine, 464. The distinction between church and parish and the powers of each are elaborately elucidated by Chief Justice Shaw in *Stebbins* v. *Jennings,* 10 Pick., 171-182.

It only remains to make application of the foregoing principles. It is obvious that the several settled ministers of this church became in succession seized of this lot, in right of the town or parish; that during the vacancies in the ministerial office the fee of the lot was in abeyance, but the town in its parochial capacity until the organization of the parish, and ever after such organization the parish itself had custody and control of the lot and became entitled to the rents and profits therefrom until a successor was installed. Upon the installation of the successor the fee vested in him. Since 1874, when the last settled minister was dismissed, the fee has again been in abeyance while the management has been in the parish, but at no time did the fee itself vest in the parish and at no time could the parish convey. Nor could the minister for the time being aliene without assent of the parish. He holds in right of the parish and it is only when the parish assent that a valid conveyance can be made. *Weston* v. *Hunt,* 2 Mass., 500; *Porter* v. *Griswold,* 6 Maine, 430. Concurrence of both is necessary.

The corporation organized in 1913 as the First Congregational Parish was not a distinct and independent parish as the plaintiff contends, but merely a reorganization and rehabilitation of the few surviving members of the old parish for the purpose of perpetuating its existence by bringing in new members, injecting new blood, and adopting a corporate charter. The written declarations at the time,

the stated purposes of the charter, and the evidence of the parties leave no room for doubt on this point. *Parsonsfield* v. *Dalton,* 5 Maine, 217. Therefore this corporation as the successor of the old parish has the legal right to the management of this glebe and to the income arising therefrom until the settlement of another minister of this church. But that is the extent of is powers. It has no further rights. It cannot convey the property. *Bucksport* v. *Spofford,* 12 Maine, 487. The title does not vest in it and therefore it has no title to convey. It cannot commit waste. The deed in this case is invalid. It is true that the deed does not convey the soil, but it does convey "all the trees standing and growing on the lot." If carried into effect the lot would be stripped, and not merely the income or profits of the capital to which the parish is entitled, but the capital itself would be effectually disposed of. This exceeded the powers of the parish for the reasons already stated. The injunction must therefore be made permanent, a reconveyance must be made by the purchaser, Clair W. Freeman, and the consideration received by the parish must be repaid to said Freeman. The details can be embodied in the decree to be filed below.

The conclusion reached renders unnecessary the consideration of other questions raised in argument, namely the rights of the Methodist church in this lot and the alleged fraud upon the parish by its agent in the sale of the timber. Regarding the first point it is sufficient to say that the Methodist church has no interest or rights whatever in the property; and regarding the second point we find no fraud practiced upon the parish by its agent who was duly authorized to negotiate the sale. Moreover the parish itself, of which this plaintiff is a member, after full knowledge of the facts ratified and confirmed the acts of its agent and consummated the sale by directing a conveyance to be made.

However, upon the main question of the invalidity of the conveyance itself for want of title in the parish the plaintiff should prevail.

Bill sustained with single bill of costs.
Temporary injunction to be made perpetual.
Decree in accordance with this opinion.

FRED E. DAGGETT,

Appellant from Decree of Judge of Probate

Penobscot. Opinion Decemer 1, 1915.

Appeal. *Appointment of Administrator.* *Presumption of Death.* *Reasons of Appeal.*

It appears that William M. Daggett, having an established residence in Dexter, departed thence on the thirty-first day of August, 1902, when about fifty-two years of age, and, from the fifteenth day of September, 1902, until the day of the hearing in the probate court upon the petition of Appellant, had neither been heard of nor from by his friends or by his heirs-at-law and next of kin, although diligent search and inquiry for him had been made by them; and also that their investigation failed to show the acquirement of another residence by the alleged deceased or the existence of any instrument making testamentary disposition of his property.

Held:

1. That upon the facts stated, in the absence of any evidence showing or tending to show that William M. Daggett was alive, the conclusion is warranted that he was dead; and that the prayer of petitioner should have been granted.
2. The statute provides that the appellant in such cases shall serve all the other parties who appeared before the judge of probate in the case with a copy of the reasons of appeal. It is admitted that no service of the reasons of appeal was made or attempted. But as no other parties "appeared before the judge of probate in the case," we are unable to perceive how service could be required or be made.

On appeal from decree of the Judge of probate. Appeal sustained. Decree of probate court reversed. The case is remanded to the Supreme Court of Probate for the county of Penobscot for further action in accordance with this opinion.

This is a petition by Fred E. Daggett to be appointed administrator of the estate of William M. Daggett. The probate Judge for

the county of Penobscot denied the petition, and the said Fred E. Daggett appealed to the Supreme Court of Probate to be held at Bangor, within and for the county of Penobscot. At the conclusion of the hearing, the case was reported to the Law Court, upon so much of the foregoing evidence as is legally admissible, for determination.

The case is stated in the opinion.

Wheeler & Howe, for appellant.

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

BIRD, J. This is an appeal from the decree of the Judge of probate of Penobscot county denying the petition of the appellant for the appointment of himself or some other suitable person, as administrator of the estate of William M. Daggett, late of Dexter, in that county, deceased. It appears that William M. Daggett was one of the heirs at law of one Mary L. Libby and that his share of her estate, more than twenty dollars in value, remaining unclaimed, it was deposited in a savings bank and later assigned by the Judge of probate to the treasurer of the county under the provisions of R. S., c. 67, § 20, as amended. It further appears that William M. Daggett, having an established residence in Dexter, departed thence on the thirty-first day of August, 1902, when about fifty-two years of age, and from the fifteenth day of September, 1902, until the day of the hearing in the probate court upon the petition of appellant, had neither been heard of nor from by his friends or by his heirs-at-law and next of kin, although diligent search and inquiry for him had been made by them; and also that their investigation failed to show the acquirement of another residence by the alleged deceased or the existence of any instrument making testamentary disposition of his property.

The court is of opinion that upon the facts stated, in the absence of any evidence showing or tending to show that William M. Daggett was alive, the conclusion is warranted that he was dead; *Burleigh* v. *Mullen,* 95 Maine, 423, 428; *Chapman* v. *Kimball,* 83 Maine, 389, 395; *Wentworth* v. *Wentworh,* 71 Maine, 72, 74; and that the prayer of petitioner should have been granted.

The statute provides that the appellant shall serve all the other parties who appeared before the Judge of probate in the case with a copy of the reasons of appeal. It is admitted that no service of the reasons of appeal was made or attempted. But as no other parties "appeared before the Judge of probate in the case," we are unable to perceive how service could be required or be made; see *Glover* v. *Jones,* 95 Maine, 303, 306-307.

Commissions were issued by a Justice of the court for the taking of the deposition of two witnesses. No notice of the application for a commission was given any adverse party as required by Rule XXIV. The requirement of notice is predicated upon the existence of an adverse party. When there is no adverse party, the occasion for the requirement as well as the possibility of compliance equally fail. See *Glover* v. *Jones,* ubi supra.

Appeal sustained.
Decree of the Probate Court reversed.
The case is remanded to the Supreme Court of Probate for the county of Penobscot for further action in accordance with this opinion.

JAMES L. MAXWELL, et als.,

vs.

YORK MUTUAL FIRE INSURANCE COMPANY.

Androscoggin. Opinion December 3, 1915.

Agents. Applications filled out by Agents. Fire Insurance. Mortgage. Occupant. Public Laws, 1861, Chapter 34. Public Laws, 1862, Chapter 115, Section 2. Vacant Buildings. Waiver.

1. Chapter 49, Section 93, R. S., providing for service of notice or process upon an agent of such Company, provides further that such agents and the agents of all domestic Companies shall be regarded as in the place of the Company in all respects regarding any insurance effected by them.
2. The Company is bound by their knowledge of the risk and of 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. To avoid liability on a fire insurance policy on the ground of untrue statements in the proof of loss, it must be shown that the statements were knowingly and intentionally untrue, and the burden of showing it is on the Company.

On exceptions by defendant. Exceptions overruled.

An action of assumpsit on a policy of fire insurance issued by defendant, dated October 24, 1912, on certain buildings located in the town of Webster. Plea, the general issue with brief statement.

At the conclusion of the evidence on both sides, the presiding Justice directed the jury to return a verdict for plaintiff for $640.06. To this ruling, the defendant excepted and his exceptions were allowed.

The case is stated in the opinion.

Harry Manser, for plaintiffs.

Tascus Atwood, for defendant.

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

HANSON, J. This is an action on a fire insurance policy and is before the court on exceptions to the order of the presiding Justice directing a verdict for the plaintiff. The facts are not in dispute. The property belonged to the heirs of Llewellyn Maxwell. It had been insured by the London & Lancashire Ins. Co. for $1500, through the agency of J. P. Hutchinson & Co., who were also the agents of the defendant company.

Prior to October 15, 1912, as appears by letter of the agents of that date, the agents were informed that the buildings were vacant and would remain so all winter, and they, being unable to secure a vacancy permit from the London & Lancashire Co., made application to two mutual companies for $750 insurance in each in behalf of the plaintiffs. As shown by this letter, the agents filled out the application in this case and sent it to the administratrix to sign. In reply to the question as to occupancy, the answer written by the agents is "vacant at present." Further, in the answers in that part of the application directed to be made by the agents, appears the information that the London & Lancashire Company had cancelled the risk on account of vacancy.

The policy in this case was issued October 30, 1912. On November 5, 1912, the agents wrote to the defendants asking them if they would increase the amount of insurance, as the Vermont Mutual had declined to go on the risk on account of its being vacant, to which the defendants replied, "We do not care to take more on these premises until occupied."

From the testimony it appears that the premises were unoccupied from September, 1912, before the issuance of the policy in October, until April, 1913, and from Christmas, 1913, for about eight weeks, and again from May 17, 1914, to the time of the fire on October 12th of that year.

It appears that the policy was written for the ordinary premium, without any additional charge for vacancy.

The defendant by brief statement alleged "that the plaintiff misrepresented a material fact in writing, viz, that the real estate to be insured by said policy was not mortgaged, when at the time of making said application said real estate was in fact encumbered

by a mortgage," and (2) That the buildings described in said application and policy became vacant in the summer and fall of 1914 and so remained vacant for more than thirty days prior to the fire . . . without the assent of the defendant, and that said buildings became vacant by the removal of the occupant.

The defendant's contention is that "inasmuch as the case shows that no extra premium was paid for vacancy, no vacancy permit was attached to the policy, that the expression 'vacant at present' carried with it the implication that the buildings were soon to be occupied as in fact they were; that when occupied, the insured was then living under the terms of the policy which was written as the ordinary policy is for the ordinary premium, . . . and the assured was bound, if a vacancy of more than thirty days should occur after the occupancy, to give the company notice." More than thirty days' vacancy did in fact exist, and no notice was given the company.

We think there is no merit in either contention in view of the admitted facts in the case. There is an entire absence of suggestion of fraud on the part of the plaintiffs, or fraud in fact shown in the case, which to be effectual was for the defendant to prove.

The letter of defendant's agent, which is here given, negatives the claim that the application in and of itself furnishes a defence to the action. The agent wrote the plaintiff on October 15, 1912, this letter:

"Mrs. Eva I. Maxwell,

Mechanic Falls, Me.

Dear Madam:

Your son informed us the other day that the farm buildings were vacant, and would remain so during the winter. We have notified the company of the vacancy and requested of them permission for the same. They refuse it on the ground they do not care to insure vacant farm buildings.

The only thing we can do for you is to cancel this policy and give you back the portion of it not used, and write it in mutual companies. They are the only ones that will take vacant farm property.

You will find enclosed two applications for insurance, one-half of it to be in the York County Mutual and the other half in the Vermont Mutual. Kindly sign each of them in two places, near

the bottom, where cross is made with ink, and return them to me, and I will fill out the blank portions after I go out and examine the premises, which I shall have to do.

Very truly yours,

(Signed) J. P. HUTCHINSON.

(Encs. 2.)"

And following this the agent filled in such blanks as he had not already filled. It then contained the reference to the mortgage and the vacancy as well; in the latter case he had written "vacant at present."

Richardson v. *Maine Insurance Company,* decided in 1859, 46 Maine, 394, is cited as authority sustaining the defendant's contention that the representation that there was no mortgage on the property was material, though the company had no lien on the real estate mortgaged. There the insured wrote a letter to the agent of the insurance company for insurance. Thereupon the agent filled out an application which contained a statement that there was "no mortgage" on the property to be insured, and signed the name of the applicant to it without the latter's knowledge. A policy was issued referring to the application as a part of the policy and was accepted by the applicant. It was held that by accepting the policy, the plaintiff convenanted and engaged that the application contained a just, full and true statement in regard to the condition of the insured property, and that he thereby ratified the application; that the company was not bound by the letter from the assured to their agent, and that such representation was material.

Such was the law until the enactment of Chapter 34, Laws of 1861, which was amended by Chapter 115, Laws of 1862, to read as follows: "Sec. 2. An agent authorized by an insurance company whose name shall be borne on the policy, shall be deemed the agent of said company in all matters of insurance; any notice required to be given to said company, or any of its officers, by the insured may be given to such agent; any application for insurance or valuation or description of the property, or of the interest of the assured therein, if drawn by said agent, shall be conclusive upon the company but not upon the insured, although signed by him; all acts, proceedings and doings of such agent with the insured shall be as

binding upon the company as if done and performed by the person specially empowered or designated therefor by the contract.

"Sec. 3. All statements of description or valuation, in any contract of insurance or application therefor, shall be deemed representations and not warranties. Any misrepresentation of the title or interest of the insured, unless the same is fraudulnet or material, shall not prevent his recovering on the policy the amount of his insurable interest; a misrepresentation of title to a parcel of the property insured shall not affect the contract as to other parcels, either real or personal, covered by the policy."

The strict rule that parties to all contracts in writing are supposed to have the intentions which are clearly manifested by the terms thereof was there applied, (*Richardson* v. *Me. Ins. Co.,* supra) and in doing so the court say "in the case before us the conditions, etc., make a part of the contract. They are free from ambiguity and doubt. A statement in the application, which is one of the conditions, is not true in fact, though no moral wrong is imputed to the plaintiff. The court cannot withdraw this statement from its consideration. The parties have made it essential, and to disregard it would be the substitution of another contract for that made by the parties."

Following this decision this court had under consideration *Emery* v. *Piscataqua F. & M. Ins. Co.* 52 Maine, 322, where the interest of the assured was that of mortgagee, but that fact, or that his interest as such was to be insured, did not appear in the policy. There was no application, but the agent examined the premises and was fully informed as to the interest of the insured. The policy was in the same form as in *Richarson* v. *Maine Ins. Co.,* supra. The court held, (1) That, if there be an error in the description of the interest of the insured in the policy, it is imputable to the defendant's agent, and the policy is not void by reason thereof; and (2) That, if there had been a misrepresentation as to the interest of the insured, it would not prevent a recovery to the full amount of the interest insurable unless such misrepresentation was fraudulent. Appleton, C J., in noting previous decisions holding policies void for various causes affecting description of property, said, "these and similar decisions are made to depend upon the peculiar language of the policies *then under consideration.* To avoid their effect, the

Act of 1861, C. 34, entitled 'An Act in relation to Fire and Marine Insurance Companies and actions on contracts of insurance' was passed. The present policy is subsequent to the passage of the act referred to, and is subject to its provisions."

In *Caston* v. *Monmouth M. F. Ins. Co.,* 54 Maine, 170, where it was claimed that the representations in the application were material and untrue, the court say: "The case finds that the application for insurance, including the valuation and description of the property, was drawn up by the agent of the company, who 'knew all the facts about the ownership and occupancy.'" The statute of 1861, c. 34, sec. 2, makes an application thus drawn up conclusive upon the company, "although it contain a representation material and untrue."

Chap. 49, Sec. 93, R. S., after providing for service of notice or processes upon an agent of such company, provides further "that such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them. The company is bound by their knowledge of the risk and of all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known by the company and waived by it as if noted in the policy."

In *Thorne* v. *Casualty Company of America* 106 Maine, 274, where the company issued a policy through a third party as agent, to whom application for insurance was made, there was nothing to show fraud on the part of the insured; but the warranty in the application that the insured was in sound condition was false, and so known to the agent. *Held,* that, though the company had no actual notice of the falsity of the warranty, it was liable on the policy, since it was the moving cause authorizing the transaction, of which the assured became an innocent victim.

In *Cole* v. *North British and Mercantile Insurance Co.,* 113 Maine, 512, it is held, that to avoid liability on a fire insurance policy on the ground of untrue statements in the proof of loss, it must be shown that the statements were knowingly and intentionally untrue, and the burden of showing it is on the company.

The application was furnished by the agent with directions to the plaintiff to sign "where the cross is made with ink, and return them to me, and I will fill out the blank portions," etc., etc. And

he did fill out all the answers, the reference to the mortgage as well as the other details. The case discloses that the plaintiff placed full reliance upon the agent and did just what he directed, and the agent did the rest. If there was mistake or misrepresentation, it is not shown to have been the act of the plaintiff or that the same was specially authorized by, or consented to by her. The act of the agent must therefore be held to have been the act of the defendant. See *Washburn* v. *Casualty Co.*, 108 Maine, 429; *Marston* v. *Life Ins. Co.*, 89 Maine, 266; *Hewey* v. *Ins. Co.*, 100 Maine, 523; 109 Maine, 323.

In *LeBlanc* v. *Standard Ins. Co.*, 114 Maine, 6, this court, by SAVAGE, C. J., in referring to Sect. 93, Chap. 49, R. S., supra, said: "The language of this statute is most comprehensive, and we think it was intended to be so. The statute itself seems to place no limits. The simple purpose of the statute is that those seeking insurance and those afterwards holding policies, may as safely deal with the agents, with whom alone they ordinarily transact their business, as if they were dealing directly with the companies themselves." . . . "The statute is best construed by interpreting it just as it reads. The agent stands 'in the place of the company,' is the company 'in all respects regarding any insurance effected by him.'"

As to the use of the words "vacant at present," we cannot adopt the defendant's view that the expression "carried with it the implication that the buildings were soon to be occupied." While it may have carried an implication that the buildings might be occupied, the contract of insurance was clearly effected on vacant property, which might so far as anything in the contract appears to the contrary, remain vacant during the period covered by the policy. The agent under date of Nov 11, 1912, wrote the plaintiff as follows: "Enclosed please find policy in one of the mutual companies that we were to get for you; the other would not go on the risk on account of its being vacant. This is all that we can do at present until it is occupied."

The plaintiff was justified in believing that the property was insured as vacant property, as it was in fact; that it was unoccupied and might be during the life of the policy was well known to the company as well as to the agent, and we find no warrant in holding that an occasional occupancy and consequent occasional vacancies,

as in this case, destroy the right to recover. The plaintiff procured insurance on vacant property. As such it was destroyed by fire. She was protected by the policy. The order directing the verdict was proper.

Exceptions overruled.

HARRY E. LUNGE, Applt., *vs.* NELLIE J. ABBOTT.

York. Opinion December 3, 1915.

Agency. Contract. Exceptions. Husband and Wife. Repairs on wife's property made by contract with husband.

1. The fact of agency can be established by proof of any facts or circumstances from which agency can reasonably and logically be inferred. The marriage relation of the parties, however, is not alone enough to establish the fact that the one is the agent of the other. But where the question is whether a husband was the agent of his wife in transactions for the repair and improvement of her property, the marriage relation, and the wife's situation and the condition of her health at the time, are of significance, in connection with the nature of the work contracted for. So, too, is the fact that the husband had transacted similar business with her approval and for which she recognized her responsibility.
2. Upon a proper submission of the question to them, the jury decided that the defendant's husband was her agent in having a furnace put in her house in her absence from home. *Held:* that there was evidence which reasonably justified the jury in so deciding.
3. An excepting party must show that he has been prejudiced by the ruling.
4. If requested instructions are not pertinent and applicable to the case, though containing a correct statement of abstract principles of law, they may properly be refused.
5. Exceptions will not be sustained to a refusal to give special requests, though they may be reasonably applicable to some features of the case, provided ample and correct instructions have already been given.
6. The instructions given were pertinent to the only issue involved in the case, were sound in law, and clearly and explicitly presented.

7. The requested instructions appear to be a verbatim copy of all the paragraphs of the head note in the case of Steward v. Church, 108 Maine, 83. None of them were peculiarly applicable to the facts in this case, and some of them were wholly inapplicable thereto.
8. We do not find any reversible error in the ruling refusing them. The jury had already been fully and amply instructed. It does not appear that the defendant was prejudiced by the ruling complained of.

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

This is an action of assumpsit on account annexed to recover the value of a furnace put into the defendant's house on contract by the husband. Plea, general issue. The jury returned a verdict for plaintiff and the defendant filed a general motion for a new trial. The defendant also requested the Justice presiding to give the following instructions, which the said presiding Justice declined to do, and the defendant excepted to said refusal to so instruct.

1. Where a husband and wife are living on a farm which the husband is carrying on, the fact that the title to the farm is in the wife does not show that he was carrying on the farm as her agent and does not make her liable for articles purchased by him for use on the farm.

2. Where in such case the husband did not represent himself to be the agent of his wife in making the purchase, she cannot be liable upon the ground of after-ratification. The doctrine of ratification applies only in cases where a person without authority assumes to have authority to act for another.

3. A promise by the wife to pay the vendor for articles purchased by the husband cannot be logically inferred from the circumstances that the articles ultimately came into her hands.

4. The fact that the wife authorized her husband to let a farm owned by her, does not justify an inference that he was her agent in carrying on the farm.

5. The fact that in making a lease of the farm and farming plant six months after the purchase of a farming implement by her husband, the wife included the implement in the lease does not justify the inference that she authorized it to be purchased on her credit.

The case is stated in the opinion.
Clarence Webber, for plaintiff.
William M. Tripp, for defendant.

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

KING, J. Action to recover $55.70 for materials and labor furnished in putting a heating furnace into the defendant's house under a contract therefor made by her husband, to whom the plaintiff gave credit supposing him to be the owner of the property. At the time the defendant was away from home in a hospital. The foundation of the action is the claim that the husband was the wife's agent in the transaction. That was the sole issue at the trial. The verdict was for the plaintiff, and the case comes up on a motion for a new trial and exceptions by the defendant.

The fact of agency can be established by proof of any facts or circumstances from which agency can reasonably and logically be inferred. The marriage relation of the parties, however, is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof. But where the question is whether a husband was the agent of his wife in transactions for the repair and improvement of her property, the marriage relation, and the wife's situation and the condition of her health at the time, are of significance, in connection with the nature of the work contracted for. So, too, is the fact, that the husband had transacted similar business with her approval and for which she recognized her responsibility.

In the case at bar the home was bought by the wife in 1911. It was a small farm on which she and her husband resided. He admitted that he had charge of the farm "outdoors." The same month the property was purchased, considerable repairs and improvements were made to the buildings, including an extension to the ell or shed and the making of a pantry inside the house. The carpenters who did the work testified that they were employed by the husband who seemed to be in charge of the work and gave them instructions, and that the wife was there while the work was going on. In April and May of 1912 the house was further improved, including the building of a piazza, and a hen house was built at that time. The

husband hired the workmen for that work and the wife paid them with her checks, some of which at least the husband made out for her to sign. Before she went to the hospital, about the first of December, 1912, the chimney of the house had been torn down. and a Mr. Hall was employed by the husband to put in a new floor and make some repairs and alterations inside the house. He was working there when the furnace was put in. Again in 1913, Mr. Hall was employed by the husband to do work on the outside of the buildings and the wife was there and gave him some directions as to the work, but his "general instructions" were given by the husband. Those were pertinent facts and circumstances for the consideration of the jury on the question whether the husband was the general agent of his wife in the management of the property, particularly in respect to the making of needed repairs and improvements to the house and buildings.

It is true that the wife was not at home when the furnace was put in, but she testified that there was no heat in the house when she went away, the chimney having then been taken down. Apparently repairs on the house had then been commenced. Is it an unreasonable inference from the circumstances, that her husband, in her absence in the hospital, was her general agent to carry on the work of repairing the house, rebuilding the chimney, and putting in some heating appliance? When he made the arrangements for the furnace to be put in he told the plaintiff that his wife was in the hospital, that he must have heat in the house before she could come home, and that she was coming very soon.

Both the defendant and her husband testified that he was not her agent in having the furnace put in, and that the first she knew about it was when she arrived home after it was all completed. But their denial of the agency was not conclusive. The jury may have disbelieved their testimony in that regard, or found that it was outweighed by other evidence that he was in fact her agent to have that work done.

The defendant, however, contends that the evidence in support of agency is insufficient to sustain the verdict in the plaintiff's favor, and cites *Steward* v. *Church,* 108 Maine, 83. That case we think is distinguishable from the one at bar. In that case the husband first obtained title to the farm and went into occupation

of it and farmed it as his business. He later conveyed the title to his wife but continued as before to operate the farm as his business, as far as outward appearances went. He bought a cream separator for use in carrying on the farm and gave his note for it. It was for the price of that article that the action was brought against the wife, on the ground that the husband was her agent in the purchase of it, and a verdict for the plaintiff was not sustained. It seems reasonably clear that in that case there were practically no facts or circumstances from which a logical inference of agency could be inferred.

In the case at bar, however, as we have pointed out, there is material evidence of facts and circumstances from which the fact of agency could reasonably be inferred. Here the wife had the benefit of the materials and labor furnished. They became a part of her property, and enhanced its value. Her conduct as to similar transactions by her husband for the repair and improvement of this same house of hers, both before and after the one in question, was such as to justify the conclusion that he was in fact her agent in such transactions. And the particular facts and circumstances connected with this transaction seem to give support to the claim that he was in fact her agent in making the arrangements for the furnace to be put in.

The plaintiff testified that in October, 1914, he called at the Abbott house and asked her to pay the bill, and that after he and the husband checked up the materials furnished, "Mrs. Abbott said she would be down and settle the account." Both she and her husband denied that. If she did promise to pay it and it was her husband's bill and not hers, that promise would not support this action. But if she made that promise, not denying her liability, that fact would have some bearing on the issue whether the bill was in fact contracted by her agent.

The jury, upon a proper submission of the question to them, decided that the defendant's husband was her agent in having the furnace put in her house. We think there was evidence which reasonably justified the jury in so deciding, and that the motion for a new trial should not be granted.

It remains to be considered whether the omission to give the requested instructions affords the defendant any just cause of com-

plaint. It is a familiar rule that an excepting party must show that he has been prejudiced by the ruling. If requested instructions are not pertinent and applicable to the case, though containing a correct statement of abstract principles of law, they may properly be refused. And exceptions will not be sustained to a ruling declining to give special requests, though they may be reasonably applicable to some features of the case, provided ample, pertinent and correct instructions have already been given covering substantially those same features.

The charge of the learned presiding Justice is made a part of the case, and an examination of it shows that the instructions to the jury were pertinent to the only issue involved in the case, that they were sound in law and were clearly and explicitly presented.

We think it quite impossible that the jury could have misunderstood the sole question of fact submitted for their determination, or failed to have comprehended the legal significance of the evidence presented as bearing on that question. They were instructed that it was conceded that the contract for the furnace was made by the husband without the wife's knowledge or consent specifically given by her; that she could not be held liable under that contract unless her husband was her agent in making it; that the relation of husband and wife is not alone sufficient to prove such agency; nor would such agency be established by the mere fact that she received the benefit of the contract, or that she subsequently promised to pay for the work done under it, if she did so promise. Again and again during the charge the jury were told that it was a question for them to decide upon a fair consideration of all the evidence, whether or not the defendant had in fact authorized her husband to act as her general agent to make repairs or improvements to her property, and, if so, whether the putting in of the furnace was within the scope of his authority.

The requested instructions appear to be a verbatim copy of all the paragraphs of the head note in the case of *Steward* v. *Church*, supra. They appear in full in the statement of the case. None of them were peculiarly applicable to the facts in this case, and we think there was no reversible error in the ruling refusing them.

The first request undoubtedly contains a correct general principle of law, and it might have properly been given in this case. But

we do not think it appears that the defendant's rights were prejudiced by the omission of that specific instruction. After the explicit instructions that were given to the jury, they did not need to be told, we think, that the mere fact that the title to the home was in the wife was not sufficient proof that the husband was her agent in what he did on or about the property. And, indeed, they were told that the fact that the furnace became a part or her property and enured to her benefit did not establish the fact that her husband was her agent in having it put in.

The second request was not applicable in this case for there was no claim made that the wife was liable on the ground of ratification. The testimony that she promised to settle the bill was not offered for that purpose. It was put in as a circumstance tending tc make more probable the claim of agency. Nor do we perceive the purpose, and certainly not the need, of the third request, in view of the fact that the jury had been instruced that if the wife did promise to pay the bill, that would not prove the agency, which was the only question in the case. As to paragraphs 4 and 5 of the requests, we need only say that presumably they refer to facts developed in the case from which they were excerpts. But such facts do not appear in this case. Clearly those requests were inappropriate.

It follows that the exceptions cannot be sustained.

Motion and exceptions overruled.

WILLARD F. MURPHY, et als,. in Equity

vs.

UTAH MINING, MILLING & TRANSPORTATION COMPANY.

York. Opinion December 6, 1915.

Bill in Equity. Corporation. Decree. Laws of 1907, Chapter 137, Public Laws of 1905, Chapter 85. Receiver Stockholders.

Although the sitting Justice before whom the cause was heard filed no findings of facts, the filing of the decree sustaining the bill and appointing a receiver is ipso facto a finding of fact in favor of the plaintiffs upon some, or all, of the allegations in their bill.

On appeal by defendant. Appeal denied with additional costs.

This is a bill in equity, brought by Willard F. Murphy, a minority stockholder, and seven other minority stockholders in Utah Mining, Milling and Transportation Company August 25, 1914, under the provisions of Chapter 85 of Public Laws of 1905, as amended by the Laws of 1907, Chapter 137, asking that the affairs of said defendant corporation be wound up and said corporation be dissolved and that a receiver be appointed to wind up its affairs.

Answers and replication were filed. The case was heard before a single Justice, who made a final decree that bill be sustained.

From this decree, the defendant appealed to the Law Court.

The case is stated in the opinion.

Frederick A. Hobbs, for plaintiffs.

Emery & Waterhouse, for defendant.

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

SPEAR, J. Willard F. Murphy of Biddeford, a minority stockholder and seven other minority stockholders, under date of August 25, 1914, under the provisions of Chapter 85 of the Public Laws

of 1905, as amended by the Laws of 1907, Chapter 137, brought a bill in equity against the defendant corporation asking that the corporation be dissolved and that a receiver be appointed, both temporary and permanent, to wind up its affairs. The answer and replication were duly filed and the matter was heard before a Justice of the Supreme Court in chambers, and after a full hearing a decree was filed sustaining the bill of the plaintiffs, to which an appeal was taken upon which the case is now being heard. Although the sitting Justice filed no finding of facts, the filing of the decree sustaining the bill and appointing a receiver is ipso facto a finding of fact in favor of the plaintiffs upon some or all of the allegations in their bill. The only question, therefore, presented to us upon the appeal is whether there was any evidence which warranted the presiding Justice in making a decree in favor of the plaintiffs. The plaintiffs' bill contains allegations that the corporation should be dissolved because by the gross mismanagement of its affairs it was in imminent danger of insolvency, and because there was danger that the estate and effects would be wasted and because it had ceased to do business. From the evidence of Harry G. Gerrish, secretary and treasurer of the defendant corporation, and of Charles T. Birchard, who was a former officer and manager of the defendant company, we think the court was authorized to draw the inference that one or all of the three allegations alluded to was sustained. It appears by the bill that the vital and principal part of the property of the defendant corporation was what was known as the Lady Bryon group of claims. Without this group as a part of its workable property, the defendant corporation had left no mining property worth working. It further appears, and is admitted, that the Lady Bryon group of claims on the 23rd day of May, 1914, was sold and transferred to pay an indebtedness to Charles T. Birchard, and was later transferred by him to another corporation formed for the purpose of working this group. After the transfer of the Lady Bryon group to Birchard all the apparatus and machinery for working the defendant corporation was moved, and after that time no business was transacted by it. Mr. Gerrish said in answer to a question: "There has been no work done at the Utah Mining, Milling and Transportation Company property since the Lady Bryon claim was transferred to Mr. Birchard." He was further asked:

"As you understand, as treasurer of this defendant corporation, at the time or soon after the Lady Bryon group was bought, everything was moved,—the machinery, equipment, buildings—to the Lady Bryon group of claims." His answer was "yes;" and further, that nothing had been done to replace machinery or equipment since. Mr. Birchard fully confirms the testimony of Mr. Gerrish. Not only did the sitting Justice have before him this direct and positive testimony regarding the financial condition and abandoned operation of the defendant company, but also the spirit of the whole transaction as manifested by the attitude of the officers and majority of the stockholders toward the life or death of the defendant corporation.

Appeal denied with additional costs.

JENNIE L. WINGATE

vs.

WATERVILLE, FAIRFIELD & OAKLAND RAILWAY.

Kennebec. Opinion December 6, 1915.

Damages. Personal Injuries. Physician's testimony. Range of their testimony.

This case involves the question of damages only. The case presents a typical illustration of the extremes to which reputable physicians will sometimes go in testifying in behalf of a patient, and the boundless latitude over which pathology, diagnosis and prognosis will permit them to range. A careful study of the evidence shows that the verdict is unconscionably excessive.

On motion by defendant. Motion sustained and new trial granted, unless the plaintiff within 30 days after filing the certificate of this

decision files a remittitur of the verdict above $2000; if such remittitur is filed, motion overruled.

This is an action on the case to recover damages suffered by the plaintiff on account of personal injuries alleged to have been caused by the negligence of the defendant. Plea, general issue. The jury returned a verdict for plaintiff for $8750. Defendant filed a general motion for a new trial and a motion for a new trial on the ground of newly discovered evidence.

The case is stated in the opinion.

B. F. Maher for plaintiff.

Johnson & Perkins and Merrill & Merrill, for defendant.

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

SPEAR, J. This is an action for personal injuries in which the plaintiff recovered a verdict in the sum of $8750. The liability of the defendant is admitted. The case, therefore, involves the question of damages only. Bearing upon the question of damages a motion based upon newly discovered evidence has been filed, but it may be said at the outset that in the opinion of the court the newly discovered evidence discloses what might have added, if seasonably investigated, additional weight to the testimony already admitted. It cannot be regarded as newly discovered evidence.

This brings us back to the consideration of the question of damages. A careful study of the evidence shows that the verdict was unconscionably excessive. This case presents a typical illustration of the extremes to which reputable physicians will sometimes go in testifying in behalf of a patient, and the boundless latitude over which pathology, diagnosis and prognosis will permit them to range. To give an intelligible analysis of the evidence in this case would require space beyond the confines of any ordinary opinion, and serve no useful purpose. Seventeen questions were submitted to the jury which, with the subdivisions, required just thirty answers. The questions were all couched in medical language and many of them were of a highly technical nature. To illustrate: Question 9. Did plaintiff receive an injury to pelvic floor caused by defendant's negligence? Question 16. Is the plaintiff's condition caused by the defendant's negligence such that an operation, to wit: hysterectomy, will have to be performed? Question 17 a. Is she suffering from

general traumatic neurasthenia and inertia of nerves controlling the blood supply of the uterus? Twenty-seven of the answers were in the affirmative. To number sixteen the jury, to their credit, said "Do not know." These questions were all taken, seriatim, from the plaintiff's specifications of her injury, the only change being the interrogatory form. It is not difficult to perceive that the jury, with these specifications before them in their room, were overwhelmed with this array of medical inquiries and technical terms. If they were bewildered it is without wonder; and that their verdict might be exaggerated, upon affirmatively answering this array of questions, all indicating different forms of disorder resulting from injury, might well be expected. It is the opinion of the court that $2000 is ample compensation for all the injuries inflicted upon the plaintiff by the admitted negligence of the defendant.

Motion sustained, and new trial granted unless the plaintiff within 30 days after filing the certificate of this decision files a remittitur of the verdict above $2000; if such remittitur is filed, motion overruled.

LILLIAN P. CYR, BY LARRY H. CYR,
Her Father and Next Friend,

vs.

GEORGE E. LANDRY, M. D.

Penobscot. Opinion December 6, 1915.

Conflicting Testimony. Drainage Tube. Malpractice. Negligence. Surgical Operation.

An action for malpractice for negligently performing an operation for pleurisy, inserting a drainage tube in the side and for improperly attaching said tube.

1. There was no allegation of malpractice for failure to discover the tube if permitted to enter the cavity through the carelessness of some person other than the defendant.

2. The only issue, therefore, before the court, under the declaration is whether the tube was improperly attached by adhesive plasters, as alleged. Upon this issue, the evidence is overwhelming that the verdict was clearly wrong.
3. But the case was tried and presented to the jury by the presiding Justice upon another issue also, namely, whether, if the tube had entered the plural cavity through accident, or the fault of another than Dr. Landry, did he then exercise such care to discover whether it was in the cavity as ordinary professional skill and knowledge required? Having been thus tried this issue may be properly regarded as before the court. *Held:* the verdict should also be set aside upon this issue.
4. In view of the fact that it was impossible for the tube to enter the cavity unless the safety pin, which fastened it in its place, was removed, and the defendant was misled by the denial of Mrs. Cyr that she had interfered with the dressing, it is the opinion of the court that when the doctor directed her several times to take the child to the hospital for an operation, he exercised such care, under the circumstances in this case, as ordinary medical skill and knowledge required. The verdict should be set aside on this issue.

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

This is an action on the case to recover damages for malpractice in securing a drainage tube which had been inserted in the side of Lillian P. Cyr for the purpose of drainage of the incision in the operation for pleurisy. Plea, the general issue. The jury returned a verdict for plaintiff for $3000. The defendant filed a motion for a new trial and also had certain exceptions, which do not appear to have been considered.

The case is stated in the opinion.

James D. Rice and W. H. Pattangall for plaintiff.

Morse & Cook, for defendant.

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

SPEAR, J. This is an action of malpractice for a surgical operation performed upon the plaintiff in which it is alleged that the defendant "was employed to operate upon her side for pleurisy, and later for the purpose of draining said incision a tube was inserted and improperly attached by adhesive plaster to the outer surface of the body. The drainage of said incision moistened

the adhesive plaster and permitted the tube to enter the body of the plaintiff and remain there a long period of time, to wit: from October, 1908 until March 24, 1912." There was no allegation of malpractice for failure to discover the tube if permitted to enter the cavity through the carelessness of some person other than the defendant. The only issue therefore, before the court, under the declaration is whether the tube was improperly attached by adhesive plasters, as alleged. But the case was also tried upon the theory of malpractice in failing to discover the tube, and this issue will be later discussed.

Upon the first issue, if the evidence warranted the jury in finding that the tube was secured as alleged, the verdict should stand. If upon the evidence they were not warranted in so finding, the verdict should be set aside. We think the verdict was clearly wrong.

The case shows that Lillian P. Cyr, for whose benefit the suit was brought, was on the 16th day of October, 1908, operated on by Dr. Twitchell of Old Town for the removal of fluid from the pleural cavity, in the treatment of which it was necessary to insert a tube for the drainage of the cavity. The tube was introduced by inserting it between the ribs, through the incision made to drain the cavity. Then gauze was put around the tube and the tube "left sticking up through the gauze." Dr. Twitchell describes the manner in which he proceeded to fasten the tube, as follows: "Then I took an ordinary safety pin, something like an inch and a half or two inches long, putting it through the tube and through the gauze at the same time, clasping or fastening it; outside of that I took other gauze and put it on loosely, and around the whole body of the child was another bandage, which was pinned; that constituted the dressing." He then says that he proceeded to put over this gauze a plaster on each side coming across—"you might say uniting the ribs, above and below on each side of the ribs, so it laid across like that, which held that firmly and securely from the gauze I put on top as a top dressing, and that was put on for the purpose of absorbing the pus or fluid which would naturally come out through the tube." Dr. Twitchell was assisted in the performance of this operation by Dr. Landry, the defendant. Dr. Twitchell continued in charge of the case until October 31, when he was relieved. In his

treatment of the child from the 15th to the 31st of October he said that Mrs. Cyr, the mother, thought he was coming too often.

Dr. Landry seems to have been called not because of dissatisfaction with the skill of Dr. Twitchell, but because the mother, speaking the French language, was unable to talk freely with him, and it was thought advisable to employ Dr. Landry, who spoke French and with whom she could converse. He took charge of the case November 2, 1908. As to just what he did the first day he took the case, or whether it was the first or second of November, seems of no great materiality. The important question is the whereabouts of the drainage tube which Dr. Twitchell, when he last saw the case on October 31st, had left fastened with a safety pin, through the gauze and the tube, in the manner in which he had first secured it. If that drainage tube, when Dr. Landry came, was then in the body of the child, he was not guilty of malpractice. If he took the tube out and attempted to secure it by the mere use of sticking plasters, and, on this account it dropped into the cavity, he was guilty. The testimony in this case was conflicting, but the mere fact of conflicting testimony is not a sufficient basis, in all cases, for the foundation of a verdict. While the general rule is that when the testimony is conflicting, the verdict must stand, yet the term "conflicting" in the rule is subject to interpretation. Our court have construed the rule as follows: "It means that there must be substantial evidence in support of the verdict,—evidence that is reasonable and coherent and so consistent with the circumstances and probabilities in the case as to raise a fair presumption of its truth when weighed against the opposing evidence. When it is overwhelmed by the opposing evidence, the verdict cannot stand." *Moulton* v. *Railway Company*, 99 Maine, 508. See also cases cited. The plaintiff's testimony comes from Mr. and Mrs. Cyr, the father and mother of the plaintiff; the plaintiff, herself, who at the time of the operation was five years of age; and Mrs. Lena Cyr, a sister of Mrs. Cyr, who claims she was present at Dr. Landry's first visit. The plaintiff's version is, that Dr. Landry when he dressed the operation took the tube out and washed it, and when he replaced it secured it with adhesive plaster instead of a safety pin; that in about a week, or after several calls, the doctor discovered on making a call that the tube was missing; that they examined the bedding, dressings, etc., without finding the tube.

This version was practically corroborated by the other witnesses named.

Dr. Landry's version is, that he was called to see the child on November second, two days after Dr. Twitchell's last visit; that as he went into the house the mother informed him that the tube was lost; that he removed the outside dressings and looked for the tube but was unable to find it; that they looked around and tried to locate it without success; that the mother then told him she thought it must have dropped into the child's body; that he told her he did not see how that could have happened, if it was left by Dr. Twitchell as he had seen him fix it, at the original operation; but that if she was at all suspicious the proper thing to do was to look for the tube and advised her to take the child to the hospital and have it looked into. Which version is true? The crucial test of truth is sometimes found not in what people say, but in what they do as well; and this is especially true when what they do and what they say transpire before anything has arisen to create a motive for evasion or falsehood; for it is common experience, after personal interests are involved, that people will exaggerate or falsify to advance or protect their interests. It is likewise a matter of common knowledge that people generally speak the truth, and act in harmony with it, when no such interests are at stake and no motive is found for misrepresentation.

We think we are justified in the assumption, when Dr. Landry was called to attend this little child, that no interest had then appeared on his part tending in any way to induce him to act or speak otherwise than in exact harmony with the situation as he found it, and as any physician of twenty-two year's experience would have done. On the other hand no interest had then appeared which was calculated to operate on the mind of the mother tending to influence her to speak or act otherwise than in harmony with the truth.

With this premise before us as a starting point, it may be pertinent to inquire, whose testimony, the plaintiffs or the defendants, is supported by the probabilities? and whose fraught with inherent improbabilities? Whose testimony is in harmony with what one would naturally expect to be done? and whose inconsistent with it? Whose bears the impress of truth? Tested by this standard, the

defendant's version of the history of the loss of this tube, when he was called, is in harmony with all the probabilities surrounding the case and substantiated by what one would expect to happen, under the circumstances; while the plaintiff's version is incompatible with the probabilities and inconsistent with what one would expect to happen. A brief analysis of the facts will show the reasons for these conclusions.

An operation had been performed on this child, a tube inserted and fastened in the usual and safe way, and the device employed certainly indicates that there was no simpler or easier method of fastening the tube than the one used. It was also safe. When Dr. Landry first came he says the mother at once said the tube was lost. That statement was in harmony with the truth, for the tube was lost inside the child. Did she make this statement to Dr. Landry? Did she make it to the many other witnesses who have testified that she told them that she so stated to Dr. Landry? to one of them before Dr. Landry had called at all, as a reason why she was to call him? Nearly six years later after this suit had been brought, she denies having made any such statements to Dr. Landry or to the witnesses. But the evidence seems to be overwhelming in favor of the conclusion that she made the statements with reference to the loss of the tube which Dr. Landry and the other witnesses attributed to her. Upon this contradiction of the plaintiff, the defendant and his witnesses are corroborated by one circumstance which is almost convincing, and if it depended for proof upon the testimony of Dr. Landry alone, might be regarded as a most cunning invention to suppport his version. But it does not so depend and is so corroborated by Dr. Twitchell that it must be conceded to be a proven fact. It it this. Upon being informed that the tube was lost, and not knowing but that it might have been removed by Dr Twitchell without the knowledge of Mrs. Cyr, Dr. Landry says that he at once proceeded to find Dr. Twitchell and ask him whether he left the tube in the incision when he last visited the case. His testimony upon this point is brief and as follows: "I tried to find out the condition the tube was in the last time the dressing was made. Mrs. Cyr told me that the dressing was just as Dr. Twitchell had always left it; there was a safety pin into it stuck through the gauze and through the tube. I then thinking that for some reason or another,

without Mrs. Cyr knowing it, Dr. Twitchell had removed the tube and I went to ask him, to find out whether he had or not. Dr. Twitchell told me that when he left the child on the 31st that the tube was attached exactly the same as it was the day of the original operation; that there was a safety pin stuck through the gauze and through the tube." Dr. Twitchell in his testimony corroborates this statement, in which he says on the second day of November, two days after he left the case, Dr. Landry found him upon the streets and inquired if he removed the tube when he left and that he informed him that he left it there as usual and fastened as usual. After seeing Dr. Twitchell, he says he then got another tube, went back to the house and put it in with a safety pin on the end of it.

At this juncture we find a physician of twenty-two years' experience called to this case in which either the tube was in place as Dr. Twitchell left it, or replaced by himself. If it was in place, and replaced on November second, as all agree, when he first dressed the operation, is it possible to understand or conjecture, what motive prompted him to go to Dr. Twitchell to inquire about a thing, that was absolute before his eyes, and was before them, according to the testimony of Mrs. Cyr, for nearly a week after he saw Dr. Twitchell? There is no mistake about the version of Mrs. Cyr and all her witnesses. They all saw alike. Her version was their version. She says: "He (Dr. Landry) took off the bandage . . . and washed the tube and put it back." Then further: "The tube disappeared through the first week of treatment. The doctor made about four calls before the tube disappeared." And yet, with this tube either directly before his eyes, fastened as Dr. Twitchell had left it, or as he, himself, had replaced it, he departs from the bedside of his patient to find out what had become of it, and makes an inquiry of Dr. Twitchell to that end. We are unable to conceive of such conduct on the part of a sane man. On November second there could be no possible anticipation of an action for malpractice by Dr. Landry, even if the plaintiff's version was true, as the tube was not then lost, and he could have no reason to assume it might be lost, even though fastened as the plaintiff claims. Accordingly, Dr. Landry's abnormal conduct was enacted without cause or reason. The plaintiff's contention that the tube was not lost, and the defend-

ant's concurrent inquiry of Dr. Twitchell whether it was, are absolutely incompatable, and one story or the other is wrong. Which? Upon the presumptive truth of the testimony of Dr. Landry and Dr. Twitchell as to Dr. Landry's inquiry regarding the tube this circumstance is overwhelmingly in favor of the defendant.

But it may be contended that the jury had a right to disbelieve the story of Dr. Landry and Dr. Twitchell in regard to Dr. Landry's inquiry. Upon the assumption that this issue is an open question, then it becomes important to discover whose version the other witnesses, the other circumstances and probabilities corroborate. First, is it probable that Dr Landry secured the tube, as the plaintiff contends? All the medical testimony in the case, including Dr. Landry, himself, fails to recall a case in which a tube was ever fastened in the way the plaintiff says it was; and further, that it would not be a proper way. As before stated, the use of a safety pin was the safest, simplest, and easiest way to secure the tube. At the very threshold of the case, therefore, arises the improbability that Dr. Landry departed from the usual practice to adopt a method, up to that time, unknown. And not only this improbability, but the plaintiff says, when the child was brought from the hospital where the tube had been removed, that Dr. Landry, who must have known that his careless method had permitted one tube to drop into the patient's body, again took out the safety pin and employed adhesive plasters to secure the replacement of the tube,—precisely what he had done before. This seems incredible. Again, if that tube was lost within the first four visits of Dr. Landry, and he fastened it the way the plaintiff said, he knew, what even a layman would strongly suspect, that the tube had dropped into the cavity. Assuming this to be the fact, is it then probable that he would have hesitated to proceed either to remove the tube himself, or take the patient to the hospital, where by the simple operation of stretching the old incision the tube was removed with forceps? This would have been the natural thing for a family physician to do. No reason or motive appears at this stage of the case, why the defendant should have done otherwise, while all the probabilities are in favor of his doing so. He could not have been preparing for a defense at this time, accordingly no motive appears for the unreasonable course, which, upon the above assumption, he must have pursued. It is

highly improbable that he knew or suspected the tube was in the cavity, a thing he must have known if the plaintiff's version is correct. Not only do these circumstances support the testimony of Dr. Landry and Dr. Twitchell in regard to the inquiry of November second, but several witnesses, so far as appears, without interest or prejudice, corroborate it, and flatly contradict the plaintiff.

It may make it clearer to here restate that Mrs. Cyr denied that she knew the tube was lost before Dr. Landry came on November second, or told him that it was lost, at or after that time. Upon this issue of fact Margaret Huges, a trained nurse, contradicts her; Alice Martin, a neighbor, contradicts her; Amanda Cole contradicts her; Ida Graham contradicts her; Sadie Shoratte contradicts her. This witness lived in a part of the Cyr house. At the time these conversations of Mrs. Cyr, testified to by these witnesses, were alleged to have been made, Mrs. Cyr had no motive to tell other than the truth. Nothing was then pending except the ordinary conditions surrounding the case. Her alleged statements were all reasonable, and, what is very convincing of their utterance, in perfect accord with the truth of the situation as it actually existed. The tube was lost.

The evidence is so overwhelming against the plaintiff's contention regarding the defendant's negligence for the loss of this tube, that the jury, for some reason, so failed to comprehend the force and effect of the evidence, when properly considered, that their verdict, upon this issue must be set aside.

As said in the beginning, the only issue under the plaintiff's declaration was whether the tube was lost through the negligence of Dr. Landry. But the case was tried, and presented to the jury by the presiding Justice, upon another issue, also, namely, whether if the tube had entered the pleural cavity through accident, or the fault of another than Dr. Landry, did he then exercise such care to discover whether it was in the cavity, as ordinary professional skill and knowledge required? In other words, was he negligent, in view of the professional skill required, in making a reasonable effort to discover whether the tube was in the cavity?

This issue was tried out without objection. Under the rule laid down in *Cowen* v. *Bucksport,* 98 Maine, 305 and *Wyman* v. *American Shoe Refining Company,* 106 Maine, 263 that, where issues are

so tried, the case may be considered as if the declaration had been amended to conform to the evidence, this second issue may be properly regarded as before the court.

The conclusions reached in discussing the first issue are clearly applicable to the determination of the second issue, upon the question of varacity between the plaintiff and the defendant. There can be little question that the plaintiff's witnesses were clearly mistaken regarding their version of the loss of the tube; and that the defendant's version is the true one.

Accordingly, notwithstanding Mrs. Cry's denial, the evidence is ample to pursuade a reasonable mind, that the tube was lost through her own improper manipulation of the dressing and that she knew, or had every reason to know, that through her own fault it had dropped into the cavity. While she did not say that it was in the cavity, her statement to the doctor at the very beginning, that the tube was lost, and her persistent reitteration that it might be in the body, in view of the fact that it was there, are well nigh convincing of her knowledge of that fact. Yet she denied to the doctor that she had interfered with the dressing and, in view of the practical impossibility of the tube entering the body with the pin attached to it, completely put him off his guard and led him to as persistently declare that such disposition of the tube was impossible. Her denial which he had a right to regard as true put him off the track. He nevertheless repeatedly told her if she thought the tube was in the cavity to take the girl to the hospital and have the question determined. The real key to the situation on this phase of the case is found in a single remark from Dr. Twitchell, that she thought it was unnecessary for him to come so often, and in the evidence of another witness, Mrs. Shoratte, who lived in the lower part of the house, that she brought down stairs and showed to her portions of the dressing which she had removed more or less saturated with matter. This witness said: "She (Mrs. Cyr) often told me she had to change the child because she was getting so she could not rest. Lots of times she had to change them morning and night." As the only possible way, as it was left by Dr. Twitchell, the tube could fall into the cavity was by removing the safety pin, the necessary inference is that somebody removed the pin. As it was removed after Dr. Twitchell left it in place on October 31st and

before Dr. Landry dressed the incision on November second, and as nobody else had charge of the case, by the process of elimination it follows that the only person who could have removed it was Mrs. Cyr; and the above evidence of Dr. Twitchell and of Mrs. Shoratte shows that she undertook to treat the case herself and in so doing improperly secured the tube and lost it. In view of the fact that it was impossible for the tube to enter the cavity unless the safety pin was removed, and that Dr. Landry was completely misled by the denial of Mrs. Cyr, that she had interfered with the dressing, and that she was charged with every reason to believe that the tube was in the body, yet withheld the information, it is the opinion of the court, that when the doctor directed her time and again to take the child to the hospital for an operation, if she believed the tube was in the body, he exercised such care, under the circumstances in this case, as ordinary medical skill and knowledge required. The verdict should also be set aside upon this issue.

Motion sustained.
New trial granted.

GEORGE ALBERT POWERS *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion December 6, 1915.

Chartered Duties. Damages. Fellow Servants. Negligence. Notice. Orders. Personal Injuries. Warning.

The defendant hired its train and crew to Hines & Son to do certain work for them. The crew were to control the mechanical operations of the train; Hines & Son were to direct its movements.

Held:

1. Upon the question as to what duty devolved upon the defendant, it may be regarded as a fair interpretation to hold that it was the duty of the crew not to give, but to obey orders; to act according to orders.
2. That they, accordingly, had a right to assume, and to act upon the assumption, that the person whose duty it was to give the orders to move the

train had exercised due care in preparation for its execution and that it was not negligence to obey, unless by the exercise of due care, the orders were, or ought to have been, discovered to be improper or dangerous to perform.

3. Whether a railroad can divest itself of its chartered responsibility is found in the inquiry, whether the negligence complained of was in the improper mechanical operation of the train in executing a proper order, or in the proper mechanical operation of the train in executing an improper order; in other words, whether the careless operation of the train was the proximate cause of the injury, or the execution with due care of a careless order was the proximate cause of the accident and injury. If the latter, the rule does not apply, as the railroad, under the contract, cannot be declared negligent, unless it is held to be an insurer.

On exceptions by the plaintiff, with stipulation that if plaintiff's exceptions are sustained, the Law Court shall assess damages and order final judgment. Judgment for plaintiff for $890.00.

This is an action on the case, brought by the plaintiff against the Maine Central Railroad Company to recover damages for personal injuries received in consequence of the negligence of the defendant company. Plea, general issue. At the close of the evidence, the presiding Justice directed a verdict for the defendant. To this direction of a verdict, the plaintiff excepted.

The case is stated in the opinion.

Morse & Cook, and W. H. Powell, for plaintiff.

Fellows & Fellows, for defendant.

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

SPEAR, J. This is an action to recover for personal injuries. After the testimony was all in the presiding Justice ordered a verdict for the defendant with the stipulation, if the exceptions taken to the order were sustained, that the Law Court should assess the damages. The only question, therefore, is whether the case should have been submitted to the jury. We think it should.

The plaintiff at the time of his injury was an employee of T. J. Hines & Son, who were contractors in constructing the eastern span of the Old Town and Milford bridge across the Penobscot river. The Maine Central Railroad contracted with T. J. Hines & Son at a certain sum per night, of not over three hours, to furnish a freight

train to unload, upon the Maine line, gravel and crushed rock, to be used in the construction of the bridge. The railroad company was to furnish the train, and crew to operate it, for a stated time and sum, but beyond this had nothing whatever to do with the use or control of the train. Its movements were not under the direction of the railroad company. It was in the employ, and working under the orders, of Hines & Son. The plaintiff was injured by being thrown between the cars, by the impact caused by moving that part of the train, to which the engine was attached, against some detached cars standing upon the track, upon one of which the plaintiff was attempting to mount for the purpose of unloading it. In causing the accident the plaintiff contends the defendant company was negligent in two ways: First, by carelessly running the engine, and cars to which it was attached, against the other cars in such a "dangerous and violent manner as to throw the plaintiff upon the track." Second, by neglecting to give any notice or warning to the plaintiff of their purpose to shackle to the cars which were being unloaded. The defendant contends, under the contract of hire, that the train crew while doing this particular work were the employees of Hines & Son, for whose conduct the railroad was in no way responsible, either for negligence in operating the train or in executing orders, if acting according to directions. In other words, that the train crew were fellow servants, in the execution of this work, with the employees of Hines & Son. The plaintiff's answer is that the railroad company, under its charter and the laws of the State, could not by contract divest itself of full responsibility for the operation of its train.

The fellow servant rule, as will be seen, does not apply. Nor do we think the doctrine that the railroad is responsible for properly executing the orders of Hines & Son, without any negligence on its own part, can be applied under the rule, that a railroad cannot divest itself of duties imposed by its charter and the laws of the State. The application of this rule depends upon the inquiry, whether the contract, which the railroad made, was in violation of its charter or the laws of the State. If it was, the rule applies in full; if not, it does not apply in full. The contract, resolved into its parts, presents the following elements: It hired its train and crew to Hines & Son to do certain work for them. For due care for its mechanical

operation it did not seek to relieve itself by the terms of the contract. And under this contract it is proper to here note the clear distinction between the implied duty of the train crew, in controlling the mechanical operation of the train, and its express duty in moving the train in obedience to the orders of Hines & Son. The crew were to control the mechanical operation of the train. Hines & Son were to direct its movements. The engineer, conductor and crew were responsible for the mechanical operation of the train; for how to run it. Hines & Son were responsible for all orders, when and where to run it. For these directions the crew had nothing to say; Hines & Son had all to say. In this contract we discover nothing partaking of illegality.

Upon the question as to what duty devolved upon the defendant to meet the measure of due care, imposed upon it under its contract, it may be regarded as a fair interpretation to hold, that it was the duty of the crew not to give, but to obey orders; to act according to orders; that they, accordingly, had a right to assume, and to act upon the assumption, that the person whose duty it was to give the order to move the train had exercised due care, in preparation for its execution, and that it was not negligence to obey, unless, by the exercise of due care, the orders were, or ought to have been, discovered to be improper or dangerous to perform. There was no other way in which they could be directed to move the cars from place to place to deposit the gravel and rock. The crew had no means of knowing except from directions.

Accordingly, the differentiation between this case and the line of cases in which the plaintiff invokes the rule, that a railroad cannot divest itself of its chartered responsibility, is found in the inquiry, whether the negligence complained of was in the improper mechanical operation of the train, in executing a proper order, or in the proper mechanical operation of the train, in executing an improper order; in other words, whether the careless operation of the train was the proximate cause, or the execution with due care, of a careless order, was the proximate cause, of the accident and injury. If the latter, then the rule does not apply, as the railroad, under the contract, cannot be declared to be negligent, unless it is held to be an insurer.

Under this interpretation of the law three questions of fact are involved. (1) Was the railroad company negligent in the mechanical operation of its train in the execution of the order to move the train? (2) Was it negligent in a failure to give proper warning that it was about to shackle onto the cars that were being unloaded? (3) Was the plaintiff guilty of contributory negligence? Should the first question have been submitted to the jury? If there was any evidence upon which the jury would be authorized to base a verdict it should have been submitted. We think the report clearly discloses such evidence. Under the rule of law above stated, the railroad company was responsible for due care in the operation of its train, in the execution of the directions under which it worked. It, therefore, follows that the fellow-servant rule cannot be applied to a negligent management of the train, in executing the order to shackle to the other cars. Under this phase of the case the plaintiff avers that the defendant did improperly operate its train, by impelling it with such force against the detached cars, upon one of which the plaintiff was about to go to work, as to be chargeable with negligence in so doing. The plaintiff was entitled to the judgment of the jury upon this issue. His testimony, if true, shows that, while he was in the act of mounting one of the detached cars, he was thrown between them by the severity of the shock, caused by the force with which the moving train struck against them. Another witness said in answer to the question, what effect the impact had upon him, "I tumbled down. It knocked me down." Another witness testified in answer to the inquiry, what caused the injury, "Well, the engine struck the cars and knocked his feet out from under him." There is other testimony of a similar nature. This testimony, coupled with the further testimony of the plaintiff and other witnesses that he had no warning,—whether true or not it is not for us to say,—was sufficient to require the facts to be submitted to the judgment of the jury whether the crew were sufficiently prudent in running the train back with the force which the evidence discloses. In view of this conclusion, it becomes unnecessary to consider the question, whether the defendant did or did not ring the bell, or otherwise give notice. The third question involving the contributory negligence of the plaintiff, under the report of the evidence, was clearly a question of fact for the jury and cannot be

decided against him as a matter of law, as the evidence would sustain a verdict if found in his favor. Under the stipulation in ordering the verdict, the only remaining question is the assessment of damages.

Upon this question we deem it our duty to rely substantially upon the testimony of the plaintiff's attending physician touching the nature and severity of the injuries of which the plaintiff complains. His description of what he found is stated in his own language as follows: "He complained of pain about his side, shoulder and arm; more particularly his arm at that time. He told me about the fall, and I examined him for his injuries. The first thing I found was a fracture of the ulna,—about there as I remember it; it was in the lower third somewhere about here; and he made complaint about soreness and lameness about his shoulder. I stripped him and examined his shoulder to see if there was any dislocation or fracture there; I didn't find any. I didn't examine the chest very carefully until a day or two after that he complained of a good deal of soreness about his chest. I reduced the fracture and put a suitable splint on it, and told him to carry his arm in the sling at his side, in the usual way. That is about all there was." A few days later upon complaint of pain in breathing, the physician made a further examination of the plaintiff upon which he thought he discovered symptoms of a fracture of a rib under the deep muscles of the back. While the proof is not conclusive of this injury, yet, in considering the evidence in the light of a jury, we think we should assume that such a fracture was sustained. Upon cross-examination, Dr. Rowe, who, by the way, seems to have been a perfectly fair witness, says that in treating the fracture of the arm he got a perfect union of the ulna and that the fracture of the rib had fully recovered so far as he was able to judge; that the arm remained in a sling or splint about four weeks. He also said, at the time of the trial, that there was nothing to indicate that the plaintiff had not fully recovered, except symptoms that were entirely subjective; that there were no objective symptoms. And in answer to the question, "There is nothing to be seen from your examination why this man is not fully recovered," replied, "No, sir." Dr. Daniel A. Robinson of Bangor, who made an examinaion of the plaintiff a short time before the trial, said the only objective symptom he discovered was that he

found somewhere about the lower third of the arm,—this side—the feeling as if the bone had been injured; and further, that both arms were of the same size and the motion so far as he could tell was all perfect, but that he complained of these two fingers; being lack of strength and being cold. Upon cross-examination in answer to the inquiry whether the injury of the ulna nerve would affect the fingers complained of, he answered: "I have never seen it do that from these injuries." The plaintiff says that he was unable to do any kind of work from the 15th day of October, 1913, when he was injured, until the 6th or 8th of January following, when he went into the woods in the employment of scaling lumber in which occupation he continued until April 8th. At the time he was injured he was earning $3.00 a day. He was therefore entitled to recover, for his loss of time during this period, for seventy-five days at $3.00 per day, amounting to $225.00. From January 8th to April 8th he says his loss was about $10.00 per month, for which he should have $30.00. From April 8th to the first of June the plaintiff, whose business during this period was river driving, says that he tried but was unable to work, on account of his injured arm, and that the wages for this employment ranged from $2.50 to $3.00 a day. It is difficult to say just what the plaintiff should be entitled to for this loss of time as it was his duty to find employment, even at a less price per day, during this period if he was able to do so. We think, however, it may be fair to allow him the minimum price of $2.50 per day, for forty-six days, which amounts to $115.00. After this the evidence fairly shows that he was able to engage in any of his usual occupations which might be offered him. He should be allowed $25.00, the amount paid Dr. Rowe for medical services, and a further sum of $25.00 for incidental expenses. He is also entitled to recover for the pain and suffering which he underwent and which he will undergo if any in the future. We think for this he is entitled to recover $500. The aggregate of these sums totals eight hundred and ninety dollars, the amount which we think the plaintiff is entitled to recover.

Judgment for plaintiff for $890.00.

ALDEN J. VARNEY *vs.* CHARLES H. MCCLUSKEY.

Aroostook. Opinion December 7, 1915.

Agreement in writing. Contract. Evidence. Market value. Memorandum book. Sale. Special market.

An action of assumpsit for the recovery of damages for alleged breach of a written agreement for the growing of potatoes and the delivery of a certain percentage of the crop between certain dates by plaintiff and payment by defendant at an agreed price for the potatoes so delivered.

Held:

1. Where, subject to objection, written evidence is read to the jury, and such evidence is not made part of the bill of exceptions and does not appear in the record, exceptions to its admission will be overruled, although at the argument counsel agree to characterize it as a recommendation.
2. Evidence of the market value of goods at a time other than that agreed upon for their delivery is not admissible upon the question of damages for non-delivery, where its admission may have been prejudicial to the excepting party.

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

This is an action on the case, based on a written contract between the parties, to recover damages for non-delivery of potatoes, as set forth in said contract. Plea, the general issue. The jury returned a verdict for the plaintiff for $367.93. Defendant filed exceptions to the admission of certain evidence and a general motion for a new trial.

The case is stated in the opinion.

R. W. Shaw, for plaintiff.

Hersey & Barnes, for defendant.

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

BIRD, J. This action of assumpsit is brought to recover damages for the alleged violation of a written agreement executed by the parties on the fifteenth day of May, 1913. By the agreement the

defendant undertakes to purchase of the plaintiff forty barrels of "New Snow" potatoes for the sum of two hundred dollars, to plant and cultivate the forty barrels in a specified manner, to grow one prize acre for which he is to receive a prize, if certain results be accomplished, and "to dig and store said potatoes, so grown from said seed as aforesaid, and at any time between the digging of the same and the first day of April, 1914, at the option of said Varney, said McCluskey is to load eighty-five per cent of said potatoes so grown, on cars at said Houlton, ready for shipment." The plaintiff, on his part, agrees to sell the forty barrels of said potatoes, to pay the prize "that, when said eighty-five per cent of said potatoes are so loaded for shipment by said McCluskey as aforesaid, he will pay said McCluskey the then market price of good merchantable Green Mountain table stock potatoes, and in addition to that price the sum of fifty cents per barrel extra, ..." The plea is the general issue, and, the jury rendering a verdict for the plaintiff for $367.93, the defendant filed a bill of exceptions and the general motion for new trial.

It is agreed that eighty-five per cent of the potatoes raised is 725 barrels and that the market price of Green Mountain potatoes of the character mentioned in the contract on the last days of March, 1914, was $1.75 per barrel.

At the trial plaintiff offered a memorandum book containing an entry made by defendant under date of November sixth, 1913, relative to the New Snow potatoes raised by him pursuant to the contract. Subject to objection, the entry was allowed to be read to the jury. The entry read does not appear in the printed record and the book is not before us. It was agreed at the argument that the entry was in effect a recommendation of the potatoes produced. It was avowedly offered by plaintiff to "show my special market price of $5 per barrel."

It does not appear from the bill of exceptions nor from the report of the evidence, which is made part of the bill, that the ruling was erroneous and prejudicial. The agreement of parties as to the character of written evidence is not to be received in place of the evidence itself which was the subject of the ruling below. Without the writing, it cannot be determined if a ruling admitting or rejecting it be correct or not nor if its admission or rejection were

harmful to the excepting party. *Jones* v. *Jones,* 101 Maine 447, 450; *Doylestown Agricultural Co.* v. *Brackett etc. Co.,* 109 Maine, 301, 308; *Drapeau* v. *Breton,* 114 Maine, . The exception is therefore overruled.

One Haines, called by the plaintiff, was permitted to testify, subject to objection and exceptions, that the market price of New Snow potatoes in May, 1914, was five dollars per barrel, all the other witnesses called by plaintiff upon the question of damages having testified that the market price on the last days of March, 1914, was five dollars. The evidence was inadmissible; *South Gardiner Lumber Co.* v. *Bradstreet,* 97 Maine, 160, 170. It is impossible to determine how the jury reached its verdict. Whether it found, upon the one hand, that one hundred and forty barrels were ordered out and agreed to be delivered on the thirtieth of March, and fixed the damages at two dollars and fifty cents per barrel, or, upon the other hand that seven hundred and twenty-five barrels were seasonably demanded and cars provided to receive them, and fixed the damages at fifty cents a barrel, in either case making an allowance for interest. If the former, the evidence admitted was prejudicial to defendant. If the latter, the jury having disregarded the theory of plaintiff as to damages as well as the testimony of his witnesses as to market price, it was not. But it should not be overlooked that if a seasonable demand was made on the thirty-first day of March there is no evidence that plaintiff furnished cars on that day for the reception of the potatoes or that the parties agreed upon any substituted place or method of delivery.

Such being the case we think the exceptions must be sustained.

This conclusion renders it unnecessary to consider the motion for new trial.

Exceptions sustained.

JOSEPH GALLANT *vs.* THE GREAT NORTHERN PAPER COMPANY.

Androscoggin. Opinion December 8, 1915.

Assumption of Risk. Damages. Dynamite. Fellow Servant. Injuries. Log Driving. Public Laws of 1909, Chapter 258.

1. The words "engaged in cutting, hauling or driving logs," as used in Sec. 8, Chapter 258, Public Laws of 1909, commonly spoken of as the Employers Liability Act, includes any actual log driving labor, regardless of whether the employer is the owner of the logs driven or not, and irrespective of the use he may intend to make of the logs after they have been driven.
2. The defendant cannot be held negligent because of the fact that it furnished dynamite for the use of its servants in the log driving operations, for dynamite is customarily furnished by the proprietors of such operations to be used by their servants in prosecuting the work of driving logs.
3. A servant of mature years and common intelligence, when he engages to serve an employer, is conclusively held to assume the risks of danger which are known to him, as well as those which are incident to his work and which are obvious and apparent to one of his intelligence.
4. A servant who is injured by the negligence or misconduct of his fellow servant cannot maintain an action against his employer for such injuries, unless the employer was negligent in the selection of that fellow-servant. The risk of injury by a fellow-servant is a risk the employee assumes.
5. The fact that the negligent servant is a foreman does not change the rule, unless at the time he was representing the master. The test is the nature of the duty that is being performed by the negligent servant at the time of the injury, and not the comparative grades of the two servants.
6. In going with the others in the boat containing the exposed dynamite ready for use in breaking the jam, a fact which he knew, the plaintiff must be held to have assumed the risks of danger to himself incident thereto, including the negligence of his fellow-servants in the boat.
7. The actual handling and using of dynamite in log driving operations is not such a duty owing from the master to his servant as the law forbids the master to delegate to another so as to relieve himself from the consequences of the negligence of those handling and using it.
8. In this case the foreman was the plaintiff's fellow-servant at the time of the accident, and that for his negligence whereby the plaintiff was injured, the defendant is not liable in this action.
9. The uncontroverted facts disclosed in the case do not sustain the plaintiff's action.

On report. Judgment for defendant.

An action brought by plaintiff to recover damages for personal injuries sustained by him while in the employment of defendant and in consequence of its negligence. Plea, general issue with brief statement, in which it is claimed that Section 8 of Chapter 258 of the Public Laws of 1909 does not apply to those engaged in driving logs.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

White & Carter, for defendant.

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

KING J. Action to recover damages for personal injuries sustained by the plaintiff on May 12, 1914, while in the defendant's employ as a river driver.

The action was brought under the provisions of Chapter 258 of the Public Laws of 1909, known as the Employers Liability Act. An amendment was allowed, adding a count at common law, with a stipulation of the parties to report the case to the Law Court upon the evidence and the special finding by the jury as to damages, that court to direct such judgment as the law and evidence require, both as to the defendant's liability and as to the amount of damages.

The material facts are not in controversy. The plaintiff was working in a crew of river drivers on the defendant's drive on Elm Stream in the northern part of the State. Frank Crockett was the foreman of that crew. He worked with the other men in driving, and his duty as foreman was to see that the crew worked efficiently. He received his orders from an assistant superintendent of the whole drive on the stream. On the day the plaintiff was injured he and eight other men including the foreman went in a boat a short distance up Elm Stream pond to release and bring down a quantity of logs that were being kept back or jammed by ice. Sticks of dynamite, primed and ready for use in breaking the jam, were taken in the boat in an open box. There was also a bag containing dynamite put into the boat. The plaintiff thus describes the accident that caused his injuries.

"The foreman, until we got up where the logs were, opposite the logs, stood in the middle of the boat, between the second and third

seats. When we got up where he wanted to stop, he gave orders for us to stop the boat, stepping over the second and forward seat, and began to light some of the dynamite, standing directly over the box. He lit a few sticks, and finally, I was seated back to him, I turned around and see him light one stick, and saw the fire sputter, and the match drop in the box. I was looking on the ice every time he threw a stick, and I kind of turned my head towards the ice where he was in the habit of throwing the sticks, and the whole thing exploded." As a result of the explosion three of the men in the boat, including the foreman, were killed, and the plaintiff was badly injured.

1. It is provided in the Employers Liability Act, supra, (Sec. 8) that its provisions shall not apply to injuries to persons "engaged in cutting, hauling or driving logs." The plaintiff, however, contends that the work he was doing when injured should be regarded as a part of the defendant's process of manufacturing pulp and paper, since the logs he was working on were to be used ultimately by the defendant for that purpose at its pulp and paper mills, and, therefore, that he was not "driving logs" within the meaning of the exemption in the Act. We think that contention is without merit. The work in which the plaintiff was engaged was being carried on more than a hundred miles from the defendant's manufacturing plant. It was in fact the work of "driving logs" and we are unable to perceive any reason why it must not be so classified, regardless of the ownership of the logs or the use to be made of them. The language of the exemption is explicit and unqualified. The meaning of the expression "driving logs" is clear, and free from all uncertainty. It includes we think any actual log driving labor, regardless of whether the employer is the owner of the logs driven or not, and irrespective of the use he may intend to make of the logs after they have been driven. We entertain no doubt, therefore, that the plaintiff was engaged in "driving logs" at the time of his injuries, and for that reason the Employers Liability Act affords him no remedy therefor.

2. It remains to be considered if the plaintiff has established that he is entitled to recover under his count at common law.

That the use of dynamite in log driving operations is a common practice is conceded. It is customarily furnished by the proprietors of such operations to be used by their servants in breaking ice and

log jams, and otherwise in the work of driving logs. Nor was the plaintiff ignorant of the custom. He was an experienced log driver, and testified that he knew that dynamite was used by river drivers to blow jams and for any purpose that such power is required. Moreover, he knew that it was being used on that drive, and he had seen it used there. The defendant, therefore, cannot be held negligent because of the fact that it furnished dynamite for use on this drive. Nor can the plaintiff claim want of information of that fact for he knew it.

He alleges that the defendant failed to provide for him a safe place to work. The boat itself was not unsafe. It became so at the time of the accident by reason of the presence of the dynamite in it and the act of Mr. Crockett whereby it was exploded. Indeed there can be no doubt from the evidence that this most unfortunate accident was the result of Mr. Crockett's carelessness. All the alleged acts of negligence of which the plaintiff complains, both of omission and commission, were the acts of Crockett. If it was negligence to take into the boat sticks of dynamite already primed and in an open box, that was the particular act of Crockett. He put them into the boat in that condition, according to the plaintiff's own testimony. If any particular one of those in the boat was more at fault than the others because they remained in the boat while the dynamite was being used, it was perhaps Mr. Crockett. But it does not appear that the plaintiff, or any of the others, even suggested that the sticks of dynamite should not be lighted while they were in the boat, although the plaintiff says "he had thrown out four or five charges *at different times* before the boat blew up." And certainly it was the carelessness of Mr. Crockett in *using* the dynamite that was the proximate cause of the explosion.

It is the well settled rule in this State that a servant of mature years and of common intelligence, when he engages to serve an employer, is conclusively held to assume the risks of danger 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. *Caven* v. *Granite Co.*, 99 Maine, 278; *Coolbroth* v. *Maine Central R. R. Co.*, 77 Maine, 165. It is well settled, too, that a servant who is injured by the negligence or misconduct of his fellow-servant cannot maintain an action against his employer for

such injuries, unless the employer was negligent in the selection of that fellow-servant. *Conley* v. *Portland,* 78 Maine, 217; *Cowan* v. *Pulp Co.,* 91 Maine, 29. The risk of being injured by the negligence of a fellow-servant is a risk that an employee assumes. And the fact that the negligent servant is a foreman does not change the rule, unless at the time he was representing the master. *Lawler* v. *Androscoggin R. R. Co.,* 62 Maine, 463; *Conley* v. *Portland,* supra; *Doughty* v. *Penobscot Log Driving Co.,* 76 Maine, 143; *Small* v. *Mfg. Co.,* 94 Maine, 551. And in the case last cited it was said: "The test which determines the master's liability for the negligence of one employee whereby injury is caused to another, is the nature of the duty that is being performed by the negligent servant, at the time of the injury, and not the comparative grades of the two servants."

Applying these well settled rules to the facts disclosed in this case, it seems clear that the plaintiff is not entitled to recover. He testified that before he got into the boat he saw "the foreman put the box of dynamite, about half full or better, in front of the forward seat in the boat, up in the bow," that it was "primed," and "was exposed," and that the fuses were "about six or seven inches long," and that he also saw another man put a bag of dynamite into the boat, "front of the forward seat." He was not compelled, knowing those conditions, to go in the boat against his will. He went along with the others at the suggestion of Crockett that he wanted a boat's crew to go up and get the logs. In going with the others in the boat containing the exposed dynamite ready for use in breaking the jam, a fact which he knew, he must be held to have assumed the risks of danger to himself incident thereto, including the negligence of his fellow-servants in the boat.

And we are constrained to the conclusion, according to the well settled rules of law, that Mr. Crockett was the plaintiff's fellow-servant at the time of the accident. All of the boat's crew were at the time engaged in the common work of driving logs, and to that end Crockett was using the dynamite which the defendant had furnished for such a use. In using it we think he did not stand in the place of the defendant as performing a duty owing from it to the plaintiff. The actual handling and using of dynamite in log driving operations is not, we think, such a duty owing from the master to his servant as the law forbids the master to delegate to another so as

to relieve himself from the consequences of the negligence of those handling and using it.

It is also alleged that Mr. Crockett was an incompetent servant, and that the defendant was negligent in employing him. But no proof was offered in support of that allegation. On the other hand the defendant's superintendent testified that Mr. Crockett was an experienced river driver and woodsman and had been in the defendant's employ for about two years.

The uncontroverted facts disclosed in this case do not in the opinion of the court sustain the plaintiff's action, and, therefore, the entry must be,

Judgment for defendant.

GEORGE NELSON, Administrator,

vs.

BURNHAM & MORRILL COMPANY.

Cumberland. Opinion December 14, 1915.

Dangerous and Attractive to Children. Elevator. Instantaneous Death. Invitee. Licensee. Negligence. Trespasser.

A boy thirteen years of age had been accustomed to visit a canning factory for his own pleasure. He had, by the permission or sufferance of employees, learned to run the elevator. One day he was directed by the superintendent to leave the building. Instead of doing so, he remained and amused himself by riding up and down the elevator. While operating it, he was killed in some way not explained. In a suit by his administrator to recover damages, it is held.

1. The deceased was a trespasser.
2. The defendant owed him no duty except not wantonly to injure him, and the fact that he was a child of tender years does not change the rule.
3. The doctrine that an owner of property is liable for injuries to children when caused by structures and appliances attractive to them does not hold in this State.

On exceptions by plaintiff. Exceptions overruled.

This is an action on the case brought by George Nelson, administrator, to recover damages for the death of Albert Nelson, a boy thirteen years of age, which occurred in the defendant's factory on account of the alleged negligence of the defendant. At the conclusion of the plaintiff's evidence, the presiding Justice directed a nonsuit. The plaintiff excepted to said nonsuit. Plea, the general issue.

The case is stated in the opinion.

Ralph O. Brewster, for plaintiff.

Carroll L. Beedy, for defendant.

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

SAVAGE, C J. Action for damages resulting from the death of the plaintiff's intestate, Albert Nelson, through the alleged negligence of the defendant. The death was instantaneous, and the action is brought under Revised Statutes, Chapter 89, Section 9. The case comes up on the plaintiff's exceptions to an order of nonsuit.

The plaintiff's intestate, a boy thirteen years of age, was killed in some way in or about the elevator in the defendant's canning factory. He was not employed by the defendant, but for several months, in company with a playmate named Alexander, he had frequently visited the defendant's factory. They seem to have been attracted there, at first at least, by the fact that Alexander's brother, Billy, then between fourteen and fifteen years of age, was the elevator boy in the factory. Nelson and Alexander had no business in the factory. They went there merely for their own pleasure. Sometimes when there, they assisted Billy in his work, other than running the elevator. And a few times they assisted one or others of the employees. Once or twice they were rewarded by the employee whom they assisted by the payment of five or ten cents. Two or three times they had been told by overseers or bosses to leave. But notwithstanding this they continued to visit the factory, without any further objection on the part of any one until the day of the accident. When they first went there the man in charge of the basement room sent them away, but learning from the elevator boy that Alexander was his brother, he said "That is all right." Billy taught them how to run the elevator, and they frequently took rides upon it, up and

down, for their own pleasure, operating it themselves. The elevator could be started up or down by pulling one or the other of two cables, and these cables could be reached from the elevator opening on any floor. There was a device for locking the elevator cage, so that it could not be moved up or down except by one having access to the cage itself. But ordinarily it was left unlocked, except when loads were being put onto it, or taken from it. When not in use, the entrance to the cage was usually open, although there were doors in the frame work of the well which could be closed. There was also a bell system by which the elevator could be signalled from floor to floor. The elevator was designed and used only for the carriage of freight, and not for passengers.

On the day of the accident at about two o'clock in the afternoon, young Nelson was started by his mother for school. But instead of going to school he went to Alexander's home and they together went to the defendant's factory. While there they went to the second or third floor where Billy was at work. At that time McManus, the "head boss," so called, came and told Billy that he had orders from the superintendent "to tell those boys to keep out," and added "Why don't they go down to the fish house with Dixie, where it is warm," the fish house being in a separate building. This message was communicated by Billy to Nelson and Alexander. And Nelson asked Billy if he had better go, and was answered, "Yes, you will have to go right out." Instead of going out, however, or of going down to the fish house, they remained with Billy, and helped him to finish loading a truck which was to be taken to an upper story by the elevator. Billy wheeled the truck onto the elevator and went up with it, leaving Nelson and Alexander in the room. Billy wheeled his load off the elevator, and went to work chopping meat. He had nothing more to do with the elevator until after the accident, which occurred, as nearly as can be gathered from the testimony, between one and two hours later.

In the meantime, Nelson and Alexander pulled the elevator down from where Billy had left it, and rode up and down on it several times. Finally Alexander went down on it alone, leaving Nelson on the second floor. Alexander called up to Nelson and asked him if he was coming home. He answered that he "was going up to wait for Billy." Being asked, "What happened next?" Alexander testified,

"When I looked up I seen his feet hanging." "And when I got up he fell in the well." In fact he had been killed. This is all the account we have of the catastrophe. No eye saw him. No one knows how it happened. No one knows in what manner or from what particular cause he went to his death. An opportunity for it was, of course, afforded by the open, unguarded entrance to the well.

We will mention only one other feature in the history of the case. It seems that earlier in the same day, as a witness for the plaintiff testified, a notice, "Danger, ring bell," had been stencilled on or about the elevator. Nelson saw it and asked Billy what it meant, and was told, "You are supposed to ring the bell before you pull any wire."

The plaintiff's declaration contains two counts. In the first he alleges that his intestate was in and about the defendant's factory by its license or permission, that the defendant's negligence consisted in the failure to guard the elevator properly with regard to the presence of a child of the tender age and understanding of the intestate and that the latter in the exercise of due care was caught between the elevator and the adjoining wall as the elevator was ascending. In a second count the plaintiff charges that the elevator was dangerous, and was attractive to children, that the defendant knew that young children were attracted to the factory by it, that it was the defendant's duty to use reasonable precautions to prevent his intestate, a child of tender years, from coming to bodily harm by reason of the enticement and allurement of the elevator, and that it failed to do so.

We must first inquire what were the duties, if any, of the defendant to young Nelson? And the answer to this question depends upon whether Nelson was at the time of the accident an invitee, a licensee, or a trespasser. If he was an invitee, the defendant owed him the duty of using reasonable care for his safety. If he was a mere licensee or if he was a trespasser, the defendant owed him no duty, except not wantonly to injure him, nor to set traps for him. *Russell* v. *M. C. R. R. Co.,* 100 Maine, 418; *Stanwood* v. *Clancy,* 106 Maine, 72; *Austin* v. *Baker,* 112 Maine 267. It is clear that Nelson was not an invitee, either express or implied. He had no business in the factory. He had nothing to do with its business. He went there solely for his own pleasure. *Stanwood* v. *Clancy,*

supra. It may be that a jury would be warranted in finding that up to the time of the notice from McManus to leave he was a licensee. He was permitted to come and remain in the factory under such circumstances as perhaps would warrant the finding of an implied license. We may assume it to be so. But after the notice from McManus, an hour or two before his death, he can be called nothing but a trespasser. The implied license, if any, was revoked, and the knowledge of the revocation was brought home to him. He was no longer permitted to be anywhere in that building. He was no longer licensed to be in or about the elevator, or to operate it. He could no longer rightfully remain in the rooms through which the elevator passed. In accordance with well established principles, the defendant did not owe him the duty of protection unless children trespassers stand on a different footing from adults.

The plaintiff in argument lays much stress upon the fact that the elevator boy was under the age of fifteen years, and that his employment under that age was forbidden by statute, Laws of 1907, Chapter 4; and upon the fact as claimed that Nelson was permitted, though under the age of fifteen years, to operate the elevator, which is also forbidden. See same statute. Violation of a statute may be evidence of negligence on the part of the violator. But it is only evidence. If this were material, it would be sufficient to say in this case that the elevator boy, or the operation of the elevator by him, had nothing to do with this accident. He had left the elevator an hour or two before and was engaged on other work. And as to permitting Nelson to operate it, the permission, if any, ceased when McManus gave the notice. When Nelson was killed he was operating it without permission, even if that kind of operation comes within the meaning of the statute. But the real and conclusive answer to the proposition is that the defendant owed no duty to Nelson at the time, because he was a trespasser. And if it owed him no duty, it was not negligent as to him.

But the plaintiff earnestly contends that even if his intestate was a trespasser, the defendant was liable for failure to use reasonable precautions to prevent injury to him, inasmuch as he was but a mere boy. In short, the contention is that the rule as to trespassers, which we have stated, ought to be and is relaxed when the trespasser is a child, and that as to trespassing children the owner of the premises

in such a case as this is bound to use care to protect them from injury. It is true that such a relaxation of the rule has been applied by some courts. But such is not the law in this State. *Elie* v. *Street Railway,* 112 Maine, 178. In the case cited, this court held that "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." As was said in *Nolan* v. *N. Y., N. H. R. R.,* 53 Conn., 461, "an owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists." *Bottum* v *Hawkes,* 84 Vt., 370; *McGuiness* v. *Butler,* 159 Mass., 233; *Buck* v. *Amory Mfg. Co.,* 69 N. H., 257; *Indianapolis* v. *Emmelman,* 108 Ind., 530. In 2 Thompson on Negligence, 1183, the author says. "In dealing with cases which involve injuries to children courts have sometimes strangely confounded legal obligations with sentiments that are independent of law." With purely moral or sentimental obligations, the law does not deal. *Buck* v. *Amory Mfg. Co.,* supra.

In his second count the plaintiff seeks to bring the case within the doctrine sustained by some courts in the so called "turn table" cases, wherein owners have been held liable for failure to guard structures and appliances attractive to children who were injured thereby, although the children were trespassers. Such structures have been called "attractive nuisances." An interesting and exhaustive note on the subject of attractive nuisances may be found in 19 L. R. A. (N. S.) 1094, where the cases are collected.

Our court said in *McMinn* v. *Telephone Co.,* 113 Maine, 519, that "the doctrine of 'attractive nuisances' has never been adopted in this State." And upon what seems to us to be the better reasoning, we think it should not be. This rule is certainly an innovation upon the rules of the common law. It has never been thought until recent years that an owner, under any conditions, was bound to protect trespassers, and no distinction was made between adults and children. The rule changes what may be regarded perhaps as a sentimental duty into a legal duty. It infringes upon the salutary and necessary rule that an owner may do what he will with his own so far as he does not interfere with the legal rights of others. It is an unjustifiable restraint upon the right of an owner to conduct his business

as he sees fit. It is a burden upon his business, and a burden created in favor of one who is at the same time trespassing upon his rights.

In the case of *Railroad* v. *Stout,* 17 Wall., 657, which was practically one of the first to declare this rule, and which is the leading case in support of the rule, the court said that the jury in that case were warranted in finding that children would probably resort to the turn table there in question, that there was a probability that an accident would occur to a child, and that it could have been prevented without considerable expense or inconvenience; and upon these premises, the court assumed a legal liability without discussion of reasons, and upheld a verdict for the plaintiff. And this conclusion has been followed, and in some cases enlarged upon, by other courts. But what logical reason is there for saying that one, young or old, who is wrongfully upon premises, can hold the owner to the expenditure of *any* money, or to submission to *any degree* of inconvenience, for his protection? We can think of none. We think there is no reason except the sentimental one, and that is not the basis of a legal obligation. *Daniels* v. *Railroad Company,* 154 Mass., 349; *Holbrook* v. *Aldrich,* 168 Mass., 15; *Bottum* v. *Hawkes,* supra; *Frost* v. *Railroad Co.,* 64 N. H., 220; *Deleware, L. & W. R. R. Co.* v. *Reick,* 61 N. J. L., 635; *Walsh* v. *Fitchburg R. Co.,* 145 N. Y., 301; *Railroad Co.* v. *Harvey,* 77 Ohio St., 235; *Ryan* v. *Tower,* 128 Mich., 463; *Wilmot* v. *McFadden,* 79 Conn., 367; *Pannill* v. *Railroad Co.,* 105 Va., 226; *Uttermoklen* v. *Boggs Run Co.,* 50 W. Va., 457.

We must hold, therefore, that the case discloses no liability on the part of the defendant, and that the order of nonsuit was right.

Exceptions overruled.

GRACE M. ROYAL, Administratrix,

vs.

BAR HARBOR AND UNION RIVER POWER COMPANY.

Hancock. Opinion December 14, 1915.

Amendment. Contributory Negligence. Direction of Verdict. Electricity. Exceptions. Negligence.

1. It is the duty of the presiding Justice to direct a verdict, when a verdict to the contrary could not be sustained.
2. An electrician handling electric wires which he knows are charged with electricity assumes the risk.
3. The case shows that the plaintiff's intestate, an electrician, knew that the wires he was handling were charged with a current of 2300 volts, and that he handled them without using any protective or safeguards. It is held that he assumed the risk, and that he was unquestionably guilty of contributory negligence.

On exceptions by both plaintiff and defendant. Exceptions by plaintiff overruled.

This is an action on the case to recover damages for the instant death of the plaintiff's intestate, alleged to be due to the negligence of the defendant. Plea, the general issue. The defendant demurred to the first count in plaintiff's declaration. The presiding Justice sustained said demurrer. The plaintiff was allowed to amend her declaration, and to the allowance of the amendment, the defendant excepted. At the conclusion of the evidence, the Justice presiding directed a verdict for the defendant. To which direction the plaintiff excepted.

The case is stated in the opinion.

D. E. Hurley, and O. F. Fellows, for plaintiff.

Hale & Hamlin, for defendant.

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

SAVAGE, C. J. Action under Revised Statutes, Chapter 89, Section 9, for damages resulting from the negligence of the defendant, whereby the plaintiff's intestate was instantly killed. The case comes before this court on the defendant's exceptions to the allowance of an amendment to the plaintiff's declaration, and on the plaintiff's exceptions to the direction of a verdict for the defendant.

It will not be necessary to consider the defendant's exceptions, for we think that the direction of a verdict for the defendant was right. And the overruling of the plaintiff's exceptions will finally dispose of the case.

It is well settled that in considering exceptions to the direction of a verdict, the only question is whether the jury would have been warranted by the evidence to find a verdict contrary to the one ordered. If a verdict to the contrary could not be sustained, it is the duty of the presiding Justice to direct the verdict. If such a verdict would be sustainable, the issue of fact should be submitted to the jury. *Horigan* v. *Chalmers Co.*, 111 Maine, 111; *Johnson* v. *N. Y., N. H. & H. R. R.*, 111 Maine, 263; *Shackford* v. *N. E. Tel. & Tel. Co.*, 112 Maine, 204. In this case there is not much conflict in the evidence. And the facts upon which hinge the vital and decisive questions in the case seem to be not only undisputed, but indisputable.

The deceased was a competent, professional electrician of sixteen years experience. He was employed by one Grindal to instal a three phase, 550 volts, 60 cycle electric motor, in a storehouse, to do the necessary inside wiring, and connect it with the motor. The defendant company was engaged to supply the electric power for running the motor from its 2300 volt service wire which was strung on poles along the side of the Grindal building, the current for the building being reduced to 550 volts by a transformer. The employment of the deceased required him to lay three wires from the motor upon the timbers of the building to and through the wall, and so to leave the ends of the wires that the defendant could connect with them wires from its service wire. Prior to the accident the deceased had laid the wires in the building and the defendant had connected its wires on the outside. But contrary to the usual practice, the plaintiff

had not placed switches or fuses in the wires, so as to guard by fuses against an unusual current, or to cut out the current by switches.

At the precise moment of the accident the electric current was on, and the deceased had begun to make the connection between the ends of the wires he had laid, from which the insulation had been removed, with the wires in the motor At the instant, no one saw him. But he was heard to moan, and he fell to the platform dead. Deep burns were found across the fingers of both hands, one being burned nearly to the bone. In her original declaration, which we refer to for a reason to be noted hereafter, the plaintiff alleged the negligence of the defendant to consist in the fact that "because of a leaky transformer and other defects in said wires and transformer the current that was suffered to run and be directed into the storehouse was not reduced to a voltage of 550 volts, but was of the full force and volume of 2300 volts," and that the deceased "believing that said wires running into said building carried only a voltage of 550 volts" attempted to connect the wire with the motor. But in the count substituted by amendment, the one upon which this verdict rests, she alleged that the defendant was negligent in that it connected the wires outside, and thus let on the current without the knowledge of the deceased, that he did not know that the wires he was working on were connected with any of the defendant's wires, and that because of a leaky transformer the current was not reduced.

The plaintiff in argument stoutly contends that it was negligence on the part of the defendant to connect the wires before any switch or fuses had been put in, without any notice to the deceased, that the connection had been made. And so it would be if such was the fact. But the defendant on the other hand contends, and its evidence, which is uncontradicted, tends to show, that on the morning of the day of the accident the deceased met the servants of the defendant whose duty it was to make the connection and asked if they had fuses and switches, and said he wanted to borrow a switch to put in; that they told him they had none; and that he told them "to go ahead and connect up the line, and that he would look out for the inside of it." If this story it true, it cannot be said that there was any negligence as to him if they proceeded to do as he told them to do. The plaintiff says, however, that the witness who narrated this interview, though not contradicted, is impeached by a somewhat different

account which he gave at another time with respect to what was said about fuses and switches. But as will be seen it is not necessary further to consider that phase of the case.

We will say in passing that there is no evidence that warrants the conclusion that the transformer leaked, or that any of the defendant's wires were defective, or that any stronger current than 550 volts passed into the building. The plaintiff's case as to negligence of the defendant must rest upon the proposition that the defendant connected the wires before they were prepared for the connection, and without notice to, or knowledge of, the deceased.

Now, whatever may have been the negligence of the defendant in this respect, if the deceased knowingly assumed the risk, or was guilty of contributory negligence, the plaintiff cannot recover. A careful study of the case compels us to the conclusion that the deceased did know that the wires were connected, and that the current was on. And if he did know that, and yet undertook to handle wires charged as these were, he did it at his own risk. And, in that case, if he attempted to handle the wires without any protection or safeguard, as he did, it was beyond question contributory negligence.

The wires were connected at ten o'clock in the forenoon, and it does not appear that the deceased was in the building at the time. The accident occurred four hours later. Though this shows that he had an opportunity to notice the connection, it shows nothing more. But the very idea of connecting the wires to the motor presupposes that the current was on. The work could not be done properly until the current was on. The testimony of expert witnesses, one on each side of the case, shows that the wires cannot be connected properly, or with certainty as to position, unless there is a current on. There are three wires and three connections. The direction in which the motor will revolve depends upon which wire is connected at each of the several connections. Connecting one wire does not start the motor. Connecting a second wire does not start it. Connecting the third wire, if the current is on, will start it. But it may revolve one way, or it may revolve the other way. If it revolves the wrong way, or contrary to the way in which in the particular case it is desired to revolve, the wires, or two of them, at least, have to be transposed. And there is no way, so is the evidence, by which it can be known before hand, which way it will revolve. It can be

ascertained only by a test under current. We think the evidence is well nigh irrisistible that this experienced electrician did not attempt to connect the wires with the motor, until he know there was a current to enable him to do so properly and successfully. Otherwise he was merely pottering uselessly about the motor. To complete the work it would be necessary for him to tape or insulate the ends of the wires which he should connect, and that he would not be likely to do until he knew by test that the motor would revolve the right way.

Besides, there is undisputed evidence that the deceased warned Mr. Grindal who was on the platform with him of possible danger. Mr. Grindal says that he was on the north end of the platform, and that Mr. Royal said that "I had better move from there," "you can't tell what might happen," or words to that effect. The plaintiff called a witness to rebut the statement of Mr. Grindal. This witness was at work ten feet away. He says he heard the deceased say "Stand back, Mr. Grindal," and that he heard nothing else. It does not matter much which expression was used. Put it either way, it was evidently spoken to warn Mr. Grindal to get away from danger. And there was no danger unless the current was on.

Again it is not without significance that the plaintiff in her original declaration alleged that the deceased attempted to connect the wires with the motor "believing that said wires running into said building carried only a voltage of 550 volts." This plainly indicates her understanding that the deceased believed the current was on. Her claim then was that the wires were overcharged by reason of a leaky transformer.

Upon the whole, then, we must hold upon the evidence and upon all the probabilities, that the deceased knew that the connections outside had been made, that the current was on, and that he undertook to do a dangerous work, without adopting any safeguards. He was an experienced electrician. Experience and familiarity not infrequently breed carelessness. Experienced men, confident of themselves, take chances. They are familiar with danger. They know how to avoid it. They expect always to avoid it. They do not always avoid it. *Perkins* v. *Oxford Paper Co.*, 104 Maine, p. 120. We cannot but think that this unfortunate accident was due to a fatal want of care on the part of the deceased, while engaged in work the dan-

ger of which he knew full well, and had assumed. The direction of a verdict for the defendant was right.

Plaintiff's exceptions overruled.

WILLIAM T. ERSKINE *vs.* ANNIE VANNAH.

Lincoln. Opinion December 14, 1915.

Bond. Duty of Officer. Replevin. Return. Service. Writ.

This is an action of replevin involving the question of insufficient service of the writ, and comes before the court on an agreed statement of facts.

Held:

1. The duty of the officer is defined in the writ or precept; that he should follow the commands of the writ in detail and in the order of their recital does not admit of question, for his safety, and the rights of litigants, require on his part certainty and precision as well as good faith.
2. In this state a writ of replevin is sued out and indorsed, served and returned in the same manner as other original writs.
3. That the plain duty of the officer requires him first to seize the property is well settled. By virtue of the writ, the sheriff proceeds at once to take possession of the property therein described, and transfer it to the plaintiff, upon his giving pledges which are satisfactory to the sheriff to prove his title, or return the chattels taken if he fails to do so.
4. Whether the defendant may feel disposed to deliver up the property or not is of no consequence to the officer; it is his imperative duty to seize the property if it may be found.
5. The officer, in executing a writ of replevin, has authority to take into his possession the property therein mentioned before delivering a copy of the order to the person charged with the unlawful detainer of the property, or leaving the copy at his usual place of abode.

Reported on agreed statement of facts. Action dismissed.

This is an action of replevin for a stove, which originated in Lincoln municipal court and reported to the Law Court on an agreed statement of facts.

The case is stated in the opinion.
George A. Cowan, for plaintiff.
Weston M. Hilton, for defendant.

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

HANSON, J. This is an action of replevin and comes before the court on an agreed statement of facts, as follows:

"In the above action it is agreed that the officer who served the writ of replevin, if present, would testify that he met the defendant's tenant on the street in Damariscotta in the afternoon of November 23, 1914, and told him he was coming up to replevy the stove in question; that the reason he told him was so he might let the fire go out; that on the same afternoon he served the alleged copy of the writ on the defendant; that on the next day he went to the house occupied by the defendant's tenant and took the stove; that he had never seen the stove nor been in the house where it was until the next day after the service of the alleged copy of the writ on the defendant. It is agreed that the officer's return shall be regarded as amended in accordance with the above facts."

The officer's return on the writ contained the usual recitals as to taking a bond, replevying the stove and delivering the same to one H. R. Bisbee, as keeper for the plaintiff, and *on the same day* "I summonded the defendant for her appearance at court as within directed, by leaving at the place of her last and usual abode an attested copy of this writ."

The defendant seasonably filed a motion to dismiss the action, alleging insufficient service. The above agreement followed, and no question of pleading is presented. *Littlefield* v. *Kimball,* et al., 104 Maine, 126.

The plaintiff contends that there was a sufficient service of the writ; "that a writ of replevin is a writ of summons, and not of attachment, that the defendant was protected by his bond, and being in no way injured, renders this case in line with any replevin service," and cites *McKinstry* v. *Collins,* 74 Vermont, 147, in support of his contention. In that case the plaintiff sued to recover damages for an alleged assault upon his wife. The defendant justified as an officer serving a replevin writ. At the close of the evidence, the

plaintiff claimed that the justification had not been made out, and requested the court to take the question from the jury, "for that, First, it did not appear that before the attempted service of the writ Sheriff Collins had taken such a bond from the plaintiff in the replevin suit as the statute requires; second, that defendant Collins completed service of the writ before seizing the colt and committing the assault, if one was committed, and that what was done after he completed his service he did without authority; third, that the testimony did not show that the writ and bond had been returned by defendant Collins to the clerk of court to which the writ was returnable. The request was refused and the plaintiff excepted. The court held "the facts tended to show that defendant had a bond to the defendant in the replevin suit when he served the writ, and that the writ and bond were returned to the clerk of the court to which the writ was returnable. The testimony of defendant Collins tended to show that while within the barn where the colt was kept he agreed with the plaintiff upon the value of the colt, made his returns on the original writ and copy, handed the copy to the defendant in the replevin suit, and delivered the colt to the plaintiff in the replevin suit. At the time Collins took the colt and turned it over to the plaintiff, *he had not returned the original writ;* and he could complete the service of it by taking and delivering the property as commanded in the writ, notwithstanding he had delivered a copy of the writ to the defendant named therein."

The service in the case at bar was made, and the writ returned, with no attempt to renew the service or amend the return, and therefore differs from the case cited in these important particulars. In this and similar cases it is the uniform practice, supported by unquestioned authority, for officers to renew service or perfect some detail of service before returning the writ. But having made the return, as in this case, there is no way provided by statute or recognized in our practice to cure that which we must hold to be a vital necessity in procedure in replevin suits. The duty of the officer is defined in the writ or precept; that he should follow the commands of the writ in detail and in the order of their recital does not admit of question, for his safety, and the rights of litigants, require on his part certainty and precision as well as good faith.

In this State a writ of replevin is sued out and indorsed, served and returned in the same manner as other original writs. R. S., Chap. 98, Sec. 2; Spaulding's Practice, 58. That the plain duty of the officer requires him first to seize the property is well settled. By virtue of the writ, the sheriff proceeds at once to take possession of the property therein described, and transfer it to the plaintiff, upon his giving pledges which are satisfactory to the sheriff to prove his title, or return the chattels taken if he fails to do so. Bouv. Law Dict., 884; Chitty, Pl., 145; *Hamburger* v. *Seavey,* 165 Mass., 505; *Steuer* v. *Maguire,* 182 Mass., 575; Words and Phrases, 6106; *Bettinson* v. *Lowry,* 86 Maine, 218.

The prime object of an action of replevin it to put the plaintiff in possession of the property; and when a writ is sued out and proper bond given, it is the first duty of the officer to seize the property, and then read the writ to the defendant if he can be found. It is not a compliance with his duty merely to read the writ to the defendant. Whether the defendant may feel disposed to deliver up the property or not is of no consequence to the officer; it is his imperative duty to seize the property if it may be found. Encyclopedia Pl. & Pr., Vol. 18, page 527, citing *People* v. *Wiltshire,* 9 Ill. App., 374; *Yott* v. *People,* 91 Ill., 11.

The officer, in executing a writ of replevin, has authority to take into his possession the property therein mentioned before delivering a copy of the order to the person charged with the unlawful detainer of the property, or leaving the copy at his usual place of abode. *State* v. *Wilson,* 24 Kan., 50; Vol. 18 Pl. and Pr., 527.

These authorities are in harmony with the practice and procedure in this State. The service being admittedly defective, and not capable of amendment or renewal, the entry will be,

Action dismissed.

JAMES W. SKENE *vs.* JOHN R. GRAHAM, et al.

Kennebec. Opinion December 14, 1915.

Collision. Damages. Negligence. Personal Injuries. Swerving to the Right.

1. It is the duty of travelers approaching to meet, seasonably to turn to the right of the middle of the traveled part of the road, so far that they can pass each other without interference.
2. It is manifest that the collision was due to the fact that both cars swerved from their course at the same instant, the car of the defendants swerving from its lawful position to one of supposed safety in order to avoid an accident, the other leaving its unlawful position and course for the same reason. That the swerving of defendants' car was imperative is apparent; that an emergency existed not only justifying but authorizing the defendants' chauffeur in so swerving is equally apparent. That his act was not due to his unlawful use of the road is shown by an overwhelming weight of the evidence, and that the defendants are not liable for any damage arising in the circumstances is a principle firmly established.
3. When two alternatives are presented to a traveler upon the highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence in taking either.
4. It is the opinion of the court that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand. It is unnecessary to consider the exceptions.

On motions by defendants. Motion sustained. New trial granted.

This is an action on the case to recover damages against John R. Graham and his wife Georgie H., for personal injuries alleged to have been caused by the negligence of the defendants' chauffeur while operating an automobile on Western avenue in Augusta, August 26, 1913. Plea, the general issue. The jury returned a verdict for plaintiff for $2175.00, and the defendant filed a general motion for a new trial. Defendant filed various requests for instructions by the presiding Justice, all of which were refused, and the defendant excepted. Exceptions not considered.

The case is stated in the opinion.

Williamson, Burleigh & McLean, for plaintiff.
Ryder & Simpson, for defendant.

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

HANSON, J. This is an action on the case to recover damages for personal injuries sustained by the plaintiff in a collision between the plaintiff's and defendants' automobiles. The jury returned a verdict for the plaintiff for $2175.00.

The case is before the court on the defendants' general motion for a new trial, and exceptions to the refusal of the presiding Justice to direct a verdict for the defendants, and refusal to give certain requested instructions.

The collision occurred at the corner of Western avenue and Sewall street in Augusta, on August 26, 1913. The plaintiff was driving a Ford car easterly on Western avenue, while the defendants were traveling westerly in a Packard car on the same street. The plaintiff was driving his own car, the defendants' car being in charge of a chauffeur. The southerly side of Western avenue was closed to traffic from a point 100 feet from its junction with Sewall street, but the northerly side of the street was open and in use by the public on the day in question, and there was sufficient room for automobiles and other vehicles to pass and repass, the width of that side of the street being 24 feet. The plaintiff left his garage with the intention of going to Manchester, and had passed up Western avenue some 275 feet when he decided to return to the garage. His counsel questioned him as follows:

"Q. Describe your course back?

A. I went right straight down the north side of the street until I got down to where I could go across the track. There was lumber and horses piled up there, so you could not get past; and so I went down and crossed the track and then proceeded on the right hand side, extreme right hand side of the street, down to Sewall street.

Q. And where was the Packard car when you first noticed it?

A. It was on Western avenue on the right hand side of the street, which would be the northerly side, coming up the avenue.

Q. That would be its proper side?

A. Yes; its proper side.

Q. Will you describe the collision; first, will you tell us where the collision took place.

A. Right on the corner of Western avenue and Sewall street, on left or south side of Sewall street; at the junction of Sewall street and Western avenue.

Q. On which corner of Sewall street was it, east or west?

A. Very nearly the middle of the street.

Q. Will you describe the accident fully?

A. Well, I was going along on my right hand side of the street, and this big Packard car came tearing up Western avenue; and when it came nearly opposite to me, all at once it swung right around, and crossed the track and struck my car."

The plaintiff claims that the defendants' car was driven out of its course, and from its lawful position on the northerly side of Western avenue, across said avenue and into collision with his car, which was and had been for some distance, proceeding on the (his) extreme right hand side of said avenue; that he was in the exercise of due care, traveling ten or twelve miles an hour, while the defendant was driving forty miles an hour. This condition, if true, would constitute culpable negligence on the part of the defendants.

But the defendants in support of their motion for a new trial contend that the evidence did not authorize the jury to find for the plaintiff, that the collision was the result of the plaintiff's own carelessness, and that any damage resulting therefrom was due to his fault and want of due care.

Harry A. Haas, who was driving the defendants' car, testified:

"Q. You started from Bangor?

A. Yes, sir.

Q. When you got to Augusta what course did you take?

A. Well, I came up State street and up Western avenue; and at Western avenue and Sewall street the accident happened.

Q. Won't you state in your own words just what happened after you left State street, on your way up Western avenue, up to the time of the collision?

A. Well, I was going up Western avenue close to the gutter, on my right hand side, on the north side of Western avenue, and I was going about 15 miles an hour; and I saw Mr Skene's Ford automobile stop close to the curb on the other side at a house, and when I got

about half way up, he started, running close to the curb in my direction. I proceeded along Western avenue and when we got close to Sewall street, he had not turned out; and if we had kept that same course, we would have run into each other head on. And so when we got to Sewall street, I swung out, and he swung out at the same time; and I turned around and stopped the machine, and he came there and caught me.

Q. At the time of the collision, the Packard car was stopped?

A. Stopped; yes, sir.

Q. And how fast should you say the Ford machine was going when he struck you?

A. Eight or ten miles an hour.

Q. But the turning, what about the turning?

A. Both turned practically the same time. I was turning to get out of his way, to pass him; and he turned at the same time. I could not turn back, because I would run into him head on; and I ran over and stopped, and he ran into me."

The defendants corroborated Mr. Haas in all important particulars, and he is corroborated by the plaintiff's witness Brown, the only witness introduced by the plaintiff who saw the collision, upon the most vital point in the case.

Mr. Brown testified as follows:

"Q. Will you describe what took place, the course of that Ford car before the accident?

A. Well, before the accident, I was coming up Sewall street going to Western avenue; and Mr. Skene, he was up Western avenue, coming clear up from somewhere, and he went up into a yard, and I was coming along and looking that way, and I saw him.

Q. You were going to the north?

A. Yes, sir; and he came down Western avenue, clear up, and he went by where they were working in the street there, and he swung over and turned across the track there where they run the electric cars; and I saw a big automobile come and go right straight across; and it went right into him and I hadn't seen that other car; and why, because Governor Burleigh's house hid me from looking down, I had not got far enough up. I was right by the corner of Governor Burleigh's house, and I was by the Soule house, and that car was behind there coming up, and there at the corner was Gov-

ernor Burleigh's house and that hid the car coming from the other way, from down street, the car coming was not in view there.

Q. Could you see the course of the Ford car all the time?

A. Yes, sir; but I did not see this big car until it came out and turned right across.

Q. Turned right across what street?

A. Western avenue—came right across. And Mr. Skene was coming from the other side of the street, cross ways.

Q. On what side of the street was Mr. Skene at the time you saw the accident?

A. On the south side of the street, coming down Western avenue."

The collision occurred on the south side of Western avenue.

It is the duty of travelers approaching to meet, seasonably to turn to the right of the middle of the traveled part of the road, so far that they can pass each other without interference. R. S., Chap. 24, Sec. 2. *Neal* v. *Randall,* 98 Maine, 69.

The defendants' contention is that the plaintiff did not seasonably turn to the right, and that the chauffeur driving the defendants' car was obliged to decide quickly whether to continue his course and collide with the plaintiff's car, or turn to the left and avoid a collision.

The case shows that the defendants were proceeding along Western avenue on the right side of the traveled way, that they had no occasion or desire to cross over to, or use the opposite side of the avenue, and it clearly appears that if the plaintiff had not been approaching from the opposite direction, they would not have done so, and it is equally certain that if the statement of the plaintiff is true they would have had no occasion to cross over to the other side. From the plaintiff's own showing, he had no reason to believe that the defendants intended to leave their course. Between the point where he could have turned to his right and the point of contact there was one hundred feet of clear way, a space admittedly sufficient for such turning in time to avoid collision; so that from the very nature of the case, if the plaintiff's statement is true the collision would not have occurred, and certainly could not have happened in the manner described. It is not explained in the evidence, nor does it appear clear from the briefs of counsel, how under all

the circumstances claimed by the plaintiff, the left side of his car could be struck by the right side of defendants' car. It is manifest that the collision was due to the fact that both cars swerved from their course at the same istant the car of the defendants swerving from its lawful position to one of supposed safety in order to avoid an accident, the other leaving its unlawful position and course for the same reason. That the swerving of defendants' car was imperative is apparent; that an emergency existed not only justifying but authorizing the defendants' chauffeur in so swerving is equally apparent. That his act was not due to his unlawful use of the road is shown by an overwhelming weight of the evidence, and that the defendants are not liable for any damage arising in the circumstances is a principle firmly established. When two alternatives are presented to a traveler upon the highway as modes of escape from collision with an approaching traveler, either of which might fairly be chosen by an intelligent and prudent person, the law will not hold him guilty of negligence in taking either. *Larrabee* v. *Sewall,* 66 Maine, 376, and cases cited.

It is the opinion of the court that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand. It is unnecessary to consider the exceptions.

Motion sustained.
New trial granted.

EDWARD C. LUQUES,
Appellant from Decree of the Judge of Probate.

York. Opinion December 14, 1915.

Appeal. Devise. Inheritance Tax. Public Laws of Maine, 1909. Residuary Legatees. Will.

This case is before the court on an agreed statement of facts in an appeal from the decree of the Judge of Probate of York county assessing an inheritance tax against Edward C. Luques, one of the residuary legatees under the will of Margaret C. Luques.

Held:

1. It clearly appears that the intention of the testator was that his widow should have full power of disposal of all the property devised to her in the will, and there was no intention to limit her use or disposal thereof.
2. It is a settled rule of law that, if a devisee or legatee have the absolute right to dispose of the property at pleasure, the devise over is inoperative.
3. A devise of land generally or indefinitely, with a power of disposing of it, amounts to a devise in fee. And such a devise, without words of inheritance, is treated as equivalent to a devise with words of inheritance.
4. The property in question did not vest in appellant in and as of the will of Samuel W. Luques, or at the moment of his death. The right of the widow to dispose of the entire estate stood between the plaintiff and his asserted right.
5. An inheritance tax being a tax on the privilege or right of inheriting, could not be levied or collected as against the appellant until such right existed in fact, a condition only to be made certain in this case by the death of the widow.
6. A power of appointment is a power of disposition given a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument. In the case at bar the property vested in Margaret C. Luques, and when her will was made there was nothing left on which a trust could operate. She had disposed of all the property, and hence no power of appointment could have been executed.
7. The will speaks from the death of the testator, and in clearest terms expresses his intent and his clearly stated purpose that if the widow had disposed of the property by sale or by will, his wishes were satisfied and at an end.

On agreed statement of facts in an appeal from decree of the Judge of Probate. Decree affirmed. Case remanded to probate court for further proceedings.

This is an appeal from decree of Judge of Probate of York county assessing an inheritance tax against Edward C. Luques.

The case is stated in the opinion.

N. B. & T. B. Walker, for appellant.

W. R. Pattangall, attorney general, for appellee.

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

HANSON, J. This case is before the court on an agreed statement of facts in an appeal from the decree of the Judge of Probate of York county assessing an inheritance tax against Edward C. Luques, one of the residuary legatees under the will of Margaret C. Luques. The agreed statement is as follows:

"Samuel W. Luques, father of appellant, died August 31, 1897. Margaret C. Luques died December 16, 1913. Edward C. Luques and Herbert L. Luques are the only children of Samuel W. Luques. Margaret C. Luques was a second wife of Samuel W. Luques and a sister of his first wife, the mother of Edward C. Luques and Herbert L. Luques. The value of the real estate coming to Edward C. Luques and Herbert L. Luques under the will of Margaret C. Luques which she took under the second clause of the will of Samuel C. Luques is $20,466.00. The value of the personal property coming to Edward C. Luques and Herbelt L. Luques under the will of Margaret C. Luques, which she took under the eleventh clause of the will of Samuel W. Luques, is $2,000."

The questions raised arise under the following sections of the will of Samuel W. Luques who died prior to the passage of the collateral inheritance tax law as in Chapter 186, Public Laws of Maine, 1909:

"Second: I give, devise and bequeath to my wife, Margaret C. Luques, my homestead place where we live with all furniture, fixtures, family library, stable connected therewith, together with its contents, horses and carriages, also house and lands on said Foss street containing tenements Nos. 34 and 36, and also houses and lands on northeast side of Summer street, containing tenements Nos. 13 and 15. Said lands being bounded on the southeast by

Foss street; on the southwest by Summer street; on the northwest by land of Risworth Jordan and by land of Joseph T. Mason, and on the northeast by land of Joseph T. Mason and by Pool street, to have and to hold to said Margaret C. Luques, her heirs and assigns forever, except as hereinafter provided."

"Eleventh: All the rest and residue of my estate, both real and personal, I give, devise and bequeath to my wife Margaret C. Luques and my sons Edward C. Luques and Herbert L. Luques, to have and to hold to them in equal shares, their heirs and assigns forever.

"If during the lifetime of my wife she shall not have disposed of the property above given and devised to her, or at her decease disposed of it by will, then said estate and property not disposed of by her, I give, devise and bequeath to my sons Edward C. Luques and Herbert L. Luques, and in the event of their decease or the decease of either of them, then the share that would have gone to the father from my wife's estate shall go to the heirs of my son or sons by representation."

As has been seen, Margaret C. Luques died after the passage of the collateral inheritance tax law, testate. By her will she made forty-two bequests of money and personal property, and the following residuary provision:—"My will is that all my just debts and funeral expenses shall by my executors hereafter named, be paid as soon after my decease as shall by them be found convenient. All the rest and residue of my estate, real, personal and mixed, of which I shall die seized or possessed, or to which I shall be entitled at my decease, I give, devise and bequeath between my nephews Edward C. Luques and Herbert L. Luques, or their heirs. And lastly I do nominate my said nephews Edward C. Luques and Herbert L. Luques and my sister Pauline C. Lithgow to be the executors of this my last will and testament."

Counsel for appellant contends, 1, that the property on which the inheritance tax was assessed was not the absolute property of Margaret C. Luques; 2, that Edward C. Luques takes his title and interest therein through said Margaret C. Luques by her execution of a power conferred upon her in the will of Samuel W. Luques; 3, that appellant takes title to the same as of and under the will of Samuel W. Luques; and, 4, that the will of Samuel W. Luques

conferred upon the said Margaret C. Luques a power coupled with a trust. The question in controversy as presented by counsel is "whether such property and interest vested in the appellant under the will of his father, Samuel W. Luques, or under the will of his stepmother, Margaret C. Luques. If it vested under the former will, it is not liable to an inheritance tax, but if it vested in him under the will of his stepmother, it is liable to such tax." We think that appellant takes under the latter and not under the former will. It is very apparent that Samuel W. Luques intended by clauses two and eleven of his will that his wife should have the absolute right of disposal of the property comprehended in said clauses, and there is nothing in the will or any part thereof to warrant a contrary inference. Aside from the use of the words "except as hereinafter provided," it is not contended that clause two does not create an ownership in fee, nor is it claimed that clause eleven creates a lesser estate when taken alone. The contention is that the exception made as in clause two, considered in connection with the alleged limitations and directions in clause eleven, does have that effect, and that as a necessary consequence "all her powers and interest in the estate were limited to the term of her life."

Samuel W. Luques in direct and simple language has furnished a meaning for the words "except as hereinafter provided" by which we must be controlled. He says in conclusion: "If during the lifetime of my wife she shall not have disposed of the property *above given and devised to her,* or at her decease disposed of it by will, then said estate and property not disposed of by her I give, devise and bequeath to my sons," etc. It clearly appears that his intention was that the widow should have full power of disposal of all the property devised to her in the will, and there was no intention to limit her use or disposal thereof. It is equally apparent that if she had disposed of the property either by sale or by will, it was just what he intended and knew she had the right to do. While such words as here used may be open to speculation and question as to the actual state of mind of the testator in a given case, the settled law is the best guide for the protection of the property rights of all interested, and the primary controlling rule in the exposition of wills is that the intention of the testator as expressed in his will shall prevail, provided it be consistent with the

rules of law. Such intention is to be gathered from the whole will taken together, every word receiving its natural and common meaning. *Shaw* v. *Hussey,* 41 Maine, 495; *Bryant* v. *Plummer,* 111 Maine, 511; *Crosby* v. *Conforth,* 112 Maine, 109. In *Ramsdell* v. *Ramsdell,* 21 Maine, 288, the testator in his will provided, "First, I give and bequeath to my beloved wife, S. C., the use during her life of all my plate and household goods, also all my personal property and real estate, except as is hereafter excepted." Then made pecuniary bequests to seven different persons to be paid by his executrix, and a further bequest to be paid by her if she thought proper, with a residuary clause in favor of his brothers and sisters and her brothers and sisters, and appointed his wife executrix. It was held, that by the will the widow had the absolute right to dispose of the entire property, for her own use and benefit, subject only to the payment of the debts. It was also held as the settled rule of law, that if a devisee or legatee have the absolute right to dispose of the property at pleasure, the devise over is inoperative.

In *Mitchell* v. *Morse,* 77 Maine, 423, a devise was in these words: "I give and devise to my wife, Sarah F. Mitchell, all the rest and residue of my real estate. But, on her decease, the remainder thereof, I give and devise to my said children, or their heirs respectively, to be divided in equal shares between them." It was held that the widow took an estate in fee simple, and that the devise over of the remainder was void. See *Wallace* v. *Hawes,* 79 Maine, 177; *Bradley* v. *Warren,* 104 Maine, 423; *Young* v. *Hillier,* 103 Maine, 17. So too in *Shaw* v. *Hussey,* supra, it is held that a devise of land generally or indefinitely, with a power of disposing of it, amounts to a devise in fee. And such a devise, without words of inheritance, is treated as equivalent to a devise with words of inheritance. See *Gifford* v. *Choate,* 100 Mass., 343; Gardner on Wills, 466; 4 Kent's Com., 535; *Jones* v. *Bacon,* 68 Maine, 34.

The concluding words which appellant holds to be in effect a limitation upon the fee, and in fact the creation of a power of appointment coupled with a trust, cannot be so considered by the court. As before stated, the language used cannot be construed to imply any such meaning on the part of the testator, but does authorize the implication of a deliberate intention that the property should be at the free disposal of his wife during her life, by sale, or by her will,

and that the same should become a part of "his wife's estate." The words used are not inconsistent with the clauses in question, which create an absolute estate, and not an estate for life. The property in question therefore did not vest in appellant in and as of the will of Samuel W. Luques, or at the moment of the death of his father. The right of the widow to dispose of the entire estate stood between the plaintiff and his asserted right.

An inheriatnce tax being a tax on the privilege or right of inheriting, could not be levied or collected as against the appellant until such right existed in fact, a condition only to be made certain in this case by the death of the widow. *Magoun* v. *Illinois Trust & S. Bank,* 170 U. S., 283; *Knowlton* v. *Moore,* 178 U. S., 41-115; 27 Am. & Eng. Ency. of Law, 338; *Cahan* v. *Brewster,* 203 U. S., 543-551.

In view of our conclusion, consideration of the question as to the legality of such tax in the presence of an actual power of appointment coupled with a trust, is unnecessary; but inasmuch as the question has been raised, it may be useful to direct attention to the recent case of *Chanler* v. *Kelsey,* Comptroller of the State of New York, 205 U. S., 466, where the question was raised. The necessary facts therefrom may be stated substantially as follows: Laura Astor Delano was the daughter of William B. Astor. Upon the occasion of her marriage in 1844 to Frank H. Delano, Mr. Astor executed a deed in the nature of a marriage settlement, conveying certain real and personal property to trustees in trust to pay the income to said Laura Delano for life, with remainder to her issue in fee, or in default of issue to her heirs in fee; and giving her power in her discretion to appoint the remainder "amongst her said issue or heirs, in such manner and proportions as she may appoint by instrument in its nature testamentary, to be acknowledged by her as a deed and in the presence of two witnesses, or published by her as a will." Three later deeds were executed substantially similar in terms. These deeds were absolutely irrevocable, took effect upon delivery, and were not made in contemplation of the death of the grantor. Laura Delano died in 1902. By her last will, admitted to probate in the county of New York, she exercised the power of appointment conferred in the deeds above named. One of the appointees to whom Mrs. Delano had appointed the property conveyed by two of the later deeds referred to, took an appeal from

the order of the Surrogate's Court refusing to dismiss the petition to the Appellate Division of the Supreme Court, where it was held that the act under which the transfer or inheriatance tax in question was imposed, as applied to the case, was unconstitutional. The state comptroller appealed to the Court of Appeals from the decision of the Appellate Division. That court sustained the right to impose the transfer tax upon the interests appointed by Mrs. Delano, and the case was finally determined as above. The argument in that case was that the estate which arose by the exercise of the power came from the original grantor, William B. Astor, and not from Mrs. Delano, and was vested long before the passage of the amendment under authority of which the tax was imposed, and to tax the exercise of the power therefore takes property without due process of law. The court say: "As in the case of *Orr* v. *Gilman,* 183 U. S., 278, we must accept the decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed." The language adopted from the decision of the Court of Appeals is here quoted, "As the tax is imposed upon the exercise of the power, it is unimportant how the power was created. The existence of the power is the important fact, for what may be done under it is not affected by its origin. If created by deed its efficiency is the same as if it had been created by will. No more and no less could be done by virtue of it in the one case than in the other."

A "power of appointment" is defined as a power of disposition given a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument. Words and Phrases, 5480, 55 Atl., 707. In the case at bar the property vested in Margaret C. Luques, and when her will was made there was nothing left on which a trust could operate. She had disposed of all the property, and hence no power of appointment could have been executed. *Fitzsimmons* v. *Harmon,* 108 Maine, 456. The will speaks from the death of the testator, and in clearest terms expresses his intent and his clearly stated purpose that if the widow had disposed of the property by sale or by will, his wishes were satisfied and at an end.

Decree affirmed.
Case remanded to Probate Court for further proceedings.

GEORGE W. MCLELLAN, et als. *vs.* JOHN E. MCFADDEN, et als.

Washington. Opinion December 14, 1915.

Abandonment. Boundaries. Mortgage. Municipal Permit. Prescription. Title. Weir.

1. A legislative grant in 1870 of the right to construct and maintain fish weirs in tide waters at a certain place was not abrogated by Chapter 78 of the Laws of 1876 which required persons intending to build a fish weir to apply to the municipal officers for a license, and authorized the municipal officers to grant the same.
2. One holding a legislative grant of the right to construct and maintain a fish weir at a certain place is not required to obtain municipal license therefor under section 96, Chapter 4 of the Revised Statutes.
3. When land on or by tide water conveyed by deed is described as bounded "on the east by the shore," and nothing else indicative of intention appears in the deed, the shore itself is the monument, and the land between high and low water mark does not pass by the grant.
4. A fish weir in tide waters did not pass as appurtenant to a farm in front of which it stood, when by the description in the deed of conveyance the land granted was bounded on the seaward side by the inner line of the shore.
5. The burden is on him who sets up the abandonment of a legal right or privilege and he must prove it by clear evidence of unequivocal acts.
6. A prescriptive right to the enjoyment of a fish weir in tide waters, constructed under a special legislative grant, may be acquired against the grantee by open, notorious, uninterrupted, exclusive and adverse use for a period of twenty years by the occupier and those under whom he claims.

On report. Judgment for defendants.

This is an action on the case to recover damages of defendant for constructing and maintaining a fish weir on a weir privilege claimed by plaintiffs, in the tide water of Herring Cove in the town of Trescott, Washington county. Plea, the general issue with brief statement.

The case is stated in the opinion.

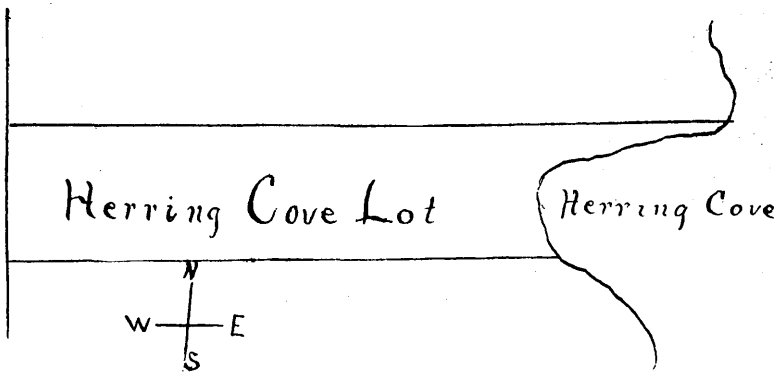
H. E. Saunders, and H. H. Gray, for plaintiffs.

C. B. & E. C. Donworth, for defendants.

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

SAVAGE, C. J. This case is concerned with the ownership of a fish weir and fishing privileges in Herring Cove in the town of Trescott. The case comes up on report. The plaintiffs claim to own them as heirs of George W. McLellan, deceased. The defendants claim to own them by grant from George W. McLellan's mortgagee; also, by a prescriptive title. The suit is brought to recover damages for an interference with, and a disturbance of, the plaintiffs' rights.

Herring Cove lies in front, and to the eastward, of Herring Cove lot, so called. The following sketch shows the situation.



The lot formerly belonged to the William Bingham estate. It was conveyed in 1863 to Elizabeth McFadden. In the description it was bounded on the east, or seaward, side, "by the shore." In 1864, Mrs. McFadden conveyed it by the same description to George W. McLellan and two others. In 1865 and 1866 these others conveyed their interests to George W. McLellan, each using the same description, but adding, "this deed is intended to convey all my right, title to and in the boats, seines and all connected in carrying on the herring fishing at the Cove, sold to the said George W. McLellan."

In 1870, George W. McLellan was granted by the Legislature the right "to construct and maintain wharves and fish weirs in front of his land in the tide waters of Herring Cove, in the town of Trescott, within the limits of an extension of the side lines of his land, east-

erly, one hundred rods from low water mark, in the waters of said cove; provided that no obstruction shall be made to the usual navigation of the waters of said cove, and that suitable signals shall be erected on said weirs, to be not less than ten feet above the tide at high water." Private and Special Laws, 1870, Chap. 326. The general law at that time provided that "no weir . . . shall extend into more than two feet depth of water, at ordinary low water." Laws of 1869, Ch. 70, Sect. 13.

In 1878, George W. McLellan mortgaged the Herring Cove lot to his brother, Wilson. The description in the mortgage bounded the lot "on the east by the shore," and called it the "Herring Cove Farm." No mention was made of weirs or fishing privileges. George W. McLellan died in 1889, and the mortgage was foreclosed later by Wilson McLellan, the foreclosure becoming absolute in March, 1894.

In June, 1896, Wilson McLellan conveyed to John E. McFadden and another an undivided quarter interest in the "Herring Cove Farm" lot, bounding it "on the east by the shore;" "also one undivided quarter of weir being on the shore of said farm." Subsequently by mesne conveyances all the title to Herring Cove Farm came to the defendants. In all these conveyances the lot was bounded "on the east by the shore," and in all, undivided interests in the fish weir were conveyed.

As early as 1866, George W. McLellan operated a weir in Herring Cove. And after he received the legislative grant in 1870, he continued to maintain and operate a weir there until the time of his death in 1889, but somewhat intermittently from 1881 to 1887. In 1887, the weir was rebuilt. In the latter part of his life McLellan removed to Massachusetts, but came back summers to operate the weir. And he died while at the weir. After the death of George W. McLellan, and until Wilson McLellan sold the property in 1896, the latter leased the weir from year to year to Stewart McFadden and his brothers. Since 1896, the defendants, and those under whom they claim, have operated the weir annually. The weir has been rebuilt by them more or less each year, some years most of it going out by stress of the elements. The present weir is located in the same place as the original McLellan weir was but inside its lines. The operators of the weir have piled their weir material on the beach, have used the shore as a landing place with boats and brush

racks, and for the general purposes incidental to the operation of the weir. They have gathered drift wood on the beach for smoking purposes, and in some instances have permitted other persons to take away sea weed. Such possession as they had was not interrupted. This is the substance of the evidence relating to use, possession and control of the weir and the shore.

The plaintiffs claim an exclusive right to the fishing privilege under the legislative grant to their father and his heirs in 1870. The defendants answer in denial of plaintiffs' right, 1, that this grant was abrogated by Laws of 1876, Chapter 78, so that the right did not descend to the plaintiffs; 2, that the plaintiffs have not been granted municipal license under the general law, R. S., Ch. 4, Sect. 96, to build and maintain the weir; 3, that the plaintiffs have abandoned all rights and privileges under the grant; and in support of their own right, 4, that they have title under the mortgage of George W. McLellan to Wilson McLellan to the farm and shore, and that the legislative grant, if not abrogated, passed under the mortgage as appurtenant to the shore, the thing granted; and if they have no title by grant, 5, that they have acquired a prescriptive right by open, notorious, continuous, exclusive and adverse use, occupation and control of the shore and weir, for a period of more than twenty years. The plaintiffs in reply say that, claiming under a special legislative grant, they are not required to obtain a municipal permit; they deny abandonment and the defendant's prescriptive title; they say that the mortgage under which defendants claim conveyed only to the shore, and not the shore itself, that the weir was not appurtenant to the upland granted, and that if the shore was granted the weir was not, from its nature, appurtenant to the shore.

We will first inquire as to the plaintiffs' rights under the legislative grant. No question is made, or can be made, but that George W. McLellan, and, unless the grant was abrogated, his heirs or assigns after him, obtained a right to build and maintain a fish weir in Herring Cove. We think the grant was not abrogated or annulled by the general law of 1876, chapter 78, which required persons intending to build a fish weir to apply to the municipal officers for a license, and authorizing the municipal officers to grant the same. This question is res adjudicata in this State. In *State* v. *Cleland,* 68 Maine, 258, the court held that the general law did not defeat a

special legislative license, like the one in this case, although the licensee had not built his weir when the general statute was passed; and that the licensee was not required to obtain a municipal license. The Cleland case, though the opinion was by a divided court, has stood unquestioned for nearly forty years, and must be regarded as a correct exposition of the law. The facts in this case are even stronger for the plaintiff than those in the Cleland case. For here, the licensee had built his weir several years before the general law was passed. And the general law in terms applied only to future erections. It follows, then, that George W. McLellan, when he mortgaged the lot in 1878, owned the weir, and had the right of fishery in the cove, and that his right in the weir and fishery descended to and is held by his heirs, unless defeated by the mortgage, or in some other way.

The next question is, Did his mortgage include the fishing rights? And connected with that is the question, Did it include the shore? The word "shore," in conveyances of land by tidal waters, is construed to mean the land between high water mark and low water mark. *Montgomery* v. *Reed,* 69 Maine, 510. By the Colonial Ordinance of 1641-7 it was declared that "in all creeks, coves and other places, about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low water mark, when the sea doth not ebb above one hundred rods, and not more wheresoever it ebbs further." By force of this ordinance it is held that the owner of upland adjoining tide water prima facie owns to low water mark, not exceeding one hundred rods; and does so, in fact, unless the presumption is rebutted by proof to the contrary. *Proctor* v. *Railroad Co.,* 96 Maine, 458. A grantor may separate the flats from the upland. But unless the flats are excluded by the terms of the grant, properly construed, they pass by a grant of the upland. *Whitmore* v. *Brown,* 100 Maine, 410.

So we must look to the terms of the grant. In construing the grant we are to give effect, if possible, to the intention of the parties, so far as it can be ascertained in accordance with legal canons of interpretation. We are to give effect to the expressed, rather than the surmised, intent. We are to consider all the words of the grant in the light of the circumstances and conditions attending the transaction. But we must consider and construe the grant accord-

ing to settled rules of construction. They are rules of property. And the security of real estate titles depends upon a strict adherence to these rules of construction.

In the mortgage of 1878, the land was bounded and limited by specified monuments. It was bounded on the north by land of Charles Balch, on the south by land of one Wellington, and on the west by land of one Chalorner. These were the limits. On the east, (the side towards Herring Cove) it was bounded "by the shore." The shore itself was made the boundary, and the shore is the whole area of land between high water mark and low water mark. "By the shore," in such case, is ordinarily a phrase of exclusion. The shore is the monument limiting the grant. It is not a part of the grant. It is as much outside the terms of the grant as are the lands of owners on the other three sides.

But what was intended by the use of the word shore may be gathered not only from the word itself, but from other expressions in the deed, read in the light of existing conditions. For instance, in *Doane* v. *Willcutt,* 5 Gray 328, the land was bounded on one side "by the sea or beach," and the word "sea" was held to afford sufficient indication that the intention was to convey to the sea, or seaward side of the beach. Perhaps the greater number of controversies have arisen where, instead of making the shore itself the boundary, ex vi termini, the boundary line has been made to begin at a fixed point, and thence to run by courses or monuments,—and thence "by the shore." In such cases, the courts have been asked to determine which side of the shore the line was intended to follow. Such a case was *Dunton* v. *Parker,* 97 Maine, 461, in which the court said,—"It does not follow from the mere fact that the shore of land is made a boundary, or that boundary is 'by the shore,' that it is by high water mark. The space between high and low water mark, properly called the shore, is frequently of many rods in width, it has an outer or seaward side, and an inner or upland side, and, nothing else appearing, a boundary by the shore may be as well intended to mean the one as the other. To determine which side of the shore was intended as the boundary it is necessary to go further." In *Doane* v. *Willcutt,* supra, the court said:—"In a conveyance, when a *line of 'shore'* is used as an abuttal, unexplained by circumstances, it may be ambiguous, leaving it doubtful whether the sea

side or the land side of the shore is intended. In general it will appear by the context which." So, in *Dunton* v. *Parker,* this court resolved the ambiguity by reference to the context. The other calls in the deed, and the termini of the call in question made it quite certain that the line was intended to run by the seaward side of the shore, or by low water mark. So in *Snow* v. *Mt. Desert Island R. E. Co.,* 84 Maine, 14, the description began "at the sea," continued by several calls "to the shore," thence "to the first bounds mentioned," which was *at the sea,* and the court held that the line followed the seaward side rather than the land side of the shore. See *Dillingham* v. *Roberts,* 75 Maine, 469. In the mortgage deed before us the context affords no light whatever. The boundary is simply "by the shore."

Sometimes the views of courts based upon a consideration of all parts of a deed have been strengthened by the consideration that no motive or reason appeared for a separation. In *Snow* v. *Mt. Desert Island R. E. Co.,* supra, the court said:—"Nothing appears showing the beach at that date to be of any value apart from the upland, of any value to reserve in granting the upland, either by reason of wharves or weirs thereon, or by any other reason of any other opportunity for separate occupation or quasi-cultivation." But it is evident that these reasons do not hold in this case. The shore as a means to the convenient and successful operation of the weir privilege was of value, separated from the farm. If, as the defendants claim, the fishing privilege was appurtenant to the shore, a mortgage of the shore would have carried the privilege. The owner might well have wished to separate the two, and retain his valuable fishing privilege, unencumbered by mortgage.

We have been cited to no case, and we know of none, that holds that, where the shore itself is made the monument, as where the land granted is bounded "by the shore," and nothing else appears, the inner side of the shore or high water mark is not the boundary line; or that the shore itself is not excluded. In the case of *Niles* v. *Patch,* 13 Gray 254, the call was "bounded westerly by the beach." Chief Justice Shaw who had written the opinion in *Doane* v. *Willcutt,* supra, speaking for the court, said:—"We would not say that there might not be such terms in the deed, as, connected with the term 'beach' would indicate an intention to include the beach; and such intent, if any, manifest in the deed, would govern its con-

struction and convey the beach. But in this deed there is no such qualification, and therefore the court are of opinion that the defendant did not acquire by it a title in fee to the beach." The foregoing reasoning applies also to the deed of the Bingham estate to Elizabeth McFadden, George W. McLellan's grantor. The description in that deed was the same as in the later mortgage to Wilson McLellan, and by the same reasoning excluded the shore. So that, when he mortgaged, George W. McLellan did not own the shore.

We therefore conclude in this case that the mortgage of 1878 to Wilson McLellan did not include the shore. The shore being excluded by the descriptive terms in the mortgage, it did not pass even as appurtenant to the land granted. *Warren* v. *Blake,* 54 Maine, 276; *Whitmore* v. *Brown,* 100 Maine, 410. To say nothing of the fact that the fishing privilege was separated from the farm granted by the shore, which is nearly five hundred feet wide at the head of the cove, there is no such connection in use between the fishing privilege and the farm as would make the former appurtenant to the latter. The fishery was not in any way necessary to the enjoyment of the farm. *Leonard* v. *White,* 7 Mass., 6. It follows that the weir and the fishery right under the legislative grant descended to plaintiffs as heirs of their father, unencumbered by the mortgage. Have they been lost since, either by abandonment or by prescription?

The plaintiffs live in Massachusetts. And prior to 1913, they had not been in Trescott for 38 years, except in 1889, when one came to get the body of their father. After their father's death, they neither operated, nor attempted to operate the weir. One of them testifies that in 1894 he had an intention to operate it that year, but was prevented by circumstances. Another witness, his son, testifies that he made arrangements in 1908 to come down and fish the weir, under his father and the other heirs, but was prevented, likewise, by circumstances. There is no other evidence of an intention to operate. It appears that they did not know even the terms of the grant.

But the burden is on him who sets up abandonment to prove it. And the proof must be clear and unequivocal of acts decisive and conclusive. *Adams* v. *Hodgkins,* 109 Maine, 361. Abandonment is a voluntary, intentional act. There is no abandonment unless so intended. But the intention may be inferred from circumstances. It

may be inferred by lapse of time or non-use, accompanied by other circumstances. 1 Ruling Case Law 5. And among the circumstances is the fact that the right in question is being adversely used by others. *Great Falls Co.* v. *Worster,* 15 N. H., 412. But mere lapse of time, or mere non-use is not sufficient evidence of abandonment. *Adams* v. *Hodgkins,* supra; *Smith* v. *Booth Bros. & H. I. Granite Co.,* 112 Maine, 297. Although in this case the lapse of time and non-use for so long a time, 24 years, considered in connection with their apparent ignorance of the terms of the grant and the continued adverse use of the privilege for all the time by others, afford considerable evidence of an intention to abandon, we prefer to put our decision upon another ground.

Wilson McLellan took possession and control of this weir and privilege in July, 1889, though his mortgage, as we have seen, did not cover them. From that time until he sold the farm and the weir to the defendants and those under whom they claim, in 1896 and 1897, he operated the weir by lessees. Since then it has been operated each year by them or their grantors. We think there can be no question but that the occupation has been adverse, and under a claim of title. Neither Wilson McLellan while he occupied, nor any grantee since, has interrupted the continuance of the adverse character of the occupation by any admission of the plaintiff's title. It is true that some of the defendants in 1893 made overtures to the plaintiffs with a view to purchase the weir and privilege. But at that time they were mere lessees of the weir under Wilson McLellan. Other than that they had no possessory title or right. And their acts at that time could not affect Wilson McLellan's possessory rights, nor prevent them from afterward occupying adversely in continuance of those rights. So that there has been an uninterrupted adverse use and occupation for more than twenty years. *Cole* v. *Bradbury,* 86 Maine, 380. The occupation has been open, exclusive and continuous. Though the weir was not operated at all seasons of the year, it was operated every year at the proper season, and that constituted continuity, within the meaning of the word, as an element in prescriptive titles.

In conclusion we say that all the elements of prescriptive right appear in the defendants. The plaintiffs have lost their right. And the certificate must be,

Judgment for defendants.

NELLIE D. CLARK *vs.* ANDREW J. GILMAN, et al.

Somerset. Opinion December 14, 1915.

Floatable Stream. Flowage. Mill dam. Riparian Owner. Trespass quare clausum.

The case comes up, on a report of all the evidence. It is an action of trespass to real estate. The defendants are the owners of mills and a mill dam across Ferguson Stream in Cambridge, Maine. The plaintiff owns a small lot above the dam, partly covered by the flowage, and bounded on its easterly side "by the channel of the stream." She caused a wharfing or abutment to be made upon her lot extending out to the easterly and southerly lines thereof, and in height about two feet above the top of the dam. The abutment was rough and uneven, especially on its easterly side next to the channel, and the evidence shows that since it was built logs running against it in floating down the channel have caught on its uneven sides and been held there by the force of the current until poled off or otherwise removed by the log driver. May 5, 1914, the defendants went upon this abutment for a few moments only and removed with pick poles some of their logs that were caught against it. That is the alleged trespass. It is admitted that the damage was nominal only.

Held:

1. The riparian owner's use and enjoyment of his property adjacent to a floatable stream is, in a sense, subject to the use of such stream by the public for the floating of logs, if reasonably exercised. He is bound in the use of his property not to obstruct the reasonable use of the stream for such purpose. The log driver also in using such stream for the passage of his logs is required to exercise reasonable care to prevent doing damage to the property of the riparian owner.
2. Where logs in their passage down a floatable stream, without the fault of the driver, are caught on the edge of the riparian owner's property, and the driver casually and from incidental necessity enters upon such property and releases the logs, doing no appreciable damage, trespass quare clausum will not lie.
3. Assuming, as we do, that the provision in the plaintiff's deed, that her lot was conveyed subject to be flowed, did not prevent her from using her lot in any manner that would not unreasonably obstruct the use of the stream as a public highway for the floating of logs thereon, we think the evidence plainly shows that the abutment which the plaintiff built on her lot was an obstruction to the passage of logs down the channel of the

stream. It materially interfered with the defendants' right to a reasonable use of the stream for floating logs to their mill. It was the existence of that structure placed there by the plaintiff that caused the logs to be stopped in their otherwise natural passage down the channel, and created the incidental necessity for the defendants to do the acts complained of. For that reason also we think this action of trespass does not lie in the plaintiff's favor, especially where no appreciable damage has resulted to her.

On report. Judgment for defendants.

An action of trespass quare clausum to recover damages of the defendant for going upon the dam or abutment and removing some of their logs that were caught against it. The defendants pled the general issue and filed a brief statement alleging that they were the owners, on their own land, of water mills and a dam to raise water for working said mills below the land of plaintiff described in her writ.

The case is stated in the opinion.

Hudson & Hudson, for plaintiff.

L. L. Walton, for defendants.

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

KING, J. This case comes up on report of all the evidence. It is an action of trespass to real estate. The defendants are the owners of mills and a mill dam across Ferguson stream in the town of Cambridge, Maine. The mill dam, or one on the same site, has existed for many years. The water raised by the dam forms a considerable flowage extending up stream in a southwesterly direction about three-quarters of a mile above the dam. Just above the dam the highway road crosses the stream and flowage on a bridge with two abutments, between which logs from above pass down to the mill. Above and near the bridge and highway the flowage spreads out somewhat to the west and then turns more sharply southerly, forming a small cove. There appears to be a margin of land between the highway, leading from the west end of the bridge, and the edge of the flowage along by the cove, that margin being quite narrow at the end of the bridge. The stream is a floatable one, capable of being used for the floating of logs, and has been so used for many years. Logs have been driven down the stream into the flowage

and thence down the flowage to the mill. And logs to a considerable extent have been landed on the flowage above the bridge. The defendant Gilman testified that since he became an owner in the mill, in 1902, logs had been landed above the bridge every year.

August 5, 1872, Nathan Clark who then owned the mills, dam, water rights, and the land flowed, at least so far as the plaintiff's land is involved, conveyed to one Alva Mitchell a certain lot of land described as follows: "It being a part of the Mill Lot, so called, in said town of Cambridge, commencing at a stake on the shore of the pond near the corner of Cole's shop and running northerly to the road line in the direction of the second post in the Bridge at the west end; thence easterly on the line of said road to the channel of the Stream; thence up the channel of the Stream fifty feet; thence westerly to the first mentioned bound subject to be flowed." It is to be observed that this lot is next westerly of the channel of the stream and in the corner formed by the channel and the highway or bridge, and extends up the channel into the flowage fifty feet. The title to this lot passed, through mesne conveyances, to the plaintiff by a deed dated December 19, 1900, with the same provision, "subject to be flowed." There was a building on the front of the lot next to the road and apparently towards the westerly side, but the water flowed in under the building.

After the plaintiff purchased the lot she caused a wharfing or abutment to be made upon the easterly and southerly sides of the lot, and apparently including the whole lot, to the height of about two feet above the top of the dam. It was built of drift logs, weighted with rocks and then covered with earth. On the easterly and southerly sides a cedar hedge was planted.

The photographs introduced show this structure to be very rough and uneven, especially on its easterly side next to the channel and at its southeast corner, with the ends of the logs of which it is built projecting irregularly, and with considerable openings between them. Its location adjacent to the channel of the stream, and its rough and irregular construction, seem to render it fit and likely to obstruct the passage of logs down the channel to the opening in the bridge; and the evidence clearly shows that since it was built logs running against it in floating down the channel have caught on its uneven sides and been held there by the force of the current until poled off or otherwise removed by the log driver.

On the 5th of May, 1914, the defendants went upon the abutment for a few moments only, and removed with pick poles some of their logs that were caught against it. That is the alleged trespass. It is admitted that the damage was only nominal.

The stream, as we have seen, is floatable, and as such may lawfully be used as a public highway upon which to float logs. The riparian owner, too, has the right to the use and enjoyment of his property. But the rights of the public to use a floatable stream and those of the riparian owner to use his land are both to be enjoyed with a proper regard for the existence and preservation of the other. The riparian owner's use and enjoyment of his property adjacent to a floatable stream is in a sense subject to the use of such stream by the public for the floating of logs, if reasonably exercised. He is bound in the use of his property not to obstruct the reasonable use of the stream for such purpose. The log driver also in using such a stream for the passage of his logs is required to exercise reasonable care to prevent doing damage to the property of the riparian owner. If these respective rights are so exercised then no substantial prejudice or inconvenience will result.

Applying these well settled principles to the facts and circumstances disclosed in the case at bar, we think the action is not maintainable.

The evidence amply shows that there was no want of reasonable care on the part of the defendants in their use of this stream in floating their logs down to their mill. It was not their fault that some of their logs were pushed by the current against this abutment and held there by its rough and uneven construction. That was the natural result arising from the character of the structure and its location adjacent to the channel of the stream. It could not be avoided without the use of some artificial means to keep the logs from going against the abutment in their passage by it. Were the defendants required to use such means? We think not under the facts and circumstances disclosed. The logs being driven were comparatively few. The defendants had the right to use the whole stream in floating them down, exercising reasonable care in so doing not to unnecessarily injure the plaintiff's property as a riparian owner. And it does not appear that such logs as were caught on the abutment did any injury to it. In this respect the case is not unlike

one where logs floating down a public stream catch upon the shore doing no injury to the riparian owner. In such case the log-driver cannot be held to an unreasonable use of the stream because he has not used means to prevent the logs touching the shores.

Here then is a case, in the most favorable view for the plaintiff, where a log in its passage down a floatable stream, without fault of the driver, is caught on the edge of the riparian owner's property, and the driver casually and from incidental necessity enters upon such property and releases the log, doing no appreciable damage. For such an act does trespass quare clausam lie? We think not. In *Hooper* v. *Hobson,* 57 Maine, 273, 276, this court, speaking by Barrows, J., said: "It is not, however, to be inferred that every casual landing upon the bank by those employed in driving a floatable stream, would be the ground of an action by the proprietor of the land." And it is there suggested that the privilege of going upon adjoining lands to remove timber lodged thereon, after the tender of compensation for damages, which is conferred by c. 43, sec. 8, R. S., would seem to imply that where no actual damage is caused in so doing, no action would lie. The right to use a floatable stream as a public highway for the transportation of logs and lumber is governed by the same principles as the right to use a public highway on land. Mr. Justice Holmes, in his work on the Common Law, at page 118, says: "That if a man be driving cattle through a town, and one of them goes into another man's house, and he follows him, trespass does not lie for this." Such casual entry upon land adjoining a public highway is considered an inevitable incident to the right to use the highway,

But we feel entirely clear in the opinion that this action does not lie for another reason. Assuming, as we do, that the provision in the paintiff's deed that her lot was conveyed subject to be flowed, did not prevent her from using her lot in any manner that would not unreasonably obstruct the use of the stream as a public highway for the floating of logs thereon, we think the evidence plainly shows that the abutment which the plaintiff built on her lot is so located and constructed that it is an obstruction to the passage of logs down the channel of the stream. It materially interfered with the defendants' right to a reasonable use of the stream for the floating of their logs to their mill. It was the existence of that structure placed there

by the plaintiff that caused the logs to be stopped in their otherwise natural passage down the channel, and created the incidental necessity for the defendants to do the acts complained of. For that reason also we think this action of trespass does not lie in the plaintiff's favor, especially where no appreciable damage has resulted to her.

Judgment for defendants.

EMELIA VEITKUNAS *vs.* J. M. MORRISON, et als.

Androscoggin. Opinion December 14, 1915.

Contract to labor and to give one week's notice of intention to quit. Forfeiture. Private and Special Laws of 1871, Chapter 636, Section 10. Revised Statutes, Chapter 40, Section 51. The test of repeal by implication.

1. In the construction of statutes, it is the obvious intent, rather than the literal import, which is to govern.
2. The test of repeal by implication of an earlier statute by a later one is whether the latter is so directly and positively inconsistent with, and repugnant to, the former that the two cannot consistently stand together.
3. The provisions of chapter 39, Laws of 1911, relating to weekly payment of wages, did not repeal or abrogate the provisions of section 51, chapter 40 of the Revised Statutes, whereby an employee, having contracted to give one week's notice of intentions to leave, and leaving without notice, forfeited one week's wages.
4. The provision in chapter 39, Laws of 1911, requiring that an employee leaving his employment shall be paid his wages in full on the following regular pay day relates to wages to which he is entitled, and not to those which he has forfeited.

On certificate from the Lewiston municipal court to the Chief Justice on agreed statement of facts. Judgment for defendants.

This is an action by the plaintiff, an employee of the defendant, to recover pay for one week's labor, having left without giving one week's notice of her intention to leave, under the provisions of Revised Statutes, Chapter 40, Section 51. The case was entered in the Lewiston municipal court and certified to the Chief Justice under

the provisions of Private and Special Laws of 1871, Chapter 636, Section 10.

The case is stated in the opinion.

J. O. Ross, for plaintiff.

Harry Manser, for defendants.

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

SAVAGE, C. J. This case is certified from the Lewiston municipal court under the provisions of Private and Special Laws of 1871, Chapter 636, Section 10.

The plaintiff was an employee of the defendants in a manufacturing business, and had contracted with them to give one week's notice of her intention to quit her employment under a penalty of forfeiture of one week's wages. She quit without giving notice, and without reasonable cause, and now brings this suit to recover her wages earned during her last week of service.

The defendants claim that the wages were forfeited by failure to give notice as required by the contract. The contract was entered into under the following provision of Revised Statutes, Chapter 40, Section 51; "Any person, firm or corporation engaged in any manufacturing or mechanical business may contract with adult or minor employees to give one week's notice of intention, on such employee's part, to quit such employment, under penalty of forfeiture of one week's wages."

The plaintiff contends that the foregoing provision of statute was impliedly repealed, and the contract made nugatory, by Chapter 39, Laws of 1911, which was in force when the wages sued for were earned. That statute provides that every manufacturing corporation, or person or partnership engaged in any manufacturing business, "shall pay weekly each employee engaged in his or its business the wages earned by him to within eight days of the date of said payment, but any employee leaving his or her employment shall be paid in full on the following regular pay day." The plaintiff's argument is that the last clause of the statute, requiring payment in full on the next pay day to employees leaving the employment, is inconsistent with the provision for forfeiture in the prior statute, and so repug-

nant to it as to show a legislative intent to repeal the forfeiture provision, impliedly, though not expressly. We do not think so.

"The test of repeal by implication," said the court in *Starbird* v. *Brown,* 84 Maine, 238, "is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old law be each efficacious in its own sphere?" Whether one statute is repugnant to another depends, of course, upon the proper construction to be given to it. And in the construction of statutes, it is the obvious intent, rather than the literal import, which is to govern. *Seiders* v. *Creamer, 22* Maine, 558; In re Penobscot Lumbering Asso., 93 Maine, 391. The letter may be departed from in order to reach the spirit and intent of the act. *Holmes* v. *Paris,* 75 Maine, 559. And in some cases, so it is held, the court may construe a statute even in direct contravention of its terms.

In the light of these rules of construction, we think that Chapter 39 of the Laws of 1911 is not necessarily inconsistent with, and repugnant to, the forfeiture clause in Chapter 40, Section 51, of the Revised Statutes. It is obvious that the apparent purposes of the two statutes are unlike. They do not touch each other. Though both relate to wages, they relate to entirely distinctive features of the wage question. The earlier statute, which includes also a provision requiring an employer, having a forfeiture contract with his employee, to pay him an extra week's wages, if he discharges him without notice, is evidently intended to prevent the injurious consequences which might result to the one or the other, if the employer discharged the servant, or the servant left the employer, without notice. It has nothing to do with the time of the payment of wages. On the other hand the Act of 1911 relates solely to the time of payment. It entitles every employee to payment weekly, and to payment of all wages earned up to within eight days of the time of payment. But the statute further provides that if the servant leaves he need not wait for his pay for the last eight days' work until the next pay day, or until eight days have elapsed, but that he is entitled to his pay in full on leaving. That is the significance of the clause in question. It assumes that the employee leaves rightfully. He is entitled at once on leaving to payment in full of the wages that are

due him, but not, we think, to wages he has forfeited. If he has not contracted to give notice of leaving, or if he has so contracted and has given notice, he is entitled to all his unpaid wages at once. If he has so contracted but has failed to give notice of leaving, and has left without cause, nothing is due him. And in such case the Act of 1911 does not apply. Thus construed, the later statute is not repugnant to the former.

The further provision in the Act of 1911 that "no corporation, contractor, person or partnership shall by a special contract with an employee or by any other means exempt himself or itself from the provisions of this act," relates only to the weekly payment of wages to which the employee is entitled. , It follows that this action is not maintainable.

Judgment for the defendants.

HORACE E. EATON, Petitioner, *vs.* JAMES E. MANTER.

Cumberland. Opinion December 14, 1915.

Alternative Writ. Corporation. Demurrer. Inspection of Books. Mandamus. Records. Stockholders.

1. The character of this writ and the discretion to be exercised by the court in issuing it seem not to have been taken away nor abridged by the statute herein considered.
2. A state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful, that the court might feel compelled to exercise its discretion in the interests of law and justice and decline to issue the writ.

On exceptions by defendant. Exceptions sustained. Motion for peremptory writ to issue denied.

Petition for mandamus by a stockholder in Maine Corporation to compel defendant, the clerk of said corporation, to allow him to inspect books and records, etc. To the defendant's answer to the alternative writ, the petitioner demurred. The presiding Justice sus-

tained the demurrer and ordered the peremptory writ of mandamus to issue. To this ruling, the defendant excepted.

The case is stated in the opinion.

Charles E. Gurney, for petitioner.

Verrill, Hale & Booth, for defendant.

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

PHILBROOK, J. This is a petition for mandamus brought by a stockholder in a Maine corporation to compel the defendant, who is the clerk of that corporation, to allow the petitioner to examine the records and stock book of said corporation and to take copies and minutes therefrom of such parts as concern his interests. The defendant filed his return or answer to the alternative writ and the petitioner demurred thereto. Upon hearing the presiding Justice sustained the demurrer and ordered the peremptory writ of mandamus to issue. To this ruling and order the defendant excepted. The petition, alternative writ, return to the alternative writ, demurrer and bill of exceptions comprise the case.

So much of the statutes as relates to this case is found in R. S., Chap. 47, Sec. 20:

"All corporations, existing by virtue of the laws of this State, shall have a clerk who is a resident of this State, and shall keep, at some fixed place within the State, a clerk's office where shall be kept their records and a book showing a true and complete list of all stockholders, their residences and the amount of stock held by each; . . . Such records and stock book shall be open at all reasonable hours to the inspection of persons interested, who may take copies and minutes therefrom of such parts as concern their interests."

The following is found in the last paragraph of the bill of exceptions which was allowed by the presiding Justice:

"The presiding Justice considered that in view of the previous decisions of this court he had no discretion to refuse a peremptory writ, and therefore on June 17, 1915, made a ruling that the peremptory writ of mandamus issue as prayed for."

The defendant contends for two propositions,

1st. That the court has the right to exercise its discretion and to refuse the writ if it considers that the proposed use by the petitioner of his status as a stockholder is an improper one;

2nd. That it is an improper use by a stockholder of his status as a stockholder to obtain a list of his coinvestors in a particular enterprise and sell this list broadcast to brokers or others.

In discussing the first contention we must clearly differentiate between the existence of a right and the authorization of the method of enforcing it. In *White* v. *Manter,* 109 Maine, 408, and *Withington* v. *Bradley,* 111 Maine, 384, relied on by the petitioner, our court distinctly notes this difference. Conceding a right to inspect these books and records, given by common law and by the statute hereinabove referred to, the courts are not agreed that it is compulsory upon the court in all cases to enforce the right by mandamus, which is a discretionary writ, and not a writ of right. Some courts seem to hold that when the right to inspect is guaranteed by statute mandamus must issue as a matter of course and that nothing is left to the discretion of the court. It is elsewhere held that the statutory right, while absolute in terms, is subject to the implied limitation that it shall not be exercised from idle curiosity, or for a merely vexatious or an unlawful purpose. *White* v. *Manter,* supra, and cases there cited. In *Withington* v. *Bradley,* supra, our court has said, "We do not wish to be understood as holding that it is compulsory upon the court in all cases to enforce the stockholders' right by granting the writ of mandamus. From its inception mandamus has been a discretionary writ, not a writ of right, and the remedy extraordinary in its nature, has been somewhat sparingly employed. The character of this writ and the discretion to be exercised by the court in issuing it seem not to have been taken away nor abridged by the statute under consideration. A state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful, that the court might feel compelled to exercise its discretion in the interests of law and justice and decline to issue the writ."

As to the second contention, we learn from the answer of the defendant admitted by the demurrer to be true as to allegations of fact, that the number of stockholders in the corporation exceed nine hundred sixty-three, that the number of shares outstanding is sev-

enty-two thousand, eight hundred fifty-eight, that the petitioner owns only a single share, of the value of less than fifty dollars, that said single share was acquired by him solely for the purpose of enabling him to examine the records and stockbook of said corporation and take copies therefrom of the list of stockholders in order that he might sell the same to brokers and others dealing in the stock of corporations, and to enable him otherwise to give information of the names and holdings of said corporation to persons not stockholders of or in any manner interested in said corporation.

We are of the opinion that these conditions bring this case clearly within the rule laid down in *Withington* v. *Bradley,* supra, and that we should decline to issue the peremptory writ. It follows that both contentions of the defendant should be sustained and that the mandate should be,

Exceptions sustained.
Motion for peremptory writ to issue denied.

FRANCIS DANA *vs.* DANIEL A. SMITH.

Washington. Opinion December 15, 1915.

Deed. Life Estate. Obstruction thereto. Reservation of a right of way. Right of way.

1. A deed to H. "his heirs and assigns," of a parcel of land (described); "a right is also given H. to pass to the highway by the shore of the flowage such as will convene his purpose;" habendum, "the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said H. his heirs and assigns;" gives H. a right, in fee, to a convenient way by the flowage to the highway.
2. The court, declaring that the way had been obstructed, directed a verdict for plaintiff; held, that the evidence as to obstruction of the way was conflicting and should have been submitted to the jury.
3. Where a growth of bushes has rendered the right of way of plaintiff impassable, the erection of a fence to the bushes but not across the way is not an obstruction thereto, although accompanied by notices forbidding passage and by an intention thus to prevent the same.

4. The burden of keeping a right of way in repair rests upon the owner of the dominant estate and not upon the owner of the servient estate, unless the latter has undertaken to repair it.

On exceptions and motion by defendant. Exceptions sustained.

This is an action on the case to recover damages for an alleged interference with a right of way across the land of defendant. The presiding Justice instructed the jury among other things, as follows; "Under my construction of the deed, the plaintiff has a right of way over Sopiel Haney's second or substituted way from the road down to the point and that right of way has been obstructed; therefore, the plaintiff is entitled to nominal damages." To this part of the instructions, the defendant excepts. The court then directed a verdict for the plaintiff for the sum of one dollar. The defendant filed a motion for a new trial.

The case is stated in the opinion.

F. Bogue, and R. J. McGarrigle, for plaintiff.

A. D. McFaul and J. F. Lynch, for defendant.

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

BIRD, J. The plaintiff prosecutes this action of trespass on the case for the purpose of recovering damages for an alleged obstruction of a right of way. On the twelfth day of January, 1895, the defendant conveyed, by deed of warranty, to one Sopiel Haney a lot of land in East Machias. In the deed immediately following the description of the land occur these words, "containing one acre more or less reserving a road to the lake where the road now is a right is also given Sopiel Haney to pass to the highway by the shore of the flowage such as will convene his purpose." The plea was the general issue with brief statement denying the existence of any right of way across the premises, except in Sopiel Haney. Certain deeds were offered in evidence by plaintiff presumably for the purpose of showing devolution of title to him, but they do not appear in the record nor are the originals before us. Still, as the case seems to have been tried upon that assumption, we will assume that, if the right of way in question was conveyed in fee to Sopiel Haney, the plaintiff has obtained his title.

There was evidence on the part of the defendant that either before, or subsequent to, the delivery of the deed of defendant to Sopiel Haney, the grantor and grantee met and laid out a way along the flowage and that a year or so later they agreed to change the location of the way, as previously laid out, by substituting for it a way along the margin of the lake above high water mark. This evidence is uncontradicted.

At the close of his charge to the jury the presiding Justice said "Under my construction of it [the deed] the plaintiff has a right of way over Sopiel Haney's second or substituted way from the road down to the point and that right of way has been obstructed; therefore the plaintiff is entitled to nominal damages." To this part of the instructions the defendant excepts. The court then directed a verdict for plaintiff for the sum of one dollar and the case is here upon defendant's bill of exceptions and motion for new trial.

The evidence being uncontradicted as to the substituted way, two questions arise under the exceptions; whether or not the grant of a right of way to Haney by defendant was one of inheritance and whether or not the question of obstruction of the way should have been submitted to the jury.

Neither the reservation of a right of way to the grantor nor the grant of a right of way in the premises of the deed indicate other than a life estate, the words heirs and assigns being omitted. The implication of a grant by the grantee to the grantor of the right of way reserved extends no further than the language of the reservation. It is unlike the case of an exception where words of inheritance are unnecessary. But the habendum of the deed of plaintiff to Haney is in the usual form, concluding with the words "to the said Sopiel Haney his heirs and assigns, to their use and behoof forever." It is familiar law that the office of the habendum is to limit or declare and fix the nature and extent of the interest or title conveyed by the premises. It may define, enlarge or, in some cases, diminish the estate granted. Where, however, there is in the premises no express limitation of the estate granted, its office to enlarge is generally undoubted. The effect of the habendum in the case before us is to convert what the premises leave as a life estate into an estate in fee. See *Berry* v. *Billings*, 44 Maine, 416, 423; 6 Am. Dec. 107, 108; 3 Wash. R. P., §§ 2270, 2271; see also *Higgins* v. *Wasgatt*, 34

Maine, 305, 308, 309. *Pratt* v. *Sanger,* 4 Gray, 84, 86, in which the same conclusion is reached, is a case where the facts are substantially the same as in the present case.

The alleged obstruction consisted of a wire fence which commenced at a point easterly of defendant's house, extended southerly and then easterly towards the margin of the lake. How near it approached the margin is therefore the important question. If the fence extended across the substituted way, defendant was guilty of the obstruction. If, on the other hand, sufficient space was left between the end of the fence and the margin of the lake to permit passage which was prevented by the growth of bushes, the obstruction was not the act of the defendant but the result of the failure of Sopiel Haney and his successors in title, upon whom, and not upon defendant, there being no evidence of any undertaking on his part to do so, the burden of keeping the way in repair rests, to keep the way open. The evidence of the witnesses is conflicting. The plan found in the record and that used at the trial appear to indicate that the fence does not cross the substituted way. If upon this point, the jury had found for the defendant, there was sufficient evidence, we conceive, to sustain such finding.

It is in evidence that the defendant placed a notice upon the land forbidding passage without his permission and that it was his intention to prevent every person from passing over his land under a claim of right. Whatever the effect of such acts and intentions, whether expressed or not, upon the acquirement of prescriptive rights may be, they cannot be actionable as interruptions or obstructions of a right of way already existing. As such, they are purely conventional. See *Rollins* v. *Blackden,* 112 Maine, 459, 466; *McTavish* v. *Carroll,* 17 Md., 1, 7; and also *Dickinson* v. *Whiting,* 141 Mass., 414, 417. The entry must, therefore, be,

Exceptions sustained.

C. O. BROWN *vs.* LINN WOOLEN COMPANY.

Somerset. Opinion December 20, 1915.

Breach. Damages. Eviction. Forfeiture. Rent. Subletting. Trespass quare clausum. Waiver.

1. The ordinary rule of damages upon an eviction is the difference between the rental value of the premises for the balance of the term and the rent reserved, but wherever they are appropriately declared for, the profits of a busineses established upon the leased premises during the period, within the term, of the eviction may be recovered.
2. Profits which it is claimed would have been derived from the particular work upon which the lessor was engaged at the time of eviction are not within the rule. They are too speculative and remote, dependent upon too many contingencies to be substituted for the ordinary rule of damages.
3. Special damages to be recoverable, must be pleaded with particularity and certainty.
4. A surrender of a lease by act and operation of law is effected by the acceptance by the tenent during the term of a new lease of the premises demised.
5. The presumption of an intention to surrender follows such acceptance, but if the acts of the parties to the lease taken all together, are such as to rebut the idea of a surrender, then none ought to be presumed.

On report. Judgment for plaintiff for $250, with interest from the date of the writ.

This is an action of trespass by C. O. Brown, of Hartland against the Linn Woolen Company, a corporation doing business at Hartland, for the unlawful eviction of the plaintiff from a saw mill in said Hartland. Plea, the general issue, with brief statement. At the conclusion of the evidence, the case, by agreement of parties, was reported to the Law Court for determination.

The case is stated in the opinion.

Merrill & Merrill, for plaintiff.

Morse & Cook, for defendant.

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

BIRD, J. This is an action of trespass quare clausum to recover damages for an alleged unlawful eviction of the plaintiff from a saw mill in Hartland. It is reported to this court upon the stipulations following:

"1. The evidence in the preceding case of *Linn Woolen Company* v. *C. O. Brown,* tried at the December Term, 1911, between the same parties, is hereby made a part of this case without being reprinted.

"2. That the single fact to be determined by the Law Court is the amount of damages to which plaintiff is legally entitled because of being evicted from possession of the mill property in question on August 28, 1911, said determination to be based upon so much of the evidence in the former case, and in this case, as is legally admissible."

The former case, *The Linn Woolen Company* v. *C. O. Brown,* was reported to the Law Court and its determination is found in 110 Maine, 88, to which reference may be had for a statement of all the facts establishing or tending to establish the liability of the defendant. In *Woolen Co.* v. *Brown,* supra, it is held that there was no forfeiture of the lease of The Linn Woolen Co., to Page for non-payment of rent; that the right to enter for forfeiture of that lease for breach of the covenant against subletting was waived by the lessor, that there was no real intention on the part of Page to surrender the whole of the property leased to him and that subsequent to the new lease of the novelty mill by the Woolen Company to Page, on the twenty-eighth day of August, 1911, both the lease and the sublease were in full force.

We fail to perceive in view of the conclusions in the former case, what forfeiture or breach of covenant existed which warranted an entry, by the Woolen Co. on the twenty-eighth day of August, 1911. See *The Linn Woolen Company* v. *Brown,* supra.

The plaintiff claims first as damages, for the remainder of his term under the sublease, the profits, which he alleges he would have made, from sawing logs belonging to him into lathes, which he began sawing on the day before the eviction and was intending to saw in the mill.

The ordinary rule of damages upon an eviction is the difference between the rental value of the premises for the term and the rent reserved. Wherever they are appropriately declared for, the profits of a business established upon the leased premises during the period, within the term, of the eviction may be recovered. And evidence of past profits is admissible in determining such future lost profits. *National Fibre Board Co.* v. *Electric Co.,* 95 Maine, 318, 328, and cases cited. We do not, however, regard the profits which the plaintiff testifies he would have made from the sawing of his stock into shingles as within the rule. They are not based upon the net profits of past business. They are, we think, too speculative and remote, dependent upon too many contingencies, to be substituted for the ordinary rule of damages. The claim is akin to that for the profits of a new business, which have been denied. I Sedg. Dam. § 183. The anticipated profits of the sawing of logs taken by a trespasser were allowed as damages in *Bucknam* v. *Nash,* 12 Maine, 474, but upon the ground that it would be inequitable to leave them in the hands of the wrongdoer. But there is a further obstacle to the allowance of the profits of sawing the shingles. The declaration makes no claim for such profits as damages but claims as special damages the loss of profits accruing from his business of manufacturing sawed timber which he had theretofore conducted in the mill. Special damages to be recoverable must be pleaded with particularity and certainty. *Tyler* v. *Salley,* 82 Maine, 128, 130; *Thoms* v. *Dingley,* 70 Maine, 100, 102; *Bradbury* v. *Benton,* 69 Maine, 194, 199; *Baldwin* v. *Western R. R. Corp.,* 4 Gray, 333, 336; *White* v. *Moseley,* 8 Pick., 356; *Dexter* v. *Manley,* 4 Cush., 14, 16, 24; *Tomlinson* v. *Derby,* 43 Conn., 562; *Taylor* v. *Monroe,* Id., 36, 46; *Wabash Trust Co.* v. *Friedman,* 146 Ill., 583, 593; *Chandler* v. *Allison,* 10 Mich., 460, 475; *Houston etc., R. Co.* v. *Lackey,* 12 Tex. Civ. App., 229. In *Bucknam* v. *Nash,* 12 Maine, 474, plaintiff was allowed to recover the anticipated profits of sawing logs taken, although not specially declared for, but we think this exception to the rule, if defensible, should not be extended; see also *Brannin* v. *Johnson,* 19, Maine, 360, 361.

The plaintiff was entirely deprived of the use of the demised premises for two months and seventeen days and is entitled to recover as damages the profits which it is reasonably certain he

would have made, had he had the use of the premises during that period. As in *National Fibre Board Co.* v. *Electric Co.,* supra, the mill did not, apparently, run every day and the other data laid before us are extremely meagre. As it is, however, necessary for us to fix the damages, we conclude that the damages for the balance of the term of the sublease will be amply covered by the sum of two hundred and fifty dollars.

The plaintiff makes the further contention that the new lease given to Page by defendant effected a surrender of the demised premises by act and operation of law, leaving plaintiff's lease from Page in full force and establishing the relation of landlord and tenant between defendant and plaintiff under the sublease with all its incidents. One of the latter is the right of renewal and plaintiff claims that he made seasonable demand for a renewal of this lease upon defendant which was refused with the result that he is entitled to recover damages flowing from this refusal for the period of four years.

A surrender of a lease by act and operation of law is doubtless effected by acceptance by the tenant during the term of such lease of a new lease of the premises demised. Presumption of an intention to surrender follows such acceptance "but if the acts of the parties taken all together, are such as to rebut the idea of a surrender, then none ought to be presumed." It is held in *The Linn Woolen Company* v. *Brown,* supra, that in the alleged acceptance of the new lease by Brown and the other acts of the parties such intention was absent, and, as already observed, that the lease and sublease were unaffected and in full force. Such being the case, the plaintiff must look for performance of his covenant to renew to his lessor and not to defendant.

Judgment may be entered for plaintiff for the sum of $250, with interest from the date of his writ.

So ordered.

WELLINGTON F. DUNTON *vs.* KIMBALL BROTHERS COMPANY.

Sagadahoc. Opinion December 20, 1915.

Mortgage. Replevin. Title to Unborn Progeny.

1. The unborn progeny of domestic animals follows the title to the dam, in case of sale or mortgage.
2. The mortgagee of a cow which was with calf at the time of the mortgage has a mortgage title to the calf when born superior to that of a subsequent mortgagee whose mortgage, given after the calf is born, specifically mentions it.
3. A mortgage which is expressly made subject to a prior mortgage is subject to it as to all things which are by law covered by the prior mortgage.

On report. Judgment for plaintiff. Damages assessed at one dollar.

This is an action of replevin for two Holstein heifer calves, the product of two cows which plaintiff sold to Richardson and took back a mortgage to secure payment of purchase price. Each cow was then with calf, which was dropped about two weeks later. Plea, general issue. At the conclusion of the hearing, the case was reported to the Law Court upon an agreed statement of facts, or so much thereof as may be legally admissible, the Law Court to render such final decision as law and justice may require.

The case is stated in the opinion.

Arthur J. Dunton, for plaintiff.

Walter S. Glidden, and Edward W. Bridgham, for defendant.

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

SAVAGE, C J. The controversy in this case of replevin relates to the title to two calves Both parties claim under foreclosed mortgages of personal property. The case comes up on an agreed statement of facts.

The plaintiff sold two cows to one Richardson and took back a mortgage to secure payment of the entire purchase price. Each cow was then with calf, and the calves were dropped about two weeks later. These calves are the ones now in question. Plaintiff's mortgage made no reference in terms to the expected calves. Five or six weeks after the calves were dropped, Richardson mortgaged the cows and calves, specifically naming the latter, to the defendant, but this mortgage was expressly made subject to the plaintiff's mortgage. Both mortgages were seasonably recorded, and both have been foreclosed The question is, who owns the calves?

We regard it as well established law in this State that, as between mortgagor and mortgagee, the unborn progeny of domestic animals follows the title to the dam, and becomes a part of the security of the the mortgagee, and that this is true, even when no mention of the progeny is made in the mortgage *Allen* v. *Delano,* 55 Maine, 113; *Hanson* v. *Millett,* 55 Maine, 184; *Bunker* v. *McKenney,* 63 Maine, 529. The cases of *Allen* v. *Delano* and *Bunker* v. *McKenney* arose under so called Holmes notes. But we think there is no distinction in principle. Why should there be? At the time of the contract the progeny is physically a part of the dam and has only a potential existence otherwise. And there seems to be no good reason why a sale or mortgage of the dam should not carry the unborn progeny. Some courts have held that the principle holds as long as the offspring is being sustained by the dam.

We think then that the plaintiff's mortgage covered the unborn calves. And as the defendant's mortgage was expressly made subject to the plaintiff's mortgage, it follows that the plaintiff's title by mortgage was superior to that of the defendant. It was superior as to all things which by law were covered by his mortgage. It was superior as to the calves.

It is unnecessary to consider other points made in the briefs.

Judgment for plaintiff.
Damages assessed at one dollar.

THE FRYE PULPWOOD COMPANY *vs.* JOSEPH G. RAY.

Washington. Opinion December 24, 1915.

Bond. Contract. Extension of Contract. Mortgage. Performance. Receiver. Sale.

Under the common money counts, the plaintiff seeks the recovery from defendant of the sum of six thousand dollars paid by the former to the latter on account of the purchase price of certain real estate which defendant undertook by written obligation to convey to plaintiff. Failure, through inability, of defendant, though requested, to perform the contract and its rescission are claimed.

Held:

1. Where defendant has never been able to convey title as provided in his contract, the plaintiff is entitled to rescind and recover back moneys paid on account of the purchase price and an institution of an action for money had and received for such moneys is under such circumstances, in itself a rescission.
2. In order to effect rescission, the party claiming the right to do so must place the other in statu quo, or do all he can towards it, but in the application of this rule the maxim de minimus will be regarded.
3. Where the term of a bond for the conveyance of timberland, which provides for possession by the obligee during the term, has expired and the possession of the obligee during the term, is that of an owner not engaged in timber operations, formal surrender of possession is not required as a prerequisite to rescission.

On report. Judgment for the plaintiff for the sum of $5998 and interest from the date of the writ.

This is an action of assumpsit under the money counts to recover from defendant the sum of six thousand dollars paid by plaintiff to defendant on account of the purchase price of certain lands which defendant undertook in writing to convey, but failed to do. Plea, the general issue and brief statement. At the conclusion of the evidence, by agreement of the parties, 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.

Peters & Knowlton, and C. B. & E. C. Donworth, for plaintiff.

A. D. McFaul and John F. Deering, for defendant.

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

BIRD, J. Under the general money counts, the plaintiff seeks in this action the recovery from defendant of the sum of six thousand dollars paid by the former to the latter on account of the purchase price of certain real estate which defendant undertook by written obligation to convey to plaintiff. Failure, through inability by defendant, though requested, to perform the contract and its recission therefor are claimed.

On the third day of February, 1913, the defendant gave its writing obligatory to plaintiff conditioned for the conveyance of certain tracts of timber land for the sum of $5.00 per acre, to be paid within ninety days from date, "terms, Forty Thousand Dollars Cash, and the balance as per arrangement made this day between Joseph G. Ray and The Frye Pulpwood Company." The bond provided the plaintiff should have possession of the premises and pay all taxes assessed thereon during the term of the bond.

On the twenty-ninth day of April, 1913, the defendant in writing extended "the option to June 1st, 1913, together with all the rights, privileges and agreements mentioned in said option as fully as if the original option expired on said June 1st."

Later by an agreement under seal, bearing date the twenty-ninth day of May, 1913, and executed by the defendant, a further extension was granted. This agreement, after reciting the substance of the bond of February 3, 1913, and an adjustment and agreement that the purchase price is to be $100,000, continues "Whereas, the terms of payment of said purchase price of one hundred thousand dollars, provided said property should be taken over by said Frye Pulpwood Company under the option contained in said agreement, were forty thousand dollars to be paid in cash upon delivery of a good and sufficient deed by the said Ray and the balance as per arrangement made between said Ray and the manager of said company at the date of said agreement, which arrangement was in substance that said property should be conveyed subject to the mort-

gage covering the same from Joseph A. Coffin to Josephine B. Coffin, dated February 12, 1908, recorded in said Registry Book 274, Page 138, provided arrangements satisfactory to the Frye Pulpwood Company could be made with the mortgagee, Josephine B. Coffin to cut timber and pulp-wood upon the same property during the continuance of said mortgage and also subject to a mortgage for twenty-five thousand dollars upon the same property, given by Joseph G. Ray to Joseph A. Coffin, now held by the heirs of Joseph A. Coffin. Said twenty-five thousand dollars, secured by said mortgage, to be assumed by the Frye Pulpwood Company, payable on or about September nineteen hundred and fourteen, with interest according to its terms; the balance, if any, of said purchase price of one hundred thousand dollars, after deducting forty thousand dollars, to be paid in cash as aforesaid, the thirty thousand dollars, held in form of mortgage by Josephine B. Coffin, with accrued interest to date of transfer and the said mortgage from Ray to Coffin, held by the Coffin heirs for twenty-five thousand dollars, with accrued interest thereon to date of transfer, to be paid in form of note of Frye Pulpwood Company to Joseph G. Ray, on one year's time, with interest at five per cent."

It further recites the payment by plaintiff on delivery of the bond of February 3, 1913, of one thousand dollars and of the sum of five thousand upon the extension of April 29, 1913, both these sums to be credited upon the cash payment of the purchase price in case of purchase by plaintiff under the option; that the Frye Pulpwood Co. has notified Ray of its desire and readiness to purchase the property in accordance with the agreement and that the Frye Pulpwood Co. has agreed to waive its rights for four months, or until October 1, 1913, and "that the said Ray has agreed to extend the agreement referred to and recited above to Oct. 1, 1913." It concludes with the undertaking on the part of Ray in consideration of the mentioned sums of money amounting to six thousand dollars, paid on account of the cash payment of the consideration, the further sum of one dollar and the mutual agreements of the parties, as recited, to extend to October 1, 1913, "all rights and privileges of purchasing the property above described and referred to upon the terms and conditions hereinabove set forth."

We must hold that the agreement of May 29, 1913, expressed the terms of the contract of the parties. There is neither claim nor evidence of either fraud or mistake in the making of the agreement. There is evidence, not uncontradicted as to its nature, tending to show an agreement to modify the terms of payment, but its existence is unimportant, as, if it were made, it was prior to date to the making of the agreement of May 29, 1913, in which we must hold the agreement of the parties is embodied.

Perhaps the chief contention centers about the proviso relative to arrangements, satisfactory to plaintiff, with Josephine P. Coffin, to cut the growth during the continuance of her mortgage. Defendant contends that plaintiff stated as early as February 3, 1913, that it could obtain such permission from Mrs. Coffin. It attempted to do so but unsuccessfully. Later defendant made efforts in the same direction with equal lack of success and before the actual making of the agreement of April 29, 1913 admitted it impossible. It makes, however, little difference whether plaintiff or defendant undertook to obtain the concession from Mrs. Coffin. It was one of the important conditions of the contract and has never been obtained. The defendant therefore, had never at the commencement of the action, January 13, 1914, been in a position to carry out the terms of the contract on his part to be performed. The right of plaintiff to rescind the contract and recover back the moneys paid on account of the purchase price is under such circumstances, undoubted and the institution of an action for money had and received is in itself a recission. *Doherty* v. *Dolan,* 65 Maine, 87, 91, 92; *Wright* v. *Haskell,* 45 Maine, 489, 492; *Dixon* v. *Fridette,* 81 Maine, 122, 125; *Horne* v. *Richards,* 113 Maine, 210, 212.

In order to effect recission, the party claiming the right to do so, must place the other in statu quo, "or do all that he can towards it." *Walker* v. *Thompson,* 61 Maine, 347, 350; *McPheters* v. *Kimball,* 99 Maine, 505, 507. Defendant claims he has not been placed in statu quo by plaintiff, because plaintiff burned a blueberry tract included in the premises, received the sum of two dollars from a party in payment for hay cut upon the premises and because before suit was brought he made no surrender of possession of the premises. In the spring or summer of 1913, plaintiff in preparation for the blueberry crop of that year burned several acres of land included in

the real estate covered by the bond and agreement. Learning that the blueberry lands were under lease to a third party, it did no more. This action on part of plaintiff cannot have the effect urged by defendant. It did no injury to the reversion, as the land was already leased for blueberry culture, and was a benefit to the lessee. The stumpage for hay cut was paid to plaintiff and has not been returned nor tendered to defendant. The cutting of the hay was not by the license or permission or with the knowledge of plaintiff. We think the rule de minimus applies. The bond provided for possession in plaintiff during its term. The term of the bond, as extended has expired. The land was timber land and the possession of the plaintiff was that of an owner of such lands not engaged in timber operations upon it. It is not shown nor suggested that plaintiff at the date of the writ was maintaining any possession. A formal surrender of possession to defendant was as uncalled for as a formal delivery of possession to plaintiff at the execution of the bond.

Judgment may be entered for plaintiff for the sum of five thousand nine hundred and ninety-eight dollars and interest from the date of its writ.

HASKELL IMPLEMENT AND SEED COMPANY

vs.

POSTAL TELEGRAPH-CABLE COMPANY.

Androscoggin. Opinion December 28, 1915.

Dispatch. Exceptions. Message. Mistake. Negligence. Telegraph.

Action to recover damages for a mistake in the transmission of a message from Lewiston, Maine to Moline, Illinois.

Held:

1. That the provision in the contract that "the company is made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination," cannot on that account be construed or held to relieve the defendant from liability to the extent of the payment of the cost of original transmission. It is clear that the parties did not so intend. The refusal to direct a verdict for the defendant was correct.
2. The defendant was not liable for any greater sum than the amount named for sending the message.

On exceptions by the defendant. Exceptions sustained.

This is an action to recover damages for the alleged failure of defendant to accurately transmit and deliver a telegram left with it at its Lewiston office by plaintiff for transmission to Moline, in the state of Illinois. Upon the conclusion of the evidence, the court directed the jury to return a verdict for plaintiff for $106.50. To which ruling and instructions the defendant excepts.

The case is stated in the opinion.

Tascus Atwood, for plaintiff.

White & Carter, for defendant.

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

HANSON, J. This is an action to recover damages for a mistake in the transmission of a message from Lewiston, Maine, to Moline,

Illinois. The writ was dated December 19, 1913. The case was tried at the January term, 1915. The presiding Justice directed a verdict for the plaintiff for $106.50, and the case is here upon defendant's exceptions to such order, and other grounds stated in the exceptions as follows:

"Upon the conclusion of the evidence the defendant moved that a verdict be directed for it. This motion was overruled by the court. The defendant then requested the court to instruct the jury that the plaintiff was not entitled to recover more than the sum of sixty-eight (68) cents, being the amount paid for sending the message. The court refused to give this instruction. The court then directed the jury to return a verdict for the plaintiff for the sum of one hundred six dollars and fifty cents ($106.50), it being admitted that if the plaintiff was entitled to recover more than sixty-eight (68) cents, this sum of one hundred six dollars and fifty cents ($106.50) fixed by the court, was correct.

To which rulings and instructions and refusals to instruct the defendant excepts and prays that its exceptions may be allowed."

The material parts of the blank supplied by the defendant with the message in question follows:

"POSTAL TELEGRPH—COMMERCIAL CABLE

Clarence H. McKay, President

NIGHT TELEGRAM

Delivered 6.24 Received at B. 16 Red Chgd.

The Postal Telegraph-Cable Company (Incorporated) transmits and delivers night messages subject to the terms and conditions printed on the back of this blank.

Design Patent Applied For

(Chge Haskell Co.) Lewiston, Me., Oct. 21, 1912

B—7624 Design Patent No. 40529

Send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.

Oct. 21, 1912

To Deere & Co.

Moline, Ill.

Have gotten five Thousand better price will leave for Moline Tuesday night unless you request otherwise.

B 50
A. M. & M. Y.
6.39 P.

E. P. Webster.

. . . . . .

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged in addition. . . . It is agreed between the sender of the message written on the face hereof and the Postal Telegraph-Cable Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED message beyond fifty times the sum received for sending the same, unless specially valued, nor in any case for delays arising from unavoidable interruption in the working of its lines, nor for errors in cipher or obscure messages. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond fifty times the repeated message rate, at which amount this message, if sent as a repeated message, is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination."

The message delivered to the correspondent in Moline was as follows: "Have gotten five Thousand better price will leave for

Moline Thursday night unless you request otherwise." The word "Thursday" was written in place of "Tuesday," after the telegram left the line of the defendant company, and while in the course of transmission over the line of a connecting company, and the plaintiff alleges that the damages sued for resulted directly from the error above mentioned. In his brief, counsel for the plaintiff in support of his contention relies entirely on the rule laid down in *Ayer* v. *Telegraph Company,* 79 Maine, 493, a case presenting the same question, but differing widely in the facts involved, and in the wording of the contract in evidence. In that case a lot of laths were offered to a Philadelphia correspondent in a telegram sent in these words: "Will sell 800 M laths delivered at your wharf, two ten net cash July shipment. Answer quick." The telegram was received with the word "ten" omitted. The offer was accepted, and the plaintiff, on account of the error, lost $80, for which he brought action. The defendant in that case offered no evidence, and, quoting from the opinion, "did not undertake to account for, or explain the mistake in transmission of the message. The presumption therefore is, that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault."

"The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims, it extends to the difference between the market price of the laths, and the price at which they were shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds. 1. The company relies upon a stipulation made by it with the plaintiff, as follows: 'All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it *repeated;* that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message, and this company, that said company shall not be liable for mistakes or delays in the transmission, or delivery, or for non-delivery of

any unrepeated message, whether happening by *negligence of its servants, or otherwise,* beyond the amount received for sending the same.'" And then the court asked the question: "Is such a stipulation, in the contract of transmission, valid, as a matter of contract assented to by the parties, or is it void as against public policy?" The court answered in no uncertain terms, "We think it is void."

It is obvious that the Ayer case cannot be accepted as controlling in this case; the facts are not the same, and the terms of the contract differ in a most important particular. It will be observed that such difference was the real basis of the opinion, and the various expressions therein in relation to individuals, corporations and the public, which were based upon the facts in the case, were then appropriate and applicable, where the sender of the message agreed that the company "shall not be liable for mistakes," etc., . . . "whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same." The case found the defendant negligent, and confidently resisting the plaintiff's claims because the plaintiff had agreed as above, not to claim in case of negligence. The result in that case need not, and will not be questioned here. The reasoning there as to contracts of individuals attempting to evade or avoid the consequences of their own negligence was but a repetition of the wisdom of cases supporting the rule from earliest times, and reasserting the policy of the law independently of statute regulation, and it is not perceived that any recent legislation, Federal or State, has been enacted transforming negligence into license, or creating a channel through which liability therefor may be avoided by contract, or otherwise permitting a person to take advantage of his own wrong. *Young* v. *M. C. R. R.*, 113 Maine, 13; *Buckley* v. *B. & A. R. R.*, 113 Maine, 164. It will be seen that the contract in suit differs from that in the Ayer case, and the words limiting liability for negligence have a stipulation as to damages accompanying them, beyond the charge for transmission. The decision in the Ayer case was reached in 1887, and contained no reference to, and was not affected by the Interstate Commerce Act of that year, for the reason that said Act did not then relate to telegraph, telephone, and cable companies doing an interstate business. The rule and policy therein emphasized controlled procedure and practice in this State until June 18, 1910, when an amendment

to the Interstate Commerce Act was passed. The portions applying here read:

"The provisions of this Act shall apply to—telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act." . . .

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable as aforesaid or any connection therewith shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful; provided, that messages by telegraph, telephone or cable subject to the provisions of this Act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Section 3 of this Act as amended, provides: "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description or traffic in any respect whatsoever or to subject any particular person, company, firm, corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 15 of the Act as amended further provides: "That whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged or collected by *any common carrier or carriers subject to the provision of this Act for the transportation of persons or property or for the transmission of messages by telegraph or telephone,* as defined in

the first section of this Act, *or that any individual or joint classification, regulations, or practices* whatsoever of such carrier or carriers subject to the provisions of this Act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, and what *individual or joint classification, regulation, or practice,* is just, fair and reasonable to be thereafter followed, and to make an order that the carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand or collect any rate or charge of such transportation or transmission in excess of the maximum rate or charge so prescribed, and *shall adopt the classification and shall conform to and observe the regulation or practice so prescribed,* etc."

The defendant claims it is not liable, because (1) the error, if any, did not happen through any negligence of the defendant; and that (2) in any event its liability is limited to the amount received for sending the message:

1. The case shows that the telegram was received in Boston without error, and was then turned over in regular course to the connecting company. The error occurred after the telegram left the defendant's control, but the provision in that contract that "the company is made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination," cannot on that account be construed or held to relieve the defendant from liability to the extent of the payment of the cost of original transmission. It is clear that the parties did not so intend. We are of the opinion that the refusal to direct a verdict for the defendant was correct. The first exception is therefore overruled.

2. As to the second exception to the refusal of the presiding Justice to instruct the jury that the plaintiff was not entitled to recover more than sixty-eight cents, the amount paid for sending the message, and the third exception to the direction of a verdict for $106.50, we think both exceptions should be sustained.

In *True* v. *International Telegraph Co.,* 60 Maine, 9, and *Bartlett* v. *Telegraph Co.,* 62 Maine, 209, cited in the Ayer case, supra, the same rule was under consideration. In the latter case, the court, by Danforth, J., said: "It has been held in many cases, that a company may make rules limiting its liability in certain cases, and perhaps it is now too late to deny this proposition, though it seems to be materially enlarging the meaning of the term, when a power given to a corporation or an individual to regulate the manner or method of doing business with the public, is converted into a means of limiting the liability which by law is attached to that business. But however that may be, all courts agree that a rule to be of binding force must be reasonable, whether its purpose is to facilitate business or limit liability. There may be a wide disagreement as to whether any given rule is reasonable, but none, it is believed, as to its want of validity, when its unreasonableness is once conceded." This court at that time (1873) recognized the growing necessity for some definite and final method of determining for all the states the question of reasonableness of rules in like cases, and that a uniform practice should be established emanating from a special source by which all should be governed, and not leave the question to the uncertain and consequent unsatisfactory finding of the courts of the various states in cases as they should arise therein.

Following the decision in *Ayer* v. *Telegraph Co.,* supra, *Primrose* v. *Western Union Telegraph Co.,* 154 U. S., 1, was decided May 26, 1894. It was there held that "a stipulation between a telegraph company and the sender of a message, that the company shall not be liable for mistake in the transmission or delivery of a message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the originating office for comparison, and pays half the sum in addition, is reasonable and valid." In *Western Union Telegraph Company* v. *Dant,* 42 Appeals, D. C., 398, November 2, 1914, L. R. A. 1915-B. (N. S.), the court had under consideration the question here involved as to limitation of liability for an unrepeated message, and it was held, that "where by statute telegraph messages may be classified and a different rate charged for each class, a condition made part of the contract for transmission, that the company will be liable for mistakes or delays

in non-repeated messages only to the amount paid for their transmission, is valid and enforceable against the sendee."

Many changes have occurred in business and business regulation in the twenty-eight years since the decision in the Ayer case and the creation of the Interstate Commerce Commission. The decision stands, but the Commerce Act has expanded until it comprehends and includes the questions involved in the case at bar, and so including, it must perforce, being the supreme law, suspend the operation of any state statute or regulation, or the force and effect of any decision in opposition thereto, the Ayer case among the rest, so far as they conflict with the Act of June 18, 1910. This rule does no violence to any state, corporation or individual, and is in keeping with the sentiment and reasons underlying sound public policy, the highest good, the best interest of all the people, not that of one state or one locality. Minnesota Rate cases (*Simpson* v. *Shepard,* 230 U. S., 352; 48 L. R. A. (N. S.) 1151; *Sligh* v. *Kirkwood,* 237 U. S., 52.

By the Act of June 18, 1910, telegraph companies have been made common carriers within the meaning, and subject to the provisions of the Interstate Commerce Act. Being so subject, all questions of classification, regulation, and procedure, and especially where, as in this case, the reasonableness of the rules, and charges, and the limitation of liability, are in question, state courts are without jurisdiction, and such cases must be brought in the Federal court, or be submitted for the determination of the Interstate Commerce Commission, as in the case of other common carriers coming within the administrative competency of that Commission. *Baltimore & Ohio Raliroad Company* v. *United States, Ex. Rel. Pitcairn Coal Co.,* 215 U. S., 481; *Northern Pacific Railroad* v. *Washington,* 222 U. S., 370; *Southern Railway Co.* v. *Reid,* 222 U. S., 424; *W. U. Telegraph Co.* v. *Brown,* 234 U. S., 542, and cases cited; *Boston & Maine Railroad* v. *Hooker,* 233 U. S., 97, and cases cited; *Pennsylvania Railroad Company, Plff. in Error,* v. *Puritan Coal Mining Company,* United States Supreme Court, October T, 1914, 237 U. S., 121.

It does not follow that this court has no jurisdiction of a case involving the recovery of the charge for transmission only, as in this case. In *Pennsylvania R. Co.* v. *Puritan Co.,* supra, the court

say: "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to the plaintiff's damage. Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal court." See *Illinois Central Railroad Company* v. *Mulberry Hill Coal Co.*, 238 U. S., 275. But in *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S., 456, involving the right of a shipper to recover damages from a carrier for alleged inadequate and discriminating car service, the court held, that, "when the complaint involves an attack upon the rule or method of car distribution practiced by the carrier in distributing cars for interstate shipments, no action is maintainable in any court for damages alleged to have been inflicted thereby until the Commission has made its finding as to the reasonableness of such rules or methods."

Continuing, that case holds, that "where . . . it appears that the Act to Regulate Commerce has been violated, and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, § 9 applies and is exclusive, and the shipper must elect between a proceeding for reparation award before the Commission, or a suit in the Federal court. He cannot resort to the state court. That section provides:

"Section 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any District or Circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." In defining the scope of Section 9, the court, in *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, supra, says: "This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the

terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before the Commission and a suit in the Federal court leaves no room for the conclusion that there is an option in such case to resort to the state court. Where the proceeding has been had before the Commission and reparation awarded, suit under section sixteen (as amended in 1910) may be brought in either a state or Federal court, but this is after the Commission's award has been made."

It is the opinion of the court that the defendant was not liable for any greater sum than the amount named for sending the message.

The entry will be,

Exceptions sustained.

HARRY E. ROSS, et al., *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion December 28, 1915.

Bills of Lading. Carmack Amendment. Common Carrier. Contract of Affreightment. Special. Contract for Heating the Cars. Initial Carrier.

Action of assumpsit against the defendant for damages to three car loads of potatoes, caused by freezing.

Held:

1. The receipts for heater charges constituted a new, and additional contract to the general contract of affreightment, based upon an additional consideration, and involving additional duties upon the part of the defendant, which having been assumed, remained liabilities not only while the shipment was in its possession, but while it was in the possession of the connecting carrier. That an intermediate carrier may make and be bound by a contract for special service aside from the general contract of affreightment, as in this case, is well settled.
2. In making the contract for transportation, the means and terms used are uniformly selected by the carrier and not by the shipper. Any special contract is ordinarily written on a printed blank prepared by the company to serve the purpose of a receipt. It is construed strictly against the company.

3. The parties were competent to make the contract for heating the cars. The receipt of the extra charges for heating and issuing the receipt therefor by the company, is prima facie evidence that the goods were in good order and in case of damage from freezing the burden of proof was upon the defendant to show that damage arose from some cause for which it was not responsible.
4. Where there are several connecting carriers, the question whether the liability of the first carrier extends beyond its own line depends upon the inquiry whether it in any form assumed or held itself out to the public as assuming any responsibility beyond the terminus of its own route. By holding itself out as a carrier in this respect, an initial carrier may assume a legal obligation to receive and carry goods beyond its own line, although it does not have any actual arrangement with the connecting lines. Its liability therefor depends upon the existence of a contract either express or implied, and the implied contract may be shown by direct or circumstantial evidence.
5. It is immaterial in this case, who owned the cars, or what kind of cars happened to be in use in the circumstances. The contract was to heat the cars in question and it was made by the defendant in its own name. There was no agency disclosed or pleaded. The blanks used were in general use by the defendant and there is nothing in the contract or on the forms used to indicate agency for any other company. It must be regarded as the contract of the defendant. The jury found that there was a breach of that contract. That the defendant is liable for such breach is well settled.

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

This is an action brought by the plaintiffs, Harry E. Ross and H. Eugene Collett against the Maine Central Railroad Company to recover the value of three car loads of potatoes shipped by the plaintiffs from Bangor, Maine, over the line of the Maine Central and connecting carriers to Hoboken, New Jersey, the potatoes having frozen enroute. Plea, general issue. During the course of the trial exceptions were taken by defendant to the admission and the exclusion of evidence, and also to the charge of the presiding Justice. The jury returned a verdict for plaintiff, and defendant filed a motion for a new trial. The exceptions of defendant are all considered in the opinion.

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, BIRD, HALEY, HANSON, JJ.

HANSON, J. Action of assumpsit against the defendant for damages to three car loads of potatoes, caused by freezing. The potatoes were shipped from East Corinth and Charleston over the Bangor Railway and Electric Company's line to Bangor, consigned to the plaintiff, and the cars were then turned over to the defendant which issued its bills of lading from that point over its own and connecting roads to their destination at Hoboken, New Jersey.

In addition to the general contract of affreightment, the plaintiff and defendant entered into another and special contract, in which for a consideration to be paid therefor by the plaintiff, the defendant agreed to heat the cars in question on their passage from Bangor to Hoboken, and upon the last named contract this suit was brought. The case was heard before as in 112 Maine, 63. On the first hearing a nonsuit was ordered. In the second trial the jury returned a verdict for the plaintiff for $1,114.91, and the case is now before the court on the defendant's exceptions to the admission of certain testimony offered by the plaintiff, to the exclusion of two questions in cross examination by the defendant's counsel, to the charge of the presiding Justice, and the refusal to instruct except as given in the charge. The same line of defence was adopted as in the first case, that the defendant was not the initial carrier and therefore not liable under the Carmack Amendment to the Interstate Commerce Act of February 24, 1887, and further because the defendant was acting as the agent of the Eastman Heater Car Company. Certain new evidence was introduced, its purpose being to establish the claim that the Bangor Railway and Electric Company is engaged in interstate business, and in this case was the initial carrier. Inasmuch as the former case holds that as to the contract of affreightment that railroad was an interstate carrier as well as the initial carrier, such new evidence is not material in the present consideration of the case.

Exceptions No. 1 and 3 and the requested instructions 1 to 6 inclusive relate entirely to the claims asserted under the provisions of the Carmack Amendment. The rights and liabilities of the parties in respect to such claim having been determined in the former case the defendant can take nothing by these exceptions. In Exception

No. 2, the defendant opposed the admission of the plaintiff's testimony that he received the potatoes at Bangor and billed the same from Bangor to Hoboken. The objection related to the alleged incompetency and irrelevancy of the testimony. It is manifest that if the contention is true, the defendant could not be prejudiced by the ruling, for the same information was before the jury in the several bills of lading and other evidence in the case, and therefore, but cumulative at best.

Exceptions No. 4 to 8 inclusive relate to the admission of testimony: 1. As to the meaning of heater charges; 2. The market price of potatoes at Bangor on the days of shipment; 3. The condition and value of the potatoes in Hoboken; 4. The meaning of the term "lighterage free" and the exact point of delivery by its local designation as "Palmers dock."

The reasons for the objection stated are the same as in the foregoing,—that such testimony was incompetent and irrelevant. We fail to see where the defendant is prejudiced by the admission of the testimony objected to, but whether prejudiced or not the testimony was admissible under well known rules. These exceptions are, therefore, overruled.

The measure of damages in cases where the shipment is made in performance of a special contract, known to the carrier will be the difference between the contract price at destination and market value at the place of shipment, less the freight. 6 Cyc., 526. Whether the loss occurred on the Bangor Railway and Electric Company's line or on the defendant's road was a jury question.

In *New York & B. Transp. Line et al.* v. *Baer & Co.*, 84 Atl., 251, where in an action for loss of wool in transit neither of the defendants was the initial carrier, and one of the defendants was not the terminal carrier in any of the shipments, it was held that "their liability could not be predicated on the Carmack Amendment, and they are subject only to the liability imposed by the common law."

The last named case emphasizes the rule that each road, confining itself to its common law liability, is only bound, in the absence of special contract, to safely carry over its own road and safely deliver to the next connecting carrier." And this is true as to an intermediate carrier that accepts property for carriage directed to a place beyond the terminus of its route.

Where it is shown that the goods were delivered to the initial carrier in good condition, and they are subsequently delivered to the consignee by the connecting and terminal carrier in bad condition, the presumption of law is, when such last named carrier is made defendant, that the goods were received by such defendant in the same condition that they were delivered to the initial carrier and the burden is upon the defendant carrier of proving that such goods came to its possession in damaged condition. And it is proper to show knowledge by the parties to a written contract for transportation of goods, of the circumstances on the basis of which it was made, for the purpose of showing what was within the contemplation of the parties in making the contract, where such knowledge is material in fixing the damages. 4 R. C. L., 913, *Weston* v. *B. & Me. R. R. Co.*, 190 Mass., 298.

Exception No. 10, relates to one of the alleged rules of the Eastman Car Company. Testimony as to such rules was excluded because the same question had been asked by counsel the day before, and answered to the satisfaction of counsel. The objection cannot be sustained. The admission or refusal to admit the testimony was within the discretion of the presiding Justice, and his ruling thereon is not open to exception.

As to the charge of the presiding Justice. The defendant objected to that part of the charge where it is stated: 1. "That the damages must be computed as of Bangor, and that the place of shipment, so far as the question of the determination of damages is concerned, was Bangor;" and 2. "That by accepting the heater charges the defendant undertook that these cars should be properly heated in their transit from Bangor to their destination."

The defendant can take nothing by these exceptions. The language used was substantially but a repetition of the words used by the defendant in its own bills of lading, and contract to heat the cars, and it does not appear nor is it urged in argument that the defendant was aggrieved by the charge in this respect.

There remains to be considered but one item from the number of requested instructions, viz: No. 7, which reads, "If the plaintiffs, or either of the plaintiffs, knew that the Maine Central Railroad Company was acting as agent for the Eastman Car Company, when it accepted the heater charges, then the plaintiffs cannot recover."

We think the objection without merit for the reason that the request was too broad in its scope, and was not warranted by the pleadings or any evidence in the case on either side. It was not confined to this case. The defendant may have been the agent of the Eastman Car Company, but it did not disclose its agency, and the case is barren of testimony tending to show agency, general or special, or the nature and terms of any contract subsisting between the defendant and the Eastman Car Company, or the actual ownership of the cars used in the transportation of the potatoes, but it is shown that two of the three cars were Maine Central Eastman Heater Cars. While it may be true that there is or was a relation of principal and agent subsisting between the defendant and the Eastman Heater Car Company, such relation does not appear from the testimony in this case. If important to the defendant, production of testimony to show agency if intended to be pleaded as a defence, which was not done, was within its power, and necessarily not a matter over which the plaintiff had control. Such testimony was not offered. If not true, and the plaintiffs could not be expected to know the terms of the business relations of the two corporations, then to hold them responsible for knowledge of such relation from information which at best is merely hearsay, would be repugnant to familiar rules of evidence and sound public policy as well. There was no evidence in the case to justify such instruction. The receipts for heater charges constituted a new and additional contract to the general contract of affreightment based upon an additional consideration, and involving additional duties upon the part of the defendant, which having been assumed, remained liabilities not only while the shipment was in its possession but while it was in the possession of the connecting carrier. That an intermediate carrier may make and be bound by a contract for special service aside from the general contract of affreightment, as in this case, is well settled. Recognition of this rule is so general that courts in asserting the principle contended for by the defendant invariably reserve from its inclusion cases where there is a special contract.

A carrier receiving a shipment of goods for transportation over its own line and for delivery to a connecting line for carriage thereon is bound, in the absence of special contract, only on its common

law liability to safely carry over its own road and safely deliver to the connecting carrier. *N. Y. & B. Transp. Line et al.*, v. *Baer & Co.*, 84 Atl., 251; *Perkins* v. *Portland R. R. Co.*, 47 Maine, 573; *Skinner* v. *Hall*, 60 Maine, 477.

In making the contract for transportation the means and terms used are uniformly selected by the carrier and not by the shipper. Any special contract is ordinarily written on a printed blank prepared by the company to serve the purpose of a receipt. It is construed strictly against the company. Baldwin American Railroad Law, 347. The general proposition, that the bill of lading is prima facie evidence of the facts recited therein is maintained by numerous cases. Redfield, Vol. 2, page 167, 4th Ed., citing *Obrien* v. *Gilchrist*, 34 Maine, 554; *Tarbox* v. *Eastern Steamboat Co.*, 50 Maine, 339.

The parties were competent to make the contract for heating the cars. The receipt of the extra charges for heating and issuing the receipt therefor by the company, is prima facie evidence that the goods were in good order and in case of damage from freezing the burden of proof was upon the defendant to show that damage arose from some cause for which it was not responsible. *Tarbox* v. *Eastern Steamboat Co.*, supra.; *Dow* v. *Portland Steam Packet Co.*, 84 Maine, 490; *Little* v. *Boston, etc. R. Co.*, 66 Maine, 239. Vol. 4, R. C. L., 916.

We have held that as to the contract in suit the defendant must be deemed to be the initial carrier, and that conclusion is supported by this court in former decisions and we do not find the doctrine challenged in other jurisdictions. The rule may be stated thus: that receiving goods destined beyond the terminus of the particular railway, and accepting the carriage through, and giving a ticket or check through, does import an undertaking to carry through and that this contract is binding upon the company. *Wheeler* v. *San Francisco, Etc. R. R. Co.*, 89 Am. Dec., 147 and cases cited. *Perkins* v. *Portland S. & P. R. R. Co.*, 47 Maine, 573; *Hill Mfg. Co.* v. *Boston & Lowell R. R. Co.*, 104 Mass., 122.

Where there are several connecting carriers the question whether the liability of the first carrier extends beyond its own line depends upon the inquiry whether it in any form assumed or held itself out

to the public as assuming any responsibility beyond the terminus of its own route. By holding itself out as a carrier in this respect, an initial carrier may assume a legal obligation to receive and carry goods beyond its own line, although it does not have any actual arrangement with the connecting lines. Its liability therefor depends upon the existence of a contract either express or implied, and the implied contract may be shown by direct or circumstantial evidence. 4 R. C. L., 881, citing *Grindle* v. *Eastern Express Co.*, 67 Maine, 317.

Express authority of the agent of a common carrier to give a receipt for goods, creating a through contract, need not be proved, when he acted as such in the proper place for receiving goods for the carrier, and was in possession of the carrier's stamp to be used in such receipts, and the carrier took possession of the goods and caused them to be shipped, presumably with knowledge of the receipt. 4 R. C. L., 887 and cases cited.

It is immaterial in this case, who owned the cars, or what kind of cars happened to be in use in the circumstances. The contract was to heat the cars in question and it was made by the defendant in its own name. There was no agency disclosed or pleaded. The blanks used were in general use by the defendant and there is nothing in the contract or on the forms used to indicate agency for any other company. It must be regarded as the contract of the defendant. The jury found that there was a breach of that contract. That the defendant is liable for such breach is well settled.

Exceptions overruled.

ANNIE E. DUNNING, in Equity, *vs.* GEORGE E. BIRD, Exr., et als.

Cumberland. Opinion December 28, 1915.

Bill in Equity. Construction. Legacies. Letters Patent. Trust. Trustee. Will.

The court will not undertake to construe the terms of a testamentary trust when it does not appear that there are funds available for the purposes of the trust.

On appeal. Appeal dismissed. Bill dismissed.

Bill in equity asking for the construction of the will of the testator, Chapin C. Brooks, late of Portland, and more especially the meaning and intent of the testator as expressed in Paragraph 3 of said will. The case was heard by a single Justice, and from his decree the plaintiff appealed.

The case is stated in the opinion.

H. N. Allin, and Charles E. Gurney, for complainant.

Thomas L. Talbot, for George E. Bird.

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

SAVAGE, C. J. Bill in equity for the construction of the will of Chapin C. Brooks. The case was heard by a single Justice and from his decree the plaintiff appealed.

The testator bequeathed to the defendant certain letters patent in trust, to be managed and controlled by the trustee either by selling the patents or granting licenses thereunder; and it was provided that the rents and royalties received from such licenses should be disposed of by the trustee in a specified manner, under which the plaintiff was to receive a share. Most of the patents expired after the making of the will and before the death of the testator. Since the death of the testator in 1913, the trustee has received for royalties the sum of $26.14. At the time of his death, the testator had

money in hand and in bank and two promissory notes, amounting in all to $2684.13.

The plaintiff asks to have determined whether the proceeds received by the trustee as resulting from the letters patent in royalties is not a specific legacy, to be paid her in precedence to general legacies, and whether as a specific legacy it should be paid from the rents, royalties and income that had accrued from the letters patent up to the time of the testator's death.

The sitting Justice ruled that the trust included only rents and royalties received by the trustee after the death of the testator. We think the ruling was correct. But we think also that there is a difficulty in the plaintiff's way, underlying that one. Even if the will were to be construed as including in the trust rents and royalties received by the testator in his lifetime, there is nothing in the case to show that the funds he left, either in cash, or money in bank or as represented by promissory notes, were derived in whole or in part from the letters patent.

As for the sum received by the trustee since his appointment. it is too trivial for consideration. The trustee's expenses in this proceeding will exhaust it.

There being now no trust fund available for the purposes of the trust, there is no occasion further to construe the will.

Appeal denied.
Bill dismissed.

MINNIE G. SMITH, Petitioner, *vs.* PHILLIPS NATIONAL BANK.

Cumberland. December 28, 1915.

Mandamus. *Notice of desire to withdraw from the Association.*
Petition. *Shareholders.*

1. When the charter of a national banking association has expired by limitation, it may be extended by vote of the shareholders, with the approval of the comptroller of the currency.
2. When the charter of a national banking association is extended by vote of the shareholders, a non-assenting shareholder may, within 30 days, withdraw, and have his shares appraised and paid for by the bank.
3. The notice of withdrawal given by the shareholder in a national banking association, within 30 days after the extension of its charter, is effective as of the date of the expiration of the original charter.
4. If after the extension of the charter of a national banking association a dividend is declared, a shareholder who demands and receives the dividend waives the right to withdraw.

On report. Petition for mandamus denied with costs.

This is a petition for writ of mandamus asking for the final determination of the question of law, whether petitioner is entitled as a matter of law to the issuance of a peremptory writ of mandamus as prayed for in said petition.

The case is stated in the opinion.

J. Blaine Morrison, and Woodman & Whitehouse, for petitioner.

Frank W. Butler, and Elias Fields of Massachusetts Bar, for respondent.

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

SAVAGE, C. J. This is a petition for a writ of mandamus, and the case comes before this court on report. The petitioner was the owner of forty shares in the defendant bank. The original charter of the bank expired May 20, 1914, and the bank proceeded by amendment of its articles of association, under the provisions of the Act

of Congress of July 12, 1882, to extend its period of succession for a term of not more than twenty years, and on May 21, 1914, the Comptroller of the Currency of the United States granted his certificate of approval of the extension.

By Section 5 of the Act referred to it is provided that "when any national banking association has amended its articles of association as provided in this Act, and the comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale." 22 Stat., 163; 4 Comp. Stat., 1913, sects. 9665, 9669. The remainder of the section is immaterial in this case.

June 5, 1914, the petitioner gave written notice to the directors of her desire to withdraw from the defendant association, and in the same writing, informed them who had been selected by her as appraiser on her part. In the meantime, June 1, 1914, the bank declared a dividend from its profits, the greater part of which had been, in fact, earned prior to the expiration of the original charter. June 10, 1914, the cashier of the bank advised the petitioner by letter that it was his impression that her acceptance of the dividend declared and payable after the charter had been extended would bar her withdrawing her interest under the provisions of the statute. Nevetheless, on July 2, 1914, she demanded in writing the payment of the dividend, and it was paid to her representative on the same day.

The directors of the defendant bank have neglected and refused to appoint an appraiser to act with the one selected by the petitioner. And the reason assigned for the refusal is that the petitioner, by demanding and accepting the dividend of June 1, waived or lost her right, under the statute, to withdraw as a shareholder, and to have the value of her shares appraised. This petition for mandamus is brought for the purpose of compelling the appointment of an appraiser by the bank, to the end that the value of the petitioner's shares may be valued, and become a debt of the bank to her.

We think the petition must be denied. The petitioner's contention is that she continued to be a shareholder entitled to dividends until she gave notice of withdrawal June 5, and that, being so entitled, her withdrawal could not affect her right to a dividend previously declared; and, consequently, that as she had a right to the dividend, the acceptance of it after withdrawal was not in any sense a waiver of her withdrawal, or a bar to these proceedings.

We think, both upon reason and authority, that the fallacy of the petitioner's argument lies in the assumption that she continued to be a shareholder until June 5. The life of the charter of a national banking association is limited in time by law. By becoming a shareholder the petitioner's rights and liabilities as such continued only to the expiration of the charter. She could not be compelled to remain a shareholder. Though the statute provided a way by which the charter life could be extended, it was entirely at her option whether she would leave off with the old or go on with the new. The statute gave her the right to elect whether she would continue a shareholder. And that election was required to be made within thirty days after the comptroller had approved the extension. If she did not exercise her option, and elect to withdraw, she continued to be a shareholder. If within thirty days she elected to withdraw, she ceased to be a shareholder and, we think, as of the time when the original charter expired. The point of division between the rights as a shareholder and her right of appraisal as a non-assenting shareholder was the point of time between the old charter and the extension of the charter. She was to elect whether she would go on with the extended charter. If she elected not to do so, it was an election not to do so for any part of the time covered by the extended charter. She could not divide the period. She could

not elect to hold on for a part of the extended period of succession. Such we think was the intendment of the federal statute. A reference to decided cases serves to strengthen our conclusion.

This question arose in *Apsey* v. *Whittemore,* 199 Mass., 65. In that case the bank had failed, and the receiver was attempting to enforce the shareholer's liability against the defendant as a shareholder. The original charter had expired several years before receivership proceedings and had been extended in accordance with the statute, and, within the thirty days provided for in the statute after the approval of the extension, the defendant gave notice of her withdrawal and selected her appraiser and the bank selected one. But the third appraiser was never selected, and no appraisal was had. The defendant never used or asserted any of the rights and privileges of a shareholder after the expiration of the old charter, and returned a dividend declared afterwards that had been sent to her. The court held that the defendant was not a shareholder under the extended charter. "It is a case," said the court, "where the defendant withdrew and *never became* a stockholder for the extended period of succession."

In *Kimball* v. *Apsey,* 164 Fed., 830, the same question arose upon facts exactly similar. The plaintiff was the same as in the Whittemore case, and the defendant was another shareholder in the same bank. The case says the defendant gave notice of withdrawal within the time limited by statute, and never asserted any rights of a shareholder after the extension. The court said: "By the terms of the statute the defendant ceased to be a stockholder on giving his notice of withdrawal September 5, 1904." The petitioner draws the inference from this language that the notice was given on that date, which was the date of expiration of the old charter. The language might be susceptible of that inference if the context warranted it. But in the light of the other expressions in the case we do not so interpret it. We think the court having said in terms that the notice had been given *within the time* limited by statute intended by the expression used to note the date as upon which the notice became effective.

But however this may be, both of these Apsey cases were taken to the Supreme Court of the United States on error. Both cases were considered together. And the Supreme Court, whose word on

federal questions is decisive, said: "As we view it, when the shareholders made their election to retire at the end of the first twenty year period of corporate organization, and took the steps required in section 5, by giving notice and appointing an appraiser to obtain a valuation of, and payment for, their shares of stock, *they thereby ceased to be shareholders beyond the original twenty-year term* of the life of the corporation and they could neither share its profits, nor be compelled to bear its burdens."

Accordingly, we hold that by force of the statute, the petitioner's withdrawal took effect as of May 20, 1914. When she withdrew, June 5, it was in effect a declaration that she had at no time after May 20 assented to the extension. She had and could claim no rights or benefits which arose to shareholders after May 20. What she did have was the right to have her shares appraised and paid for at their value on May 20. And the fact that there were undivided profits earned before that date would necessarily enhance the value of her shares. If she chose to elect as she did that her rights as shareholder should not continue under the extended charter, she then had no right to a dividend declared after the extension. She could obtain all that belonged to her by an appraisal.

We have treated the question of profits as if the petitioner's claim to a share depended upon the fact alleged in her petition, and admitted to be true, that the greater part of them was earned while she was a shareholder. If this be so, still some of the profits which she demanded and received as a dividend was earned after she ceased to be a shareholder. Besides, the statute contemplates a sale of her shares by auction. Such a sale would determine the value of the shares on May 20, 1914. The transferree would be entitled to all dividends declared after that time. The law, it is said, refuses in the case of a transfer to investigate the question when the dividend was earned. In contemplation of law the net profits are earned at the instant the dividend is declared. This rule is just because the accrued profits and expected dividends enter into the value and price at which the stock is sold. *Richardson* v. *Richardson,* 75 Maine, 575; 2 Cook on Corp., sect. 539.

The remaining question is whether the demand for, and acceptance of, the dividend after the petitioner's withdrawal in any way affected her rights under the withdrawal. We think they did. We think

the withdrawal was waived. We do not think the withdrawal was irrevocable, at least until the bank acted upon it. It was competent for the petitioner to withdraw the withdrawal or waive it, if she chose to do so. It was possible for her to effect a waiver in law, even if she did not intend to do so. A waiver is ordinarily defined to be the voluntary relinquishment of a known right, a matter of intention. *Stewart* v. *Leonard,* 103 Maine, 128. The intention, however is not the secret intention. It is the intention to be gathered from the language and conduct of the party. But a waiver in law may be shown by a voluntary act, the legal effect of which is contrary to that intended. This court said in *Stewart* v. *Leonard,* supra, "waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right, or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." And it may be added that under such circumstances, if the renunciation of the waiver would work to the injury or disadvantage of another who relied upon it, the party making the waiver is estopped to deny it. *West* v. *Platt,* 127 Mass., 372.

Applying this rule, how does the petitioner stand? She gave notice of withdrawal June 5. That withdrawal, if carried into effect as she desires, will give her the right to recover of the bank the value of her shares on May 20, enhanced necessarily by the increment of undivided earnings to that date. She will receive the benefit of those earnings. On July 2, she demanded and received the dividend of June 1, which included those earnings or at least a part of them. So that if she obtains an appraisal under the statute she will have received, and the bank will have been compelled to pay to her, those earnings twice over. Under these circumstances, the acts of demanding and receiving the dividend were so inconsistent with the existence of the rights claimed under the withdrawal, and so detrimental to the rights of the bank, that it must be held that the withdrawal was in law waived, and that the petitioner is estopped to claim further rights under her notice of withdrawal. She had her election. She might have elected to maintain her withdrawal, and become a creditor of the bank for the value of her shares, or

she might have elected to receive her dividend as a shareholder. She could not enjoy both privileges. She could not be both creditor and shareholder. She elected to take her dividends as shareholder. And she must abide her election, although perhaps she did not foresee the consequences.

Petition for mandamus denied with costs.

ANNA K. GILMAN, by FRAZIER GILMAN, Guardian, in Equity,

vs.

CHARLES T. HAVILAND, et als.

Kennebec. Opinion December 28, 1915.

Demurrer. Guardian. Judgment. Mortgage. Sale. Sheriff's Deed.

Bill in Equity to have a certain sale of real estate on execution, made November 20, 1889, declared void and set aside on the alleged ground that the judgment debtor was of unsound mind and incapable of managing her own affairs at the time and was not represented in the proceedings by any guardian.

The case was heard upon the merits before the Justice below, and on November 24, 1914, he filed a decree dismissing the bill for the reasons stated in his findings of fact filed with the decree and referred to therein. From that decree the plaintiff appealed.

Held:

1. The decision of a single Justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is erroneous, and the burden of proving the error rests on the appellant.
2. Public policy requires that the judgments and orders of courts and the sales of property thereunder should not be lightly vacated and set aside upon a claim that the parties thereto were of unsound mind at the time they were rendered, especially after the lapse of more than a score of years during which time other parties have acquired rights in the property involved. Such a claim must be established by proof that is clear and convincing.
3. The conclusion of the court upon the whole evidence is that it does not appear that the decision of the sitting Justice dismissing the bill on the merits was erroneous.

Bill in equity. On appeal by plaintiff. Appeal dismissed. Decree below affirmed.

This bill in equity was brought for Anna K. Gilman by Frazier Gilman, her guardian, to set aside a sheriff's sale to defendant Charles T. Haviland of property belonging to Anna K. Gilman. At the hearing of the cause before the sitting Justice, the bill was dismissed. From this decision the plaintiff appealed.

The case is stated in the opinion.

Johnson & Perkins, and A. K. Butler, for plaintiff.

H. D. Eaton, for defendant Haviland.

F. W. Clair, for Belle and Chas. Gilman.

John E. Nelson, for widow of D. P. Foster and the guardian of his minor children.

A. H. Bridges, for H. M. Fuller and B. F. Towne.

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

KING, J. Bill in equity, on appeal by plaintiff.

The first bill in this case was filed February 27, 1908, in which Charles T. Haviland was named as the only defendant. Its object was to have a certain sale of real estate on execution made November 20, 1889, declared void and set aside.

Anna K. Gilman was the judgment debtor and the then owner of the real estate, which consisted of three separate parcels, two in Waterville and one in Oakland. Mr Haviland was the judgment creditor and purchaser at the execution sale. The bill alleged in substance that Haviland first recovered a judgment in New York against Anna K. Gilman; that he entered suit on that judgment at the June term, 1888, of the Superior Court for Kenebec county, Maine; that notice of the suit was proved at the June term of said court, 1889, and an appearance was entered for the defendant by F. E. Southard, an attorney; that at the September term, 1889, Southard withdrew his appearance and judgment by default was entered; that Anna K. Gilman was of unsound mind and incapable of managing her own affairs at the time of said execution sale, and when the judgment was rendered, and that she was not represented in the proceedings by any guardian. It also alleged that Haviland obtained his judgment and had said execution sale made

with knowledge of the mental incapacity of the judgment debtor and with intent to defraud her. There was a further allegation that a part of said real estate was subject to a mortgage given by Anna K. Gilman September 25, 1883, to the Waterville Savings Bank to secure $2000, which mortgage the bank, under an arrangement with Haviland, foreclosed, and thereafter, on December 6, 1897, conveyed its interest thereby acquired to him. The prayer of the bill was that the sheriff's deed to Haviland be declared void and cancelled; that he account for the rents, issues and profits of said real estate; and that upon payment of the amount due on said mortgage the same be decreed fully satisfied and the foreclosure proceedings thereunder and the deed from the bank to Haviland be declared void and cancelled.

Mr. Haviland made full answer to the allegations of the bill, denying the alleged incapacity of Anna K. Gilman, and all the charges of misconduct on his part in the premises. Thereafter he filed a plea in bar, alleging therein that Charles B. Gilman, who was a brother of Anna K. Gilman, recovered a judgment against her and caused the same real estate to be seized, sold and conveyed to him on the execution issued thereon, all of which was done subsequent to the Haviland execution sale, and that Anna K. Gilman did not redeem from said last execution sale, and, therefore, had no interest in the real estate entitling her to maintain the bill. No hearing appears to have been had on that plea.

Subsequently the plaintiff was permitted to file a new amended bill which is the one now before the court. In this bill Charles T. Haviland, Charles B. Gilman, Belle Gilman Tufts, Bell Gilman Tufts, guardian of Charles B. Gilman, J. A. Stewart, Benjamin F. Towne, Herbert M. Fuller, Dana P. Foster, Frank Redington and Sophronia D. Redington are made defendants.

This bill contains the same allegations as in the first bill, and adds, in substance, that Charles B. Gilman on August 10, 1888, brought suit in the Superior Court for Kennebec county, Maine, against Anna K. Gilman on a judgment recovered by him against her in New York; that judgment was rendered therein and execution issued thereon July 16, 1891, upon which the same real estate that was sold on the Haviland execution was seized and sold, together with another parcel of real estate situated in Waterville,

and that the said Charles B. Gilman was the purchaser thereof at said sale and received a sheriff's deed thereof; that no notice of the Charles B. Gilman suit was given to her, and that she was then insane and incompetent to protect her rights and was not represented in the proceedings by any guardian; that Charles B. Gilman died testate April 24, 1893, having bequeathed and devised all his estate to his only child, Charles B., and his wife, Belle Gilman, now Belle Gilman Tufts, in equal shares; that the defendant Haviland, at different times since November 20, 1889, made conveyances to certain persons of portions of said real estate (each of said conveyances being specified in the bill, with its date, the description of the property conveyed, and the grantee or grantees therein). Those grantees now living are made defendants; and in the case of those deceased, their heirs or devisees are made defendants.

The prayer of the bill is, that the sheriff's deed to Haviland, and all deeds and mortgages made by him or his grantees be declared void and cancelled; that Haviland account for the rents, issues and profits of said real estate; that upon payment of the amount due on the mortgage to the Waterville Savings Bank satisfaction thereof be decreed and the foreclosure proceedings thereunder and the deed from the bank to Haviland be decreed void and cancelled; that all the defendants be enjoined from conveying said real estate; and that the sheriff's deed to Charles B. Gilman be declared void and cancelled.

Belle Gilman Tufts for herself, and as guardian of Charles B. Gilman, filed disclaimers of any and all right, title and interest in the property. All the other defendants filed demurrers which have not been heard, and also made full answers.

The cause was heard before MR. JUSTICE SPEAR upon bill, answers, replication and evidence and, on November 24, 1914, he filed a decree dismissing the bill for the reasons stated in his finding of facts filed with the decree and referred to therein.

The only issue at the hearing, as stated by the Justice in his findings, was one of fact, whether Anna K. Gilman in November, 1889, had "sufficient mental capacity to enable her to comprehend ordinary business transactions and particularly the transaction here involved." Upon that issue the Justice found against the plaintiff. He filed a full statement of the grounds and reasons for his finding of facts,

discussing therein at some length the evidence that led him to his conclusion, which he thus expresses: "It is my opinion, therefore, upon all the evidence in the case, that the plaintiff during the years 1889 and 1890 was of sound mind to the extent of enabling her to understand any ordinary business transaction and particularly the transaction touching the defendant's seizure and sale of her real estate in Waterville on execution."

The first inquiry, therefore, is whether the decision of the single Justice in the defendants' favor on the merits of the cause should be reversed. If not it will be unnecessary to decide the other questions raised by the demurrers.

It is the settled rule in this State that the decision of a single Justice upon matters of fact in an equity hearing should not be reversed unless it clearly appears that such decision is erroneous, and that the burden of proving the error rests on the appellant. *Young* v. *Witham,* 75 Maine, 536; *Paul* v. *Frye;* 80 Maine, 26; *Railroad Co.* v. *Dubay,* 109 Maine, 29.

The record of this case covers 556 printed pages, and, therefore, it is not feasible to make here any detailed analysis or comprehensive review of the evidence presented. Some brief reference, however, to undisputed facts and circumstancs, and to the testimony relied on in behalf of the plaintiff, seems necessary.

In 1897 Anna K. Gilman was confined as a person of unsound mind in some institution in London, England. Ten years later her brother Frazier brought her back to this country. When she went to England does not appear. It was apparently between 1892 and 1897. Prior to her going to Europe, she had managed her business affairs in her own way, and they were of unusual importance. She was an executrix, with others, of the will of her father, Nathaniel Gilman, who died in New York in 1859, leaving an estate valued at about a million dollars. For quite thirty years thereafter she was involved in continuous litigation in the courts of New York and Maine in connection with that estate. A petition for an accounting by the executors was filed in the courts in New York in 1864, and the final decree thereon was not made until the year 1888. And she was also involved in much other litigation during that period and for several years thereafter. The evidence shows that she was inclined to litigation and was headstrong and ungovernable in prose-

cuting it, apparently to her own ultimate disappointment and financial embarassment.

As the time drew near when a decree was inevitable in the matter of her accounting she was disturbed and excitable. . By that decree, made in 1888, she was charged with a balance of about $40,000 to be paid by her to those entitled thereto under the will. She was then financially embarassed, and greatly harassed by the persistent efforts of those having judgments, and other claims against her, to collect them. Haviland recovered his judgment against her in New York in the early part of 1888. Immediately following the decree against her as executrix, her brother Charles B. Gilman brought his suit against her in Maine and attached her property.

Up to that time she appears to have had her home in the Gilman house at 265 Clinton street, Brooklyn. In the latter part of 1888 or early in 1889 she evidently undertook to conceal her whereabouts Frazier Gilman, her brother and guardian, testified that he did not know where she was and could not find her from about 1888 to 1897, when he learned of her confinement in London. The evidence shows that in February, 1889, she went to Hartford, Connecticut, and that for the next two or three years and perhaps longer, she lived there, and in some other places in Connecticut and Massachusetts. A witness testified that the last time Miss Gilman visited her home in Wakefield, Massachusetts, was in 1892, and she thinks she then spoke of going to Europe. There is no evidence of where she lived, or what she did, from about 1892 to 1897.

Several witnesses testified in behalf of the plaintiff, as to her conduct, personal appearance and mode of life during a considerable period of time including the years 1888 and 1889. That testimony tends to show that she was naturally of a nervous and excitable temperament; that she pursued litigation with obstinate persistence, refusing to be guided by the advise of her attorneys, and insisting on having her ideas followed which as a rule resulted disastrously to her interests; that for a considerable time prior to June, 1888, when the final decree for accounting was filed against her as executrix, she seemed to be working almost continuously over her accounts, and was then very nervous and easily excited; that she lived in comparative seclusion from 1888 on, especially after she went to Hartford, avoiding meeting people generally; that she

appeared to have little means, was poorly dressed, and lived inexpensively at different boarding houses; that her conversation with those whom she trusted was chiefly of her financial difficulties and her inability to extricate herself from them; that she seemed to believe that her brothers and other relatives had greatly injured her, and were pursuing her; and that she acted as if she feared she still was being followed and hunted by people. That testimony undoubtedly describes the conduct and appearance of an eccentric and erratic person. But the fact must not be overlooked that that testimony is the recollection of witnesses as to things done and said a quarter of a century ago. And the weight to be given to that testimony of the eccentric and erratic conduct of Anna K. Gilman during 1888 and 1889, as evidence that she was then insane, should be determined in the light of her then situation and circumstances. The evidence amply justifies the conclusion that she left New York and lived thus reclusively in and about Hartford because of a desire to avoid process servers, and to be secluded from those seeking to find her. The sitting Justice in his findings says: "She was in fact pursued by process servers, who served papers upon her, and probably by detectives, in order to locate her for the service of other papers. Her desire to conceal her identity and escape strangers was undoubtedly to avoid those official pursuers, and, to my mind, tended to prove a comprehension of what was going on rather than the presence of mental delusions. She was actually harassed and annoyed, as many other people have been, who have been for years the victims of the triumphs and disappointments of litigation, and was undoubtedly mentally harassed and annoyed in consequence. But nothing in the evidence is sufficient to establish the conclusion that in 1888 and 1889, her mental disturbance had actually gone beyond the degree of anxiety that would naturally result to any mind similarly situated."

We think it is a fact of significance that in none of the important litigation in which Miss Gilman was engaged in the courts of New York and Maine, both before and after the Haviland suit against her, was it ever suggested that she was mentally incapacitated and should be represented by a guardian. Her brother Frazier, the guardian, the only one of her relatives to testify in her behalf, and who testified that he thought she was insane in 1886 and then contemplated having her put under guardianship, was a party to a

petition, to which she was also a party, filed in the courts of New York for the sale of the Nathaniel Gilman homestead, and on which the homestead was sold to him in "1892 or 3." but no suggestion of her mental incapacity was made in that proceeding. Later, in 1896, he brought proceedings against her in the courts of Maine for the partition of real estate, and no suggestion was therein made that she was of unsound mind. Several business letters of Anna K. Gilman, written to the tenant of her property in Waterville, Maine, were introduced in evidence. Four of these were written in 1888, and six in 1889. Those letters do not disclose any trace of unsoundness of mind on the part of the writer. On the other hand they indicate a well ordered mind, comprehending clearly the business matters referred to, and disclosing a memory for business details of more than average power. No one, we think, can read those letters without being constrained to the conclusion that the writer of them was not then mentally incapacitated to manage her business affairs. Six of those letters were written while the Haviland suit in Maine was pending against her. One of her witnesses as to her mode of life and conduct while in Hartford, stated on cross-examination that Miss Gilman was "very bright and very good company." Another witness, speaking of her at that time, said "she was bright" and that she seemed well informed as to railroad stocks, advising the father of the witness to invest in a certain railroad stock.

Public policy requires that the judgments and orders of courts and the sales of property thereunder should not be lightly vacated and set aside upon a claim that the parties thereto were of unsound mind at the time they were rendered; especially after the lapse of more than a score of years during which other parties have acquired rights in the property involved. Such a claim must be established by proof that is clear and convincing.

We have not overlooked in our examination and study of this case, that evidence was presented tending to show that the property sold on the Haviland execution was of considerable more value than the judgment debt, and that it seems unreasonable that Miss Gilman, if she was not then mentally incapacitated, would have thus abandoned the property. But in this connection it is to be borne in mind that she was at that time apparently so deeply indebted on

other judgments and otherwise that there was no feasible way for her to save the property, and no object for her to redeem it from the Haviland sale.

Our conclusion upon the whole evidence is that it does not clearly appear that the decision of the sitting Justice dismissing the bill on the merits was erroneous.

Appeal dismissed.
Decree below affirmed.

HENRY H. PIERCE, in Equity, *vs.* JOSIAH PIERCE, et al.

Cumberland. Opinion December 28, 1915.

Construction. *Implied or precatory trusts.* *Intention of testator.* *Recommendation.* *Trust.* *Will.*

This case brings before the Law Court for construction portions of the will of Josiah Pierce who resided in England at the time the will was made, and died there December 22, 1913. The will was drafted by the testator himself, an experienced lawyer.

1. In the interpretation of wills the cardinal rule, to which all other rules must bend, is that the intention of the testator must prevail, provided it is consistent with the rules of law; and that intention is to be found in an examination of all parts of the will in the light of the existing circumstances.
2. The crucial test to determine if a trust is created by precatory words is whether the testator actually intended by his words to control the action of his legatee by imposing an imperative duty upon him in respect to the property, or whether he intended his words to be merely advisory, leaving it to the discretion of the legatee whether that advice should be followed or not.
3. Whenever a testamentary disposition clearly indicates an intention to give the donee an absolute and unrestricted ownership of the property, any subsequent provision tending to impose restraint upon the alienation of such an estate is void.
4. Precatory words in a will should not be accorded such force and meaning as will deprive the donee of his beneficial use and full right of disposal of a gift otherwise absolute, unless the court can gather from the rest of the will and the attending circumstances, an intention of the testator which is reconcilable with the idea of a trust imposed upon the legal estate devised.

5. It is not to be presumed that a testator intended as imperative a request to his devisee which is incapable of being effectively carried out. Precatory words will not be held to create a trust that cannot be practicably executed.
6. Held: That the testator gave to his grandson, under clause 4 of the will, an absolute and unqualified estate in the property therein devised to him; and that the language of clause 5, considered in the light of the previous absolute devise of the real estate made in the same will, cannot be accorded the force of a command.
7. The conclusion of the court, therefore, is that the defendant Josiah Pierce had the right to make the sale of the growth to the defendant Warren, which is complained of, without first offering the property to the plaintiff at the value at which the property was last previously assessed for the purpose of taxation as requested by the testator in clause 5 of this will.

On report. Bill dismissed with costs.

Bill in equity by Henry H. Pierce against Josiah Pierce and Hugh M. Warren, for the construction of the will of Josiah Pierce. Answers and replication were filed in the case. By agreement of the parties to the cause, it was reported to the Law Court upon the amended bill, answer and agreed statement of facts; and evidence filed herewith, for determination, upon so much of the evidence as may be held by the court to be legally admissible, the court will render such judgment as the law and facts may require.

The case is stated in the opinion.

Libby, Robinson & Ives, for complainant.

Richard Webb, for respondents.

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

KING, J. This case brings before us for construction portions of the will of Josiah Pierce who resided in England at the time the will was made, and died there December 22, 1913.

The provisions of the will involved are:

"2. I give devise and bequeath to my brother George Washington Pierce the use and occupation of all my real estate situated in the Town of Baldwin in Maine aforesaid together with all my furniture books and other personal effects upon the said premises for and during his life without power to alienate or encumber the same in any manner or to cut or permit to be cut any wood or timber

thereon except such as may be necessary for repairs thereof or for fuel thereon.

3. I give to my trustee all moneys belonging due or owing to me in the State of Maine upon trust to get in and receive the same and to apply the income thereof or if necessary the Capital Firstly in discharge of any proper fees and expenses incurred by my trustee and taxes in relation to the said real estate or otherwise in connection with this trust Secondly in payment during the life of my said brother George Washington Pierce of all just taxes insurance repairs and other necessary outgoings connected with my said real estate and Thirdly in payment of the maintenance of my said brother George Washington Pierce during his life.

4. From and after the decease of my said brother George Washington Pierce and subject to the above named tenancy in his favor during his life I give devise and bequeath all the said real estate furniture personal effects moneys and property included in Clauses 2 and 3 hereof to my grandson Josiah Pierce absolutely.

5. Should my said grandson Josiah Pierce or his Guardian or Guardians during his minority decide to sell the said real estate then I request him or them to first offer the property to the sons of my brother Lewis Pierce in order of seniority at the value at which the property was last previously assessed for the purposes of taxation. And in any future sale or transfer of the said property I request that provision shall be made for the preservation of the family burial ground and the monuments thereon."

George Washington Pierce predeceased the testator. The Baldwin real estate consists of about 350 acres all well wooded with timber, excepting about 20 acres. September 3, 1914, the defendant Josiah Pierce, the grandson and devisee of the testator, executed and delivered to the defendant Warren, for a consideration of $15,500, a deed of all the standing timber and other wood growth upon said real estate, excepting the timber upon a small part thereof upon which are located the buildings and the family burial ground. The deed to Warren was made and delivered without the knowledge of the plaintiff, who is the eldest son of Lewis Pierce, and without any offer of the property to him at the value at which it was last previously assessed for the purposes of taxation, which was $7,600. The plaintiff, thereupon, brought this bill in equity the object of which is to have Warren enjoined from cutting or injuring any of

the growth on the premises, to have the deed of the growth declared void and cancelled, and to have the premises conveyed to the plaintiff upon his payment of the $7,600, with such provision as the court may deem proper for the preservation of the family burial ground and the monuments therein.

The question presented is as to the meaning of clause 5 of the will. The plaintiff claims that a trust was therein created in his favor in respect to the real estate. Is the language there used mandatory and imperative, or merely suggestive and advisory? Does it impose upon the devisee in clause 4 a legal duty towards the plaintiff in respect to the real estate divised, or does it only express the testator's advise and recommendation to the devisee which he was not bound to follow?

The law of England is substantially the same as that of this State, as to the rules to be applied in the interpretation of wills, and as to the doctrine of implied or precatory trusts. That doctrine was fully and clearly stated in the recent case of *Clifford* v. *Stewart,* 95 Maine, 38, and need not here be discussed at length. It is beyond doubt that in the interpretation of wills, in some cases, words of recommendation, request, desire, entreaty, hope or confidence, have been held sufficient to create a trust, and that in other cases the same or similar words and expressions, and even words ordinarily importing command and obligation, have been held to be advisory only and not to create a trust. The cardinal rule, as is often said, to which all other rules must bend, is that the intention of the testator must prevail, provided it is consistent with the rules of law. And that intention is to be found in an examination of all parts of the will in the light of the existing circumstances. The interpretation of one will may be of little value as a guide for the interpretation of another though more or less similar; for each will differs in its scheme, as well as in the situation and circumstances of the testator. "You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe." Lindley, L. J. in In re Hamilton, (1895) 2 Ch. 370, 373. "The crucial test after all is whether the testator actually intended his language to be imperative, whether he intended to govern and control the action of the legatee, to impose an obligation or duty upon

him in the use of the property, or whether he intended his words to be merely advisory, no matter how urgently expressed, still leaving it to the discretion of the legatee whether that advise should be followed or not." *Clifford* v. *Stewart,* supra.

Another rule to be observed is, that whenever a testamentary disposition clearly indicates an intention to give the donee an absolute and unrestricted ownership of the property, any subsequent provision tending to impose a restraint upon the alienation of such an estate is void. *Turner* v. *Hallowell Savings Institution,* 76 Maine, 527. Precatory words in a will should not be accorded such force and meaning as will deprive the donee of his beneficial use and full right of disposal of a gift otherwise absolute, unless the court can gather from the rest of the will and the attending circumstances an intention of the testator which is reconcilable with the idea of a trust imposed upon the legal estate devised. "When to impose such a trust would be to nullify previous expressions in the will and to create a repugnacy between its different parts, then the rules of construction forbid the attempt." *Clay* v. *Wood,* 153 N. Y., 134, 142.

Applying these rules to the case at bar we think the plaintiff's contention is not sustainable.

The testator was 79 years of age when the will was executed, and had been deprived of his eyesight for some years. He was a lawyer of experience, and dictated the will to his wife. Its language and provisions clearly indicate that he was not inexperienced in drafting testamentary dispositions, and it is reasonable to infer that he understood the rules applicable to their construction.

The first five clauses of the will relate to his real and personal property in Maine. By the subsequent provisions, as modified by the codicile, all the remainder of his estate is given to his widow for life. Upon her death one-third of the estate is to go to his daughter, one-third in equal shares to his two grandsons (the defendant and his brother) sons of the testator's deceased son, and the widow is given a power to dispose of the remaining third by her will.

Independent of the request contained in clause 5, there is nothing in the will to indicate any intention of the testator to make the sons of his brother Lewis partakers of his bounty. They are not otherwise referred to by him. And his relationship to them is not sufficient we think to indicate that he felt such an interest in them, or

sense of duty to provide for them, as would make it reasonably certain that he intended by the request contained in clause 5 to make an imperative testamentary provision for them.

Nor do we perceive any sufficient proof that he intended the provisions of clause 5 to be imperative to effectuate a purpose that the ownership of the real estate should not pass out of the Pierce family. The request in clause 5 tends only to restrict the sale of the property by his devisee. It does not prevent its unlimited transfer by will or descent. And it does not apply at all to this plaintiff should he become the owner of the property under the provisions of clause 5. He would then be at liberty to sell the property, in whole or in part, to whomsoever he chose. It does not seem reasonable, therefore, that the testator intended to clothe his otherwise absolute devise of this real estate to his grandson and namesake with a trust that would deprive him of the right to its beneficial enjoyment and full power to dispose of it, and leave his nephews, to whom the property might pass under the alleged trust, wholly unrestricted in their power to use and alienate it.

Again it is not to be presumed that a testator intended as imperative a request to his devisee which is found to be unreasonable and incapable of being effectively carried out. Precatory words will not be held to create a trust which can not be executed. The provisions of clause 5 are not feasible, except perhaps in the one contingency that the devisee should decide to sell the entire property as a whole. Is it reasonable to suppose that if the devisee decided to sell a specific portion of the real estate the assessed valuation of that portion could have been ascertained? Certainly not the assessed value of the growth on a part of the land, which he did in this case decide to sell. Had he decided to sell some ten acre lot, or the growth thereon, would it not have been impossible to have effectively carried out the request in clause 5 in respect to such proposed sale? Such property is usually assessed for purposes of taxation as a whole; certainly the growth is not assessed separately from the land.

But the learned counsel for the plaintiff urges that the devisee decided to sell the whole property, having sold in fact that part which made up its chief value, and offered to sell the rest, hence the contingency contemplated by the testator arose and the provisions of clause 5 became applicable, and possible to be carried out. But

that does not remove the infirmity of the request contained in clause 5, unless it be held that the testator intended that request to be carried out *only* in case the devisee should decide to sell the property as a whole. But that construction would defeat the plaintiff's claim; and he confidently argues against it.

The conclusion follows, of course, that if the devisee could not make the sale of the growth in question without complying with the request in clause 5, he could not sell any part or portion of the property however small without complying with that request. If he could not sell the stumpage of the growth, then manfestly he could not accomplish the same end by cutting the growth and selling the logs and lumber. And such is the plaintiff's contention as urged in his brief. We do not think the testator intended to thus limit and restrict his grandson in the use and enjoyment of the real estate devised to him in clause 4. We are unable to discover such an intention from the whole will and the existing circmustances in the light of which it is to be construed.

And, moreover, we are constrained to the conclusion that the testator gave to his grandson Josiah Pierce, under clause 4 of the will, an absolute and unqualified estate in the property therein devised to him. The material words of the devise are: "I give devise and bequeath all the said real estate furniture personal effects moneys and property included in clauses 2 and 3 hereof to my grandson Josiah Pierce *absolutely*." In construing the language of that devise it must be kept in mind that it was the language selected by the testator himself who was an experienced lawyer. We attach importance to his use of the word "absolutely". Being a lawyer, it is highly improbable that he would have used the word "absolutely" in that connection in any other sense than its usual and ordinary meaning, signifying, free from limitations, uncontrolled, and without condition. If he intended his devise to his grandson to be limited, on condition, and subject to restrictions as to its use and enjoyment, is it reasonable to conclude that he, being a lawyer of experience, would have said that he made the devise "absolutely"? We think not.

In our view of clause 4 of the will, therefore, we must read the language of clause 5 in the light of a previous absolute devise of the real estate to the defendant Josiah Pierce made in the same will.

So reading it we cannot accord to the testator's request therein expressed the force of a command. To do that would be to find that the testator intended thereby to nullify his absolute gift of the property to his grandson as previously made in the same will, an attempt which the well settled rules of construction forbid.

Our conclusion, therefore, is that the defendant Josiah Pierce had the right to make the sale of the growth to the defendant Warren, which is complained of, without first offering the property to the plaintiff at the value at which the property was last previously assessed for the purposes of taxation as requested by the testator in clause 5 of his will. Accordingly the entry will be,

Bill dismissed with costs.

ANNIE F. ALDRICH *vs.* FRANK L. BOOTHBY, et al.

Cumberland. Opinion December 30, 1915.

Cutting Machine. Damages. Defective Machine. Special Demurrer.

Trespass on the Case.

An action of trespass on the case for the recovery of damages for an injury suffered by plaintiff while in employment of the defendants, while at work in the operation of a machine known as a cutting machine.

Held:

Where the declaration in such case alleges that the machine when necessarily stopped by plaintiff suddenly started, causing an injury, an allegation "that the starting of the machine was through no fault or negligence on her part, but wholly on account of certain defects in the lever and attachments connected thereto used in starting and stopping said machine" is too general and indefinite.

On exceptions by plaintiff. Exceptions overruled. Demurrer sustained.

This is an action on the case to recover for personal injuries sustained by plaintiff while employed by defendants in operating a cutting machine. The defendant filed a special demurrer to the plain-

tiff's declaration and the presiding Justice sustained the demurrer. To this ruling, the plaintiff excepted.

Hinckley & Hinckley, for plaintiff.

William Lyons, for defendants.

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

BIRD, J. This is an action of trespass on the case for the recovery of damages for an injury suffered by plaintiff while in the employment of defendants. The latter filed a special demurrer to the declaration and the ruling of the court sustaining the demurrer is before us upon the exceptions of plaintiff.

The declaration alleged that while the plaintiff was at work in the operation of a machine, commonly known as a cutting machine, "it became necessary for her to stop the machine in order to remove certain materials which had become clogged in said machine; that she shut down said machine and started to remove said material; that while so engaged in removing said material and without fault on her part, the machine suddenly and without warning, started, catching her hand therein and seriously injuring the same; that the starting of the machine was through no fault or negligence on her part, but wholly on account of certain defects in the lever and attachments connected thereto used in starting and stopping said machine;—"

Among the many special grounds of demurrer is this:—

"Because the plaintiff does not allege how or in what respect the lever and attachments connected thereto in starting and stopping said machine were defective, dangerous and out of repair."

The objection appears to be well taken. It is uncertain whether the defects are in the lever or in its attachments or in all or, if not in all and in the attachments, in which of the attachments, nor is the nature or character of the defect alleged. Good pleading requires in such case a definite statement of the particular defect, so far as may be practicable to state it, which caused the injury. *McGraw* v. *Paper Co.,* (Strout, J.) 97 Maine, 343, 346. The machine in question cannot be so complicated as to render it impos-

sible or impracticable to allege the particular defect. At the trial of the cause, the particular defect, as a general rule, to which we hold this case no exception, must be shown, and the sources of information thereof must be as available before suit brought as at the trial.

Nor do we think the existence of defects in the lever and attachments to be well pleaded. Their existence is not definitely stated nor alleged, but is to be collected by inference or argument only.

It is not believed necessary to consider the other grounds of demurrer. For the reasons above given the entry must be

Exceptions overruled.
Demurrer sustained.

GEORGE M. HAINES, pro ami, *vs.* FRANK W. BROWN.

Penobscot. Opinion December 30, 1915.

Fee Simple. Life Estate. Tenant for Life. Will. Writ of Entry.

Writ of entry for recovery for the recovery of a parcel of land in Etna. The demandant declares upon an estate in fee simple, and defendant, pleading the general issue, alleges by way of brief statement that he is not the owner of the land in fee simple, but is rightfully in possession as tenant for life.

Held:

1. The effect, as employed in a deed, of the words, "this deed to take effect at the decease of the grantor and not before," is to reserve a life estate in the grantor.
2. Where by devise of real estate for life, provision is made for sale of such real estate if absolutely necessary for the maintenance and support of the devisee, it is incumbent on those claiming under such devise to show that the power has been well executed and that the contingency has happened.

On report. Judgment may be entered for demandant for an estate, in the premises demanded, for the lifetime of Rosannah Brown.

This is a real action brought by George M. Haines, an infant under the age of twenty-one years, who sued this action by next friend, against Frank W. Brown, of Etna, Maine, to recover a parcel of land situate in said Etna and described in the writ. Plea, the general issue and brief statement. At the conclusion of the evidence, it was agreed by the parties to report the case 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. Mitchell, and B. W. Blanchard, for plaintiff.

George E. Thompson, for defendant.

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

BIRD, J. This is a writ of entry brought by the infant plaintiff, by next friend, for the recovery of a parcel of land in Etna. The demandant declares upon an estate in fee simple and defendant, pleading the general issue, by way of brief statement alleges that he is not the owner of the land in fee simple, but is rightfully in possession as tenant for life.

It appears that the land, possession of which is sought, was until his decease, the property of one Reuben Brown. By his will, after a nominal pecuniary legacy to each of five sons and two daughters, he gave and devised the rest and residue of his estate to his wife Rosannah Brown to her sole use as long as she should remain his widow or until her decease with the privilege of selling any part thereof, if absolutely necessary, for her support and maintenance, "but under no other consideration," with remainder, not used for her support, to his two sons, Alvin C. and Noyes Brown.

The testator died in the year 1894. His widow, Rosannah, continued to live upon the demanded premises, while defendant, who had married, lived a mile or more distant. The evidence tends to prove, and it is not contradicted, that late in the year 1897 or in early January of the following year Rosannah Brown went to the home of defendant and expressed a desire to live in his family. On the seventeenth of January, 1898, Alvah (Alvin) C. Brown, son of Reuben Brown conveyed his interest in the premises to his brother

Noyes Brown who, two days later conveyed all his interest to Nora Brown, the wife of defendant. The uncontradicted evidence also tends to prove that about this time defendant and his family removed to the home of his mother upon the lot in question and by warranty deed dated February 10, 1898, Rosannah Brown, in consideration of maintenance, care, etc., to be furnished her by the grantee, conveyed the lot of land to Nora Brown. In this deed, immediately after the description of the lot occurs the following: "Meaning by this to convey all my right, title and interest to the homestead farm of the late Reuben Brown. The support of the said Rosannah Brown to be in the family of the said Nora Brown and this deed to take effect at the decease of said Rosannah Brown and not before and not to be transferred without Rosannah Brown joining in this deed." Nora Brown died in December, 1906, and until her death Rosannah Brown was confessedly satisfied with the support and maintenance afforded her. About three weeks before her death Nora Brown conveyed the premises by deed of quitclaim to her husband, the defendant during his life, and the remainder to her four children. This deed provided that defendant "carry out all the conditions and considerations mentioned in said Rosannah Brown's deed to the said Nora Brown." Apparently his mother was provided with proper sustenance and care by defendant at least until December, 1910, when the woman, whom defendant married in April, 1911, came into the family to act as housekeeper. In April or May, 1911, the mother without demand for better sustenance and care and without stating to defendant, so far as the case discloses her reason therefor, left the premises and repaired to the house of her son Alvah where she has since resided. By warranty deed of April 26, 1912, in consideration of her support and maintenance, etc., she conveys to her son Alvah the lot demanded and covenants that the premises are free of "encumbrances; except a conditional deed to Nora Brown, the conditions of which have long since been broken." The grantee Alvah C. Brown by deed of warraty dated May 20, 1912, conveys the premises to the plaintiff.

What was conveyed to Nora Brown by the deed of Rosannah Brown of February 10, 1898? The grant is of the lot in fee simple. The caveat clause following the description, "meaning by this to

convey all my right, title and interest to the homestead farm of the late Reuben Brown," neither enlarges nor diminishes the grant. If it has any effect, it is to declare the intention of the grantor to convey not only of her life estate, which was absolute in her, but also the remainder which she might convey upon the happening of a contingency. The effect, however, of the words "this deed to take effect at the decease of said Rosannah Brown and not before" was to reserve a life estate in the grantor, Rosannah Brown, and, assuming the contingency provided for in the will of the deceased husband to have arisen, to convey a vested remainder to the grantee. *Watson* v. *Cressey,* 79 Maine, 381, 382; *Achorn* v. *Jackson,* 86 Maine, 215, 218. Immediately following the words last quoted from the deed occur the following: "and not to be transferred without Rosannah Brown joining in this deed." The expression is doubtless intended to mean "not to be transferred without Rosannah Brown joining in the conveyance." If these words refer to the life estate reserved, as we have seen, to Rosannah Brown, they are of no effect as no deed save hers could convey it. If these words refer to the remainder conveyed, we need not determine whether they are repugnant to the grant or a restraint upon alienation, if it be found that the deed of Rosannah Brown to Nora Brown did not effect a conveyance of the remainder to the latter.

The power to sell given Rosannah by the will was contingent upon such sale being absolutely necessary for her maintenance and support. It is incumbent on those claiming under her to show that the power was well executed and that the contingency has happened. No declaration nor recital to that effect is sufficient. There must be competent evidence. *Stevens* v. *Winship,* 1 Pick., 318, 319, 327; *Warren* v. *Webb,* 68 Maine, 133, 136. See also *Jones* v. *Bacon,* Id., 34; *Larned* v. *Bridges,* 17 Pick., 339, 342.

There is in this case no evidence whatsoever that the contingency provided for by the will had happened, either at the time of the widow's conveyance to Nora Brown or to Alvah Brown. In neither case, therefore, can we find conveyance of the remainder. But the title of the remaindermen, the sons of the testator, was in Nora Brown at the time of her conveyance to defendant. The demandant, consequently, has derived under his deed no title to the remainder.

His deed however, is effectual to convey to him an estate for the life of Rosannah Brown and he is entitled to judgment for an estate in the premises for her life. *Pillsburry* v. *Brown,* 82 Maine, 450, 456.

Judgment may be entered for demandant for an estate, in the premises demanded, for the lifetime of Rosannah Brown.

So ordered.

HARRY H. DONNELL, Applt., from Decree of Judge of Probate.

Sagadahoc. Opinion December 31, 1915.

Administrators. Commissioners. Creditors. Insolvency. Inventory. Petition to Judge of Probate to examine claim. Private claim of administrator. Statute of Limitations. Will.

1. Upon petition of the administrator to the Judge of Probate to examine and allow his private claim, annex it to the list of claims, the Judge dismissed the petition.
2. In the opinion of the court, whether the petitioner's claim should have been allowed or disallowed is a pure matter of law.
3. The commissioners in insolvent estates have nothing to do in passing upon the allowance of the private claim of an administrator against the estate.
4. It does not go into their hands even for annexation to the list of claims allowed.

On report. Appeal sustained. Case to be remanded to probate court for determination in accordance with this opinion.

This is a petition by Harry H. Donnell, one of the administrators with the will annexed of the insolvent estate of William T. Donnell, late of Bath, Maine, asking that his private claim against deceased may be examined and allowed by the Judge of Probate and annexed to the list of claims, etc. The cause, by agreement of parties, was reported to the Law Court upon agreed statement of facts, or so

much thereof as may be legally admissible; the Law Court to render such final decision as law and justice may require.

The case is stated in the opinion.

W. S. Glidden, for appellant.

J. M. Trott, for respondent.

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

SPEAR, J. This case comes up on report. Harry H. Donnell of Bath, was one of the administrators with will annexed, of the estate of William T. Donnell, late of Bath. William T. Donnell died October 25, 1910, testate. His will was duly probated and Henry H. Donnell was appointed one of the administrators and qualified as such. An inventory of the estate was duly filed. On the 7th day of May, 1912, the estate was represented insolvent, and a warrant to commissioners in insolvency was issued on the same day. Henry H. Donnell, one of the administrators, had a private claim against the estate, amounting in the aggregate to the sum of $2295.88, which is admitted to be correct, and subject to the administration of claims of the fifth class. On November 9, 1912, the commissioners made their report showing claims of creditors of the fifth class allowed by them to the amount of $22,204.68, and this report was accepted and approved. On the first Tuesday of August, 1914, the administrators settled their fourth account, showing a balance in their hands of personal assets to the amount of $11,876.82. Upon petition of the creditors the probate court ordered from this balance a distribution of $9000 to be paid pro rata upon their claims, as allowed by the commissioners, leaving a balance of $2876.82, which was reserved for a percentage on contingent claims and future charges of administration. The dividend of $9000 was distributed and paid as ordered. No new assets have come to the hands and knowledge of the administrators and no final account has yet been filed or allowed. There are no unpaid claims now outstanding of the first or fourth classes. On the first day of September, 1914, and subsequent to the above proceedings, Henry H. Donnell, one of the administrators petitioned to the Judge of Probate to examine and allow his claim, annex it to the list of claims, and decree a

proportional dividend to him. Upon hearing the petition was dismissed, and an appeal taken, alleging as a reason, that the decree was contrary to law.

If we understand the position taken by the creditors, it is that, while the appellant's right of petition is not barred by the statute of limitation, it is within the discretion of the court to allow or refuse to allow the administrator's private claim. We find ourselves unable to adopt this view. In the opinion of the court whether the petitioner's claim should have been allowed or disallowed is a pure matter of law, depending upon the plain language of the statute. Chapter 68, Sections 3, 4, 5, 6, 7, 8, and 9 provide for the appointment of commissioners on insolvent estates and the mode of their proceeding. But none of these provisions show that the commissioners have anything whatever to do in passing upon the allowance of the private claim of an administrator against the estate. It doesn't go into their hands even for annexation to the list of claims allowed. Section 8 of Chapter 68 reads as follows: "Interest shall be cast on claims allowed, from the death of the debtor to the time of the commissioners' first report, unless the contract otherwise provides. At the expiration of the time limited, the commissioners shall make their report to the Judge, who, before ordering distribution, may recommit it for the correction of any error appearing to him to exist. Their fees shall be paid by the administrator. Any claim which he has against the estate, shall be examined and allowed by the Judge and by him annexed to the list of claims, and a proportional dividend decreed to him." The last sentence of this section applies solely to the private claim of an administrator against an insolvent estate and shows that such a claim, as before suggested, is not required to be presented to the commissioners in any form. The language of the statute is clear and says that such a claim shall be examined and allowed by the Judge, and by him, not the commissioners, annexed to the list of claims, and a proportional part decreed by the Judge to him, the administrator, holding the private claim. In other words, a private claim is a distinct and exclusive matter from beginning to end for the adjudication of the Judge of Probate. Nor does he pass upon such a claim as a matter of discretion, but as a matter of law. If the adjudication were a

matter of discretion of course there would be no appeal. His adjudication would be final. The reason for appeal in the present case was that the adjudication of the probate court in disallowing the petitioner's claim was unlawful. The only question, therefore, which arises for consideration is whether the petitioner presented his claim to the probate court for adjudication within the time limited by the statute.

It is now well established in this State that the private claim of an administrator is not within the bar of the statute against other creditors. In fact the appellees in this case frankly admit that the petitioner's claim is not barred by the statute of limitations. It is, therefore, unnecessary to discuss this feature of the case further. If, then, not barred by the statute, did any rights of the creditors legally intervene to prevent the allowance of the petitioner's claim? This brings us to the inquiry, What were the creditors' rights against this insolvent estate including that of the petitioner? For it must not be lost sight of in this proceeding that the petitioner was a creditor of the fifth class with the other creditors. The rights of creditors are stated in *Fogg* v. *Tyler,* 111 Maine at page 551 in this language: "But partnership estates, applicable to debts of the same class, should be distributed equally among creditors of the same class." This rule applies equally to private estates. Therefore, all these creditors including the petitioner were entitled to precisely the same percentage of the insolvent estate. How, then, can the objecting creditors be injured by the delay in allowing the petitioner's claim? They are just as well off and no worse off than if his claim had been annexed before the first dividend; and perhaps they are better off since, if there is not enough now in the hands of the administrators to pay the petitioner's percentage in full, the creditors have profited pro tanto.

So far as the percentage is concerned, the creditors are also benefitted, since, if the petitioner's claim had been added before the percentage was struck, it would have diminished the rate to be paid, and the creditors would have received proportionately less. They, therefore, can have no complaint upon this score. Accordingly, we are unable to discover any legal or equitable objection which the creditors could raise to the allowance of the petitioner's claim. By

such an allowance the original rights of all the creditors will be preserved and the original right of none impaired, as would otherwise be the case if the petitioner's claim is disallowed.

It is the opinion of the court that the Judge of Probate has exclusive jurisdiction of the adjudication of the petitioner's claim; that the allowance or disallowance of the claim was a matter of law and not a matter of discretion; that as a matter of law the claim was not barred by the statute of limitation; and, inasmuch as the amount of the claim is admitted to be correct and due, if allowable, it should have been allowed by the Judge of Probate, annexed to the list of claims and a proportional dividend decreed to the petitioner out of the funds left in the hands of the administrators, after the settlement of their fourth account, and available for the payment of claims of the fifth class against the estate.

Appeal sustained. Case to be remanded to Probate Court for determination in accordance with opinion

ALDEN J. VARNEY *vs.* WILSON H. COLE.

Aroostook. Opinion December 31, 1915.

Account annexed. Delivery. Sale. Special Contract. Written Contract.

It is held that a fair interpretation of the whole contract requires a finding in favor of the plaintiff.

On report. Judgment for plaintiff for $450 and interest from the date of the writ.

This is an action of asumpsit upon a contract in writing to recover the sum of $450 for 150 barrels of seed potatoes which defendant had, according to the contract in writing declared on in the writ. The potatoes were destroyed by fire. At the conclusion of the evidence, by agreement of parties, the case was reported to the Law Court for determination upon so much of the evidence as is legally admissible.

R. W. Shaw, for plaintiff.

Madigan & Pierce, for defendant.

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

SPEAR, J. The facts in this case so far as material are as follows: The plaintiff, Varney, in the spring of 1913 sold to the defendant, Cole, one hundred and fifty barrels of New Snow potatoes and was paid at the rate of two dollars per barrel or three hundred dollars, ($300). Cole agreed to plant the potatoes and to deliver the yield of those potatoes to Varney on demand any time up to April 1, 1914. Upon delivery Varney was to pay Cole fifty cents per barrel more than the market price for table stock. If Varney complied with this agreement Cole agreed to pay him an additional three dollars per barrel for the seed, or four hundred and fifty dollars, ($450).

Cole planted the potatoes, dug and stored the yield until on February 22, 1914, without fault on his part they were destroyed

by fire. Varney demanded delivery after the fire, and the defendant being unable to comply, Varney demanded that Cole pay him for the seed potatoes at five dollars per barrel, less three hundred dollars ($300), received, leaving a balance of four hundred and fifty dollars, ($450).

The defendant contends: First, that the plaintiff cannot recover on an account annexed. This contention is sustained. Second, that the plaintiff cannot recover upon the special contract because he says, he contracts the performance of which depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance, and cites numerous instances claimed to fall within the rule.

But in order to determine whether the rule, if, as claimed by the plaintiff, applies to the solution of the case at bar, it seems advisable to insert the entire contract, which reads as follows:

"This indenture made this 13th day of May, A. D. 1913, by and between Alden J. Varney of Hodgon, Maine, of the first part and Wilson H. Cole, Maine, of the second part, Witnesseth as follows, to wit: the said Cole agrees to plant on his farm in Crystal, Maine, 150 bbls. or 25 acres of the New Snow Potatoes and to sell and deliver to said Varney all merchantable potatoes grown on said 25 acres and hold in storage said potatoes until April 1 first 1914, said potatoes to be stored and delivered free of cost to said Varney at the nearest railway station. And will further agree to deliver said potatoes at any time before April first 1 1914, within two days notice from said Varney, said Cole further agrees to plant said potatoes on his best potato soil and to use one ton of high grade fertilizer per acre and to grow one prize acre to be measured by three reliable men before it is dug. Said men to weigh each barrel of potatoes grown from said acre, said men shall vouch as to the number of pounds grown on said acre. Said Cole further agrees to remove the potato tops from several rows of said acre and have a photograph taken of said rows. Said Varney further agrees to pay said Cole fifty cents per barrel for said New Snow Potatoes, than is paid for potatoes for table use, on the day said Cole delivers said potatoes to the station. Said Cole further agrees to pay said Varney

four hundred and fifty dollars ($450) if said Varney fulfills this agreement."

This contract, as is apparent, is inartificially drawn, and for a clear understanding must be resolved into at least two independent parts. The first provides that the defendant shall take of the plaintiff a certain quantity of seed potatoes, plant them in a certain way, harvest them, store them, and, upon a specified demand, deliver these specific potatoes to the plaintiff at a certain price per barrel, which was an increase, as stated, of fifty cents above that paid for potatoes for table use. These stipulations to furnish seed and make demand embrace all Varney was required to do to fulfil his part of the contract. But these potatoes were all destroyed by fire, which made it impossible for the defendant to comply with this part of the contract requiring him to deliver the potatoes in specie. If, therefore, the plaintiff's action was to recover for damages, under these circumstances, for the failure of the defendant to deliver the potatoes, as agreed, much might be said in favor of the defendant's contention that the rule which he invokes should be applied.

The second part of the contract and the one upon which the plaintiff relies, is not, however, based upon a demand and refusal to deliver the specific potatoes. It is based solely upon the fulfillment by Varney of his part of the agreement, that is, the first part, as above stated. All he could do to fulfil this part was to demand the potatoes of Cole. If Cole upon demand had had possession of the potatoes, and refused to deliver them, Varney had done all he could do to fulfil the first part of the contract. If Cole, on account of the destruction of the potatoes, without his own fault, was relieved from delivering them, then Varney had equally, by his demand, done all he could to fulfill the first part of the contract. In contemplation of law, he stood ready, upon his demand, to take the potatoes, and pay the fifty cents extra. In fact it is not in controversy that the plaintiff was without fault.

We now come to the second part of the contract, which is independent of the first part, except that it expresses the consideration upon which the defendant agrees to perform the second part. By this the defendant in express terms without ambiguity, qualification or reservation "further agrees to pay said Varney four hundred and fifty dollars ($450.00), if said Varney fulfills this agreement;"

that is the first part, which as above appears, Varney did do. This stipulation on the part of the defendant was absolute, and neither unlawful nor impossible at the time it was made. Nor is its performance impossible now. It does not depend at all upon the delivery of the potatoes to the plaintiff. The plaintiff seeks to recover, not for non delivery, but for 150 barrels of seed potatoes, which the defendant had and used, and for which, if the plaintiff met his part of the contract, he agreed to pay the sum of $450.00, in addition to $300.00 he had previously paid. But the defendant contends that this part of the contract depends upon a complete performance of the first part; that it was not the intention of the defendant to pay $450.00 extra for the seed potatoes unless he got fifty cents extra for the crop raised. On the other hand there is nothing in the agreed statement to show that the seed potatoes at the time they were delivered to the defendant were not worth $450.00 more than had been paid. There is nothing in the terms of the contract to show that they were not worth this sum; and the plain language of the contract stipulates to pay it if Varney did as he agreed. Varney did do as he agreed, which was a valid consideration for the promise of Cole to pay the $450.00, which he agreed to do.

We are of the opinion that a fair interpretation of the whole contract requires a finding in favor of the plaintiff. The entry, therefore, must be,

Judgment for the plaintiff for $450.00 and interest from the date of the writ.

HOSEA BUTTERFIELD, in Equity, *vs.* JENNIE B. LANE, et als.

Knox. Opinion Decemer 31, 1915.

Bill in Equity. Cloud on Title. Deed. Mortgage Deed. Support.

This case involves the priority of the foreclosure of a mortgage. The defendant took a warranty deed of the plaintiff and as a part of the same transaction gave back to him a mortgage without any exceptions conditioned for his support upon the premises. When the deed was delivered there was an outstanding mortgage upon the premises of which the plaintiff knew and whose duty it was to pay it. Of this mortgage the defendant had no knowledge. Later the mortgagee demanded payment. The defendant's husband paid it, foreclosed it, assigned it to the defendant and the equity expired vesting the title in her. After this event, the plaintiff foreclosed his mortgage and the equity expired. The plaintiff claims that his foreclosure should prevail, under the rule that the purchase of the outstanding mortgage by the defendant under her warranty in her mortgage should enure to his benefit.

Held:

Such a transaction on the part of a grantor in a warranty deed is so tainted with legal, if not actual, fraud, that a fair application of the well established rules of law will intervene to prevent him from profiting by his own wrong in obtaining the benefit of such an after acquired title.

The rule invoked by the plaintiff is based upon the doctrine of estoppel; but the rule of estoppel was ingrafted upon the common law to prevent wrongs and not to promote them.

On report. Bill dismissed.

This bill in equity was brought by plaintiff to remove a cloud from certain real estate which the plaintiff conveyed to Jennie B. Lane, who received from plaintiff a mortgage providing for plaintiff's support upon the premises conveyed. Answer and replication were filed. At the conclusion of the hearing in this cause, the same, by consent of parties, was reported to the Law Court to render such final judgment as the legal rights of parties require.

The case is stated in the opinion.

M. S. Holway and E. B. Burpee, for plaintiff.

M. A. Johnson, for defendant.

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

SPEAR, J. This case involves a bill in equity brought by the plaintiff to remove the cloud from, and recover title to, certain real estate which the plaintiff conveyed to Jennie B. Lane, taking from her a mortgage providing for his support upon the premises conveyed. The facts are as follows:

Previous to 1883 Oscar Rokes was the owner of the premises in question. That year he mortgaged the premises in consideration of $155.00 to J. G. Piper. In 1904 Rokes gave a warranty deed to Alethere E. Butterfield, wife of Hosea Butterfield, the plaintiff, excepting the Piper mortgage which the grantee assumed. Rokes took from her a mortgage providing for his support and maintenance on the premises, in which Mrs. Butterfield covenanted that the place was free from incumbrances except the Piper mortgage, which she assumed. In 1911 Alethere E. Butterfield by her warranty deed conveyed to Hosea Butterfield, her husband, the plantiff, the premises in question subject to the terms of the Rokes mortgage. In 1912 Hosea Butterfield by his warranty deed conveyed the premises in question to Jennie B. Lane, one of the defendants, subject to the Rokes mortgage, and took a mortgage back, providing also for his own support upon the premises. Accordingly, at this juncture Jennie B. Lane became the grantee of the premises in question under a warranty deed from the plaintiff and at the same time mortgagor of the premises to the plaintiff for his own support and for the support of Rokes upon the premises. It is unnecessary to go further into the details of the matter of support, as this question is not raised in the case.

The evidence fairly establishes that Rokes lived with Mrs. Lane from sixteen to eighteen weeks before he died. No controversy arises regarding the fulfillment of her part of the mortgage obligation for his support and maintenance. Rokes, therefore, here disappears. The plaintiff remained upon the place and had his subsistence there from February until June, just about five months, when he went away for the purpose of getting married, and did marry the defendant's mother. He says, "I don't find any fault with the home" while I was there. Over the purpose and manner

of his leaving arises a sharp controversy of fact upon the determination of which the defendant puts more or less importance as a matter of law. If the facts are as the defendant claims them, that the plaintiff when he went away informed them that he was going to abandon the place, surrender the idea of further support upon it, and authorized her to do whatever she pleased with it, being merely a verbal statement, cannot be regarded as a matter of law sufficient to bar him from claiming a right to resume his contract for support upon the place. At this point we may also omit further reference to this particular issue in its bearing upon the legal propositions involved.

The next important issue in the case requires us to revert to the Piper mortgage. In the warranty deed from the plaintiff to Mrs. Lane no mention is made of the Piper mortgage, although the plaintiff well knew that this mortgage was at that time outstanding and not fully paid. A controversy here arises in the testimony as to whether when the defendant received her deed a verbal agreement was made on her part to assume the payment of the Piper mortgage. The plaintiff contends such agreement was made; the defendant and her husband deny that they ever heard of the Piper mortgage at that time. Upon a careful reading of the testimony we are of opinion that the contention of the defendant upon this issue must prevail. It therefore results that the plaintiff conveyed this property by warranty deed, well knowing that the Piper mortgage was outstanding, without any knowledge of this fact on the part of the defendant or her husband. John W. Lane, husband of the defendant, having been informed by Piper that the Piper mortgage was outstanding and not paid and that he intended to foreclose it, paid the amount due to Piper and took an assignment of the mortgage in April, 1912. May 6th he foreclosed the mortgage, the first and last publication, on May 6 and May 24, respectively, being entered for record the 28th day of May, 1912. On the 28th day of September of the same year he assigned this mortgage and foreclosure to Jennie B. Lane, the defendant, in whose hands the equity expired on the 6th day of May, 1913, and the title of the mortgaged premises as a matter of law vested in her and became absolute.

The plaintiff, however, claims two defenses to the legality of this title as acquired by the defendant. First, that the plaintiff after foreclosure proceedings had begun made a legal tender of the amount due upon the mortgage, which operated in law as a redemption. Second, that the defendant in her mortgage to him warranted the title to be free from all incumbrances and, under this warranty, could not purchase an outstanding claim against the property which would not as a matter of law enure to his benefit. The first defense cannot prevail, as the evidence fails to show any legal tender. The second defense cannot prevail because the outstanding mortgage upon the property, which the defendant bought in, was an obligation of the plaintiff, himself, and was an existing incumbrance under the warranty deed which he gave to the defendant. She conveyed to him in her mortgage precisely the same premises which he conveyed to her in his deed; and we are unable to conclude, as a matter of law, that her acquisition of an incumbrance, which he concealed and owed, should inure to his benefit. If so, then she has to pay just this amount more than she agreed to pay, a thing which is expressly condemned, on principle, in *Pike* v. *Galvin,* 29 Maine, last paragraph on page 187, in this language: "To permit him to acquire a title subsequently purchased by his releasor, would often enable him to obtain in another and less direct mode, property of more value than the purchase money." He knew the mortgage was outstanding and due and liable to foreclosure by any person into whose hands it might legally fall. It was his duty under the circumstances of this case to take care of this mortgage, and not the defendant's. It is a well established rule, based upon reason as well as authority, that when a party warrants a title and thereafter relieves that title of an incumbrance, whatever it may be, which the grantor had created or which existed upon the property, such relief should inure to the benefit of the grantee, because he has once paid for it and has then received just what he purchased and no more; and further, to redress the incumbrance, if not otherwise disposed of in his favor, he would have a right of action against the grantor. But the case at bar is precisely the reverse of this. When the plaintiff took her warranty deed and agreed upon a consideration, that consideration measured the value of her purchase. If an outstanding mortgage was then existing upon the premises purchased, instead

of being required to remove this incumbrance for the benefit of the plaintiff, who had already once had the benefit of it in the consideration named, she was obliged to remove it in order to protect herself against the total loss of the very title which the plaintiff had warranted to her and thereby pay this much more to the grantor. We are unable to discover any rule of law or equity which requires her to hold the title to the Piper mortgage thus acquired for the benefit of this plaintiff.

The plaintiff cites a long list of cases in Maine and Massachusetts tending to show that under a deed of warranty an after acquired title by the grantor enures to the benefit of the grantee; but not one of these numerous cases is based upon a train of facts like those in the case at bar; not one contains a reference to a state of facts, containing a fraudulent concealment of an incumbrance upon a title conveyed by a warranty deed, where the same premises, at the same time and as a part of the same transaction, are mortgaged back to the grantor with the warranty, that the mortgaged premises are free from all incumbrances, the only incumbrance existing at the time being that concealed by the grantor in the warranty deed. Such a transaction on the part of a grantor in a warranty deed is so tainted with legal, if not actual, fraud that a fair application of the well established rules of law will intervene to prevent him from profiting by his own wrong in obtaining the benefit of such an after acquired title. The above rule is based upon the doctrine of estoppel. *Pike* v. *Galvin,* 29 Maine, 183; but the doctrine of estoppel was invented and ingrafted upon the common law, to prevent wrongs and not to promote them.

Under the well established principle of law that when a deed and mortgage of the same premises are made as nearly at the same time as the succession of events will permit, they constitute one and the same transaction. It may well be said that the mortgage coveyed to Butterfield precisely what the deed conveyed to Mrs. Lane, no more and no less. He received under the mortgage all that he conveyed in his deed. He can ask no more.

Bill dismissed.

FRED S. THOMPSON, Appellant from Decree of Judge of Probate.

In Re Estate of HENRIETTA T. NICKELS.

Waldo. Opinion January 3, 1916.

Appeal. Copy. Exceptions. Jurisdiction. Last Will. R. S. Chap. 76, Sect. 1. Revocation. Will. Witness.

1. The probate court has jurisdiction to admit a lost or destroyed will to probate, when proved by copy, upon proof of the continued existence of such will unrevoked up to the time of the testator's death.
2. The expression "continued existence of the will" in R. S. Chap. 66, Sect. 9, which gives probate courts jurisdiction to admit a lost or destroyed will to probate upon proof of the continued existence of such will unrevoked up to the time of the testator's death, does not mean the continued physical existence of the will.
3. The destruction of a will by the testator is presumed to have been done with the intention of revocation.
4. When it appears that a will was destroyed by the testator under the mistaken belief that another valid will had been executed, the revocation is not necessarily absolute, but may be deemed to have been made on condition that the later will was a valid one. And in such case the former will may be considered as continuing in existence unrevoked.
5. Appeals in probate proceedings can be sustained only when the appellant is aggrieved.
6. A petitioner for the probate of a will cannot be said in law to be aggrieved by a decree granting his petition and admitting the will to probate, though his attitude to the proceedings may have changed.

On exceptions by respondent. Exceptions overruled. Decree of probate court affirmed.

This is an appeal to the Supreme Court of Probate from decree of probate court of Waldo county, whereby the will of Henrietta T. Nickels of Searsport, dated November 9, 1911, was allowed and admitted to probate. From this order, the appellant appealed and also had various exceptions to the refusal of court to rule as requested.

The case is stated in the opinion.

Wm. P. Whitehouse, Henry W. Swasey, and Robert F. Dunton, for proponents.

George F. Gould, Aurelia E. Hanson, and Eugene C. Upton, for appellant.

SITTING: SAVAGE, C. J., SPEAR, CORNISH, KING, HALEY, HANSON, PHILBROOK, JJ. MR. JUSTICE HALEY did not concur.

SAVAGE, C. J. Appeal from decree allowing the will of Henrietta T. Nickels. The case comes up on the appellant's exceptions to rulings in the Supreme Court of Probate.

The will in question was executed by Mrs. Nickels in due form on November 9, 1911. Subsequently, in November, 1913, she caused another will to be drafted, which changed in some particulars the 1911 will. This will she signed. But after her death a few months later it was discovered that the 1913 will was attested by only two subscribing witnesses, and was therefore invalid as a will. R. S., Chap. 76, Sect. 1. The 1911 will could not be found, and presumably had been destroyed. But a copy of it had been preserved. And this copy was offered as proof for probate of the will, and is the basis of the present proceedings. The ground upon which the petitioners for the probate of the will have proceeded is that Mrs. Nickels destroyed the 1911 will under the belief that the 1913 will constituted a valid testamentary disposition of her estate, and that, although the destruction of a will by the testator is presumed to have been done animo revocandi, yet when it appears that the will was destroyed under a mistaken belief that another valid will had been executed, the revocation is not necessarily absolute, but may be deemed to have been made on condition that the later will was a valid one. This is the doctrine of dependent relative revocation. The revocation is dependent upon the assumption that another valid will has been made. *Townshend* v. *Howard,* 86 Maine, 285. The probate court allowed the 1911 will, as proved by copy, and this judgment was affirmed on appeal by the Supreme Court of Probate.

For reasons to be stated hereafter we think the appellant is not in position to press his exceptions. But a question of jurisdiction has been raised which must be noticed. For when the court is made aware in any manner that it is without jurisdiction the proceedings

must then stop. It has no power to award judgment. *Central Maine Power Co.* v. *M. C. R. R. Co.,* 113 Maine, 103. It is claimed in the appellant's brief that the probate court had jurisdiction to admit to probate a lost or destroyed will, proved by copy, only "upon proof of the continued existence of such lost will, *undestroyed* up to the time of the testator's death." It is true that the probate court, a statutory court, has only such jurisdiction as is conferred upon it by statute. And the Supreme Court of Probate has no more. But the probate court has jurisdiction to probate wills, and the statute gives it jurisdiction to admit lost or destroyed wills to probate when proved by copy. R. S. Chap. 66, Sect. 9. The limitaton of the power is not as expressed in the appellant's brief that probate may be granted only "upon proof of the continued existence of such lost will *undestroyed* up to the time of the testator's death," but "upon proof of the continued existence of such lost will *unrevoked* up to the time of the testator's death." The distinction is obvious. And the question is not so much one of jurisdiction as of proof. And even if it were the former it would not avail. The "continued existence of the will" does not mean its continued physical existence. A will may continue to exist though the paper it was written upon is destroyed. See *Rich* v. *Gilkey,* 73 Maine, 595. The opinion in the case just cited was not an opinion of the Law Court, but it has always been regarded as a correct exposition of the law. *Cousens* v. *Advent Church,* 93 Maine, 292. And whether the 1911 will continued legally "unrevoked" until Mrs. Nickel's death is the precise question which has been argued in this case.

But we have already indicated that the appellant can take nothing by his exceptions. Appeals in probate proceedings can be sustained only by persons "aggrieved." R. S. Chap. 65, Sect. 28. And the appellant is not in any legal sense aggrieved. He is one of the petitioners for the probate of this will. He still stands upon the record as a petitioner. And yet he appeals from the granting of the prayer of his own petition. Such a situation is entirely anomalous. He proposes, and in the same breath opposes. He is both proponent and defendant. His positions are incongruous. As a matter of procedure he cannot be a party of record on opposite sides of the same proposition. He cannot be actor and reus in the

same cause. See *Warren* v. *Stearns,* 19 Pick., 73, where the situation is called a "legal absurdity." 15 Ency. of Pl. & Pr., 481. As a proposition of law it is impossible to say that he has been aggrieved by the granting of his own petition. The cause of his change of attitude may fairly be inferred from the evidence. He was a beneficiary under both wills. At the time he signed the petition for the probate of this will he understood there were legally adopted daughters who would inherit the entire estate, if settled as an intestate estate. R. S. Chap. 69, Sect. 35. He afterwards learned that the "daughters" had never been legally adopted, so that, as Mrs. Nickels left no children, if the estate was settled as intestate he, a nephew and collateral heir, would inherit much more than his legacy amounted to. While he labored under the mistake of supposing that the so called adopted daughters would inherit under the statute, an oral agreement was entered into by or on behalf of nearly all the legal heirs and the legatees named in the wills, who were affected by the changes, that the 1911 will should be offered for probate by copy, and if allowed, that the ultimate distribution, as among themselves, should be in accordance with the imperfectly executed will of 1913. To this agreement this appellant was a party. And under such conditions he signed the petition for the probate of the 1911 will. The fact that he afterward discovered his mistake does not change the situation. He did not amend his position. When he learned that it was for his interest that the estate should be settled as intestate, he might properly have withdrawn from the petition, at least, before decree. But he did not do so. And he stands today of record as a proponent of the will which he is seeking to overthrow. The conclusion of law that he is not aggrieved is not to be waived by the adverse party. Under these conditions, we are compelled to hold that the appellant was not aggrieved by the decree of the probate court, within the meaning of the statute. And for this reason his exceptions must be overruled.

Exceptions overruled.
Decree of probate court affirmed.

ANNA LEAR, in Equity, *vs.* HARRY MANSER, Executor, et als.

Androscoggin. Opinion January 3, 1916.

Beneficiary. *Bill in Equity.* *Legacy.* *Private Trust.* *Testator's Intention.* *Trust.* *Will.*

John M. Marr died May 3, 1913, leaving a will, dated December 19, 1911, which has been duly probated, containing the following provisions:

"Second. I give and bequeath all the rest, residue and remainder of my estate of whatever name and nature to my said executor in trust, to be paid by him to such person or persons, or institution as shall care for me in my last sickness, such payment to be made to the person or persons or institution, or any or all of them, as may in the discretion of my said executor be equitably entitled thereto, and the payment by my said executor and receipt taken by him therefor shall be sufficient voucher and discharge to him under the provisions of this item. This provision of my will is to be considered a legacy or bequest and not as the performance of any contract obligation on my part."

At the time the will was executed the testator was an elderly man, having no nearer relatives than nieces. He came to the home of Mrs. Mary M. Bradbury of Lewiston, October 16, 1911, and secured board there for himself at $4.00 per week. He lived there under that arrangement, paying his board, except for the last week or two, until his death, a period of nineteen months. Mrs. Bradbury cared for him in his last sickness. She was informed of the will after his death, and now claims the residue of his estate under the provisions of the second item thereof.

The plaintiff is one of the testator's nieces. She claims that the residue of the estate should be paid by the executor to the heirs at law of the testator. Her claim is put on the ground that the beneficiary of the residue of the estate is not sufficiently specified and designated so that the trust can be carried out.

Held:

1. To constitute a private trust the cestui que trust must either be clearly identified or made capable of identification by the terms of the instrument creating the trust.
2. But it is not required that the beneficiary of a private trust should be designated by name in the instrument creating the trust. Some other designation will suffice if it makes certain the beneficiary intended.
3. The instrument creating the trust in the case at bar contains a specific designation by which the cestui que trust was to be identified.

4. The meaning of the words "care for me in my last sickness" is not uncertain. What particular person or persons or institution did furnish that care is a provable fact, and in our view, readily provable. Indeed, it is established with certainty that Mrs. Bradbury is the person who cared for the testator in his last sickness.
5. In the opinion of the court, the beneficiary of the testator's bequest made in the second item of his will, although not identified therein by name, is sufficiently described there to be capable of identification with certainty, and that the trust therein created is a valid trust and should be carried out.
6. It follows from this conclusion and from the fact established by the evidence that Mrs. Mary M. Bradbury of Lewiston is the person who cared for the testator in his last sickness, that the property held by the executor in trust under the provisions of item second of the will is to be paid by the executor to her as the sole beneficiary of that trust.

On report. The property held by the executor in trust under the provisions of item second of the will is to be paid by the executor to Mary M. Bradbury as the sole beneficiary of that trust. Accordingly a decree may be entered to that effect. So ordered.

This is a bill in equity brought by Anna Lear praying for the construction of the second clause of the will of John M. Marr, late of Lewiston, deceased. It is the contention of said Anna Lear that this bequest is void. At the conclusion of the evidence, this case, by agreement of parties, was reported to the Law Court for its determination.

The case is stated in the opinion.

McGillicuddy & Morey, for plaintiff.

Harry Manser, for defendants.

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

KING, J. John M. Marr died May 3, 1913, leaving a will, dated December 19, 1911, which has been duly probated, containing the following provisions:

"Second. I give and bequeath all the rest, residue and remainder of my estate of whatever name and nature to my said executor, in trust, to be paid by him to such person or persons, or to such institution as shall care for me in my last sickness, such payment to be made to the person or persons, or institution, or any or all of them

as may in the discretion of my said executor be equitably entitled thereto, and the payment by my said executor and receipt taken by him therefor shall be a sufficient voucher and discharge to him under the provisions of this item. This provision of my will is to be considered a legacy or bequest and not as the performance of any contract obligation on my part."

At the time the will was executed the testator was an elderly man, having no nearer relatives than nieces. He came to the home of Mrs. Mary M. Bradbury of Lewiston, October 15, 1911, and secured board there for himself at $4.00 per week. He lived there under that arrangement, paying his board except for the last week or two, until his death, a period of nineteen months. Mrs. Bradbury cared for him in his last sickness. She was informed of the will after his death, and now claims the residue of his estate under the provisions of the second item thereof.

The plaintiff is one of the testator's nieces. She claims that the residue of the estate should be paid by the executor to the heirs at law of the testator. Her claim is put on the ground that the beneficiary of the residue of the estate, which the testator gave to the executor in trust, is not sufficiently specified and designated so that the trust can be carried out. That is the question presented by this bill in equity, which is before the Law Court on report.

It is an undoubted principle that the intention of a testator shall be effectuated if it can be consistently with the rules of law. There can be no question in this case as to the testator's intention in making the bequest in item second of his will. It was that the person or persons or institution that should care for him in his last sickness should have the residue of his estate. Can that intention be effectuated consistently with the rules of law? We think it can be. By the provisions of item second of his will the testator created an express trust. It is not a public or charitable trust, for it does not purport to be for the benefit of the public at large, or some part thereof, or an indefinite class of persons. Is it a valid private trust? To constitute a private trust there must be not only a certain trustee who holds the legal estate, but also "a certain specified cestui que trust clearly identified or made capable of identification by the terms of the instrument creating the trust." Pom. Eq. Jur. Sec. 1018.

And that is a well settled principle. But it is not required that the beneficiary of a private trust should be designated by name in the instrument creating the trust. Some other designation will suffice if it makes certain the beneficiary intended. Nor is it essential that the testator have in mind the particular individual upon whom his bounty may fall. If he makes the particular object of his bequest ascertainable with certainty that will be sufficient. Gifts in trust for a specified class of persons, or for persons specifically defined and described, through not named, are not void for uncertainty in respect to the beneficiaries, because such beneficiaries are capable of identification by the terms of the instrument creating the trust. For example, in *Howard* v. *Am. Peace Society,* 49 Maine, 288, a bequest to the Congregational minister of the Congregational Society of the town of Auburn was effectuated, although no one was holding that position when the will was executed. The court there said that, since no one then held that position, the testator could not be supposed to have had in mind any particular individual, and that the provision had respect to a time then future when there should be a minister of that society. That person being identified by proof was held entitled to take under the will.

In the case at bar the testator did not identify by name the beneficiary of his bequest. But did he not by the terms of his will make his intended beneficiary capable of identification with certainty? That is the precise question here involved. The beneficiary intended was to be "such person or persons or institution as shall care for me in my last sickness." That was the specific description by which the cestui que trust was to be identified. The provision had respect to the then future when there would be some person or persons or institution that had cared for the testator in his last sickness. No one can doubt what is the meaning of the words "care for me in my last sickness." What particular person or persons or institution did furnish that care is a provable fact, and, in our view, readily provable. Indeed, it is established with entire certainty that Mrs. Bradbury is the person who cared for the testator in his last sickness. No one else claims to have done so.

The plaintiff cites and relies upon the case of *Murdock* v. *Bridges,* 91 Maine, 124, in support of her contention. In that case the donor

by a non-testamentary writing gave her property to W. E. Murdock in trust to pay her debts and then provide for her husband during the rest of his life and pay his debts, and after his death "the balance shall go to the people who have cared for me, as W. E. Murdock shall think best." The court there held that the provision respecting the balance of the trust property could not be carried out for want of certainty as to the beneficiaries, it being a pure benevolence and not a charity.

It is readily perceived that the language used in the instrument creating the trust in that case does not make the cestui que trust capable of identification. The donor there attempted to confer upon W. E. Murdock a power to select the cestui que trust from "the people who have cared for me," and as he "shall think best." That was a personal power resting in the will of a particular individual. And, as the court there said, it "would have perished with the person." It was, therefore, an attempt to create a trust that the court could not execute should occasion require. Moreover, the expression there used, "the people who have cared for me," is most indefinite and unlimited. No particular care is described, nor is any portion of the donor's life mentioned as the time to which the care referred to related. And the class from which the selection was to be made included all persons who cared for the donor at any time during her life. Manifestly such a description of the distributees of a trust fund is too uncertain.

In the case at bar, however, no such uncertainty exists. Here, the testator made no attempt to confer on his executor any power to select the cestui que trust. He made his own selection. In his will he defined and described his intended beneficiary to be "such person or persons or institution as shall care for me *in my last sickness.*" He thereby prescribed a rule whereby his beneficiary could be identified with certainty. That trust, in the event of the death of the trustee, would not perish with him. It could be executed by another trustee appointed by the court if necessary, for the duty imposed upon the trustee, and the discretion given to him in the exercise of that duty, are imperative and not optional, they were intended by the testator to be executed at all events. *Cutter* v. *Burrows,* 100 Maine, 379. This case therefore is plainly distinguishable from

that of *Murdock* v. *Bridges*. For a case very similar to the one at bar, see *Dennis* v. *Holsapple,* 148 Ind., 297, where it was held that the beneficiary, though not named, was capable of identification by the language of the will, and the trust was effectuated.

It is the opinion of the court in the case at bar that the beneficiary of the testator's bequest made in the second item of his will, although not identified by name, is sufficiently described therein to be capable of identification with certainty, and, therefore, that the trust therein created is valid and operative, and should be carried out.

It follows from this conclusion and from the fact established by the evidence that Mary M. Bradbury of Lewiston is the person who cared for the testator in his last sickness, that the property held by the executor in trust under the provisions of item second of the will is to be paid by the executor to said Mary M. Bradbury as the sole beneficiary of that trust. Accordingly a decree may be entered to that effect.

So ordered.

MADELINE B. COOMBS, et al., by Guardians

vs.

CORNELIA G. FESSENDEN, et al.

Androscoggin. Opinion January 3, 1916.

Deed. Delivery. Exceptions. Real Action. Title.

The only issue at the trial was whether a certain deed from William C. Coombs to his mother, Marcia G. Coombs, was delivered. Both the grantor and grantee are dead. The deed was found unrecorded among the grantee's papers after her death. The verdict was that the deed was delivered, and the case comes up on exceptions and motion by the plaintiffs.

Held:

1. There was no error in any of the instructions that were given.
2. The chief contention of the plaintiffs throughout the trial was, that assuming all the facts connected with the execution and transfer of the deed to be as stated by Mr. Springer, the attorney, still those facts did not conclusively establish that the parties actually intended at the time that the title was to immediately pass, and the plaintiffs urged that the evidence introduced of the circumstances and situation of the parties and their subsequent acts and statements was sufficient to justify the jury in finding that the deed was not in fact delivered with that intention.
3. The gist of the requested instructions, that were refused, was, that the jury might find Mr. Springer's testimony to be true and still find for the plaintiffs on the question of legal delivery of the deed, provided they were satisfied from all the evidence in the case that, although the deed was physically transferred from the grantor to the grantee, nevertheless the parties did not intend that the title and ownership of the property should immediately pass to Mrs. Coombs.

We think the requested instructions were sound in law and appropriate to be given as applicable to an issue which the plaintiffs had raised in the case and introduced some evidence to support.

4. The question whether the plaintiffs were prejudiced by the refusal of the requested instructions is not free from doubt. But after a full examination of all the evidence, the court is unable to reach the conclusion that they may not have been prejudiced thereby, for there was considerable evidence introduced tending to show that the parties treated the property after the alleged delivery of the deed as if no transfer of the title had in fact been made.

It is therefore the opinion of the court that the plaintiffs' exceptions to the ruling denying their requested instructions must be sustained. This conclusion makes a consideration of the motion unnecessary.

On motion and exceptions by plaintiff. Exceptions sustained. Motion not considered.

This is a writ of entry to recover three parcels of land. The only issue was whether a certain deed from William C. Coombs to his mother, Marcia G. Coombs, dated July 1, 1909, was a valid conveyance. The case was submitted to the jury in the form of one question: "Was this deed which was dated and acknowledged July 1, 1909, delivered by the grantor, William C. Coombs, to the grantee, Marcia G. Coombs?" The jury answered this question in the affirmative. The plaintiff had various exceptions to the exclusion and admission of evidence, which are considered in the opinion, and also filed a motion for a new trial.

The case is stated in the opinion.

Oakes, Pulsifer & Ludden, for plaintiff.

Ralph W. Crockett, for defendants.

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

KING, J. This is a real action brought in behalf of the plaintiffs by their guardians for the recovery of three parcels of land. They claim title to it by descent as the daughters and only heirs of William C. Coombs. The only issue at the trial was whether a certain deed from William C. Coombs to his mother, Marcia G. Coombs, was delivered, and that issue was submitted to the jury by the following question: Was this deed, which was dated and acknowledged July 1st, 1909, delivered by the grantor, William C. Coombs, to the grantee, Marcia G. Coombs? The jury answered in the affirmative, and the case comes before this court upon exceptions and motion for a new trial by the plaintiffs.

THE EXCEPTIONS.

Both the grantor and grantee are dead. After the death of Mrs. Coombs the deed was found among her papers. It had not then been recorded. Rufus F. Springer, the attorney who drew the deed, testified as to its execution and delivery, in substance, that William C. Coombs came to his house a little after nine o'clock in the evening of the day of the date of the deed and told him that he had made a sale of his property to his mother and requested him to go to his office and draw a deed to that effect; that on the way to the office they called at the mother's house and talked the matter over with her, after which the witness went to his office, prepared a deed, took it to Mrs. Coombs' house and read it to her but she was not satisfied with it; that he again went to his office and prepared the deed in question and returned with that to the mother's house where it was read to her in William's presence and was satisfactory to her; that William then and there signed and acknowledged the deed, whereupon the witness, after filling out his certificate of its acknowledgement, passed the deed to William, the grantor, who then handed it to his mother, the grantee. There was no direct testimony con-

tradicting those statements of Mr. Springer relating to the execution and manual delivery of the instrument. No one else was then present. Mrs. Coombs at the time was about seventy years of age, quite lame, but bright mentally. She owned other real estate. William lived with her and continued to do so until her death in January, 1913. He had pronounced habits of intemperance.

The plaintiffs contended that, notwithstanding the testimony of Mr. Springer, the deed was not delivered and accepted with an intent that the title to the property was to pass immediately, and therefore that there was not a valid legal delivery of the deed. In support of that contention the plaintiffs relied upon evidence of the circumstances and situation of the parties, of their subsequent acts in relation to the property, and of certain statements made by them, all tending to show, as the plaintiffs contended, that neither William nor his mother at the time of the manual delivery of the deed intended that the title to the property was to pass immediately from William to his mother. On the other hand, the defendants contended that the subsequent acts of the parties were not inconsistent with, but rather indicated and emphasized, an understanding on their part that the title to the property had passed to the mother, and they introduced testimony tending to support that contention.

The first exception, to the exclusion of certain testimony, was not pressed in argument and accordingly is not here considered. The other rulings complained of are thus presented by the bill of exceptions:

The presiding Justice, in his charge, after reading to the jury the testimony given by Mr. Springer as to the execution and delivery of the deed, instructed the jury, "If that testimony of Mr. Springer is true, and it is uncontradicted, that constitutes a sufficient delivery in law," and after discussing further what would constitute a sufficient delivery, said "So the first question for you to decide here is whether Mr. Springer's testimony is true or false," and after further discussion, concluded by saying: "It is for you to say whether his testimony in regard to the transaction that night is so shaken by other testimony that you do not believe what he told you, as I have read, to be the facts."

Afterwards, having described and compared in a general way the class of testimony put in by both sides, he said "You must take the whole of it into consideration and then determine whether or not what Mr. Springer says is true, and whether or not it has been overcome by any other evidence."

The contention of the plaintiffs, throughout the case, was that even assuming that all the facts connected with the execution of and transfer of the deed were actually as stated by Mr. Springer, they still did not necessarily constitute a delivery sufficient to pass the title, and pursuant to that claim, asked for the following instructions, which were given; viz., "In order to be a legal delivery the deed must be delivered with the intent that it shall pass the immediate title and not to take effect in the future or upon any contingency."

Following that the plaintiffs asked for further instruction; "If the jury shall believe that Mr. Springer's testimony does not give the entire circumstances of the transaction they are not required to find that his testimony is false in order to find for the plaintiffs. They may find if the evidence in their opinion justifies the belief, that the circumstances notwithstanding the statements of Mr. Springer that though physically transferred the deed was not delivered with intent of passing immediate title, and if so the delivery was not a valid legal delivery."

As to this instruction the court said "I can not give you that, gentlemen, in those words. I have already told you that if you believe Mr. Springer's testimony is true, and is uncontradicted and unexplained, that that would constitute in law a delivery. The weight of his testimony is for you, and at the end you are to say whether there was or was not a delivery."

On the same point, the plaintiffs asked a third instruction, as follows, "The case does not rest merely upon the question whether Mr. Springer's testimony is true or false, but upon what the jury concludes upon the whole testimony was the actual effect of the whole transaction."

As to which the court said, "I think I have covered that also in my previous charge and what I have just said."

Upon the same point, the plaintiffs asked a fourth instruction, as follows: "If the jury shall believe that Mr. Springer's testimony does not give the entire circumstances of the transaction on the night the deed was alleged to be delivered they are not required to find that his testimony is false in order to give a verdict for paintiffs as to delivery." And as to this the court said "I have told you two or three times that the effect of Mr. Springer's testimony is all for you. The whole of the testimony is for you. I cannot make it any more plain."

It is undoubtedly true as a matter of law that the facts testified to by Mr. Springer, in the absence of any qualification or explanation of them, constituted a sufficient legal delivery of the deed, since from those facts unexplained there is a justifiable inference that the parties intended that the deed should have its legal effect to transfer immediately the title to the property from the grantor to the grantee. But those facts might be qualified and explained by other evidence, by the force of which any such inference might be fully rebutted, and the lack of an intention to make a complete legal delivery be affirmatively established. The plaintiffs complain that the instructions given to the jury as to the effect of Mr. Springer's testimony were not sufficiently qualified. But we find upon examination of the charge of the learned presiding Justice that in connection with what he said to the jury as to the effect of Mr. Springer's testimony if true, as quoted in the exceptions, he added (what does not appear there) that "in the absence of any testimony contradicting those facts or explaining those facts, that is sufficient delivery." That was a correct and unexceptionable statement of the law. Nor do we find any error in any of the instructions that were given. It remains then to be considered if the plaintiffs were entitled to their requested instructions.

While it appears from the cross examination of Mr. Springer that the plaintiffs questioned the accuracy of his recollection as to what was said and done at the time of the execution and alleged delivery of the deed, it is entirely clear, as set forth in the bill of exceptions, that the chief contention of the plaintiffs throughout the case was, that assuming all the facts connected with the execution and transfer of the deed to be as stated by Mr. Springer, still those facts did not conclusively establish that the parties actually intended

at the time that the title was to immediately pass, and the plaintiffs urged that the evidence introduced of the circumstances and situation of the parties and their subsequent acts and statements was sufficient to justify the jury in finding that the deed was not in fact delivered with that intention.

The requested instructions were evidently presented by the plaintiffs because of an apprehension on their part, after the charge, that the jury might have misunderstood the real meaning of the instructions given as to the effect of Mr. Springer's testimony, and might believe that the only real question for them to decide was whether Mr. Springer testified truly, if so, and the deed was physically handed by the grantor to the grantee, then that constituted a legal delivery, losing sight of the other vital question whether, if that act was done, the parties really intended an immediate transfer of the title to the property. We cannot say that there was not some ground for such an apprehension. The attention of the jury had been specially directed to the testimony of Mr. Springer, and the importance of their ascertaining whether it was true or false had been strongly urged upon them. It is possible that they might have been impressed with the idea that the whole question as to the legal delivery of the deed hinged on whether or not Mr. Springer testified truly.

The gist of the requests that were refused was, that the jury might find Mr. Springer's testimony to be true and still find for the plaintiffs on the question of legal delivery of the deed, provided they were satisfied from all the evidence in the case that although the deed was physically transferred from the grantor to the grantee nevertheless the parties did not intend that the title and ownership of the property should immediatey pass to Mrs. Coombs. We think the requested instructions were sound in law and appropriate to be given as applicable to an issue which the plaintiffs had raised in the case and introduced evidence to support.

Were the plantiffs prejudiced by the refusal? This question is not free from doubt. But after a full examination of all the evidence the court is unable to reach the conclusion that the plaintiffs may not have been prejudiced by the refusal to give the instructions. There was considerable evidence introduced tending to show that the parties treated the property after the alleged delivery of the

deed as if no transfer of the title had in fact been made. It cannot be held, we think, with unmistakable certainty that the plaintiffs must necessarily fail ultimately. It is therefore the opinion of the court that the paintiffs' requested instructions should have been given, and that the exceptions to the ruling denying them must be sustained. This conclusion makes a consideration of the motion unnecessary.

Exceptions sustained.

THOMAS J. NICKERSON *vs.* FREDERIC H. GERRISH.

Cumberland. Opinion January 3, 1916.

Fracture. Malpractice. Physician. Reasonable Care. Unskillfully Diagnosing.

Action on the case against a physician for negligently diagnosing and treating the plaintiff's injuries to his right leg as a sprain only, when in fact both bones were fractured. A verdict for $5,000 was returned and the case comes up on motion for a new trial based upon the grounds that the verdict is against the weight of the evidence, and that the damages are excessive.

Held:

1. The court is not convinced from an examination of the evidence that the jury's finding as to the defendant's liability is so clearly and unmistakably against the weight of the evidence that it should not be permitted to stand.
2. But the court is constrained to the conclusion, after a study and weighing of all the evidence relating to the damages which the plaintiff is entitled to recover, that the jury manifestly erred in fixing the plaintiff's damages at $5,000. That amount we think is clearly excessive. The opinion of the court is that the evidence does not justify an award of damages in excess of three thousand dollars.

On motion by defendant for new trial. If the plaintiff, within 30 days after the certificate is filed, remits all of the verdict in excess of $3000, motion overruled; otherwise, motion sustained.

This is an action on the case against the defendant, a physician, for negligently and unskillfully diagnosing and treating his right leg as a sprain only, when in fact both bones were fractured. Plea, general issue. The jury returned a verdict for plaintiff for $5000, and the defendant filed a motion for a new trial.

The case is stated in the opinion.

White & Carter, for plaintiff.

Thomas L. Talbot, for defendant.

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

KING, J. Action on the case for malpractice against a physician for negligently and unskillfully diagnosing and treating the plaintiff's injuries to his right leg as a sprain only, when in fact both bones were fractured. A verdict for $5000 was returned and the case comes up on motion for a new trial based upon the grounds that the verdict is against the weight of the evidence, and that the damages are excessive.

On January 5, 1914, the plaintiff, who then was and now is superintendent of transportation of the Maine Central Railroad Company, while walking in the round house at Kineo, stepped unawares into an ash pit, so called, about three or four feet deep, striking his full weight on his right foot flat on the brick bottom of the pit, and thereby fractured both bones of his right leg, the fibula and tibia, about three inches above their lower ends. He was immediately placed in the private car of the General Manager of the railroad and taken to Bingham where his leg was examined to some extent in the car by one Dr. Brown who applied a temporary dressing to it until the plaintiff should reach Portland where he lived and receive other surgical and medical treatment. On arriving at his home in Portland, about eight hours after the accident, the plaintiff was attended by the defendant who diagnosed his injuries as a sprain and administered treatment accordingly. Subsequently he visited the plaintiff six times, the last visit being Januay 14th or 15th. At that time the plaintiff was on crutches and suffering considerable pain, but at his suggestion that he wished to get back to his office the defendant advised that he might do so. The defend-

ant did not see the leg again until February 4th, when the plaintiff called at his office, and it was then "obvious to the eye," to use the defendant's words, that there had been a fracture as the result of the accident. The defendant did not, however, inform the plaintiff of that fact, or then propose any treatment to reduce the fractures, but, as he says, advised him to have the leg massaged and report in three days. On the evening of the same day, Wednesday, the plaintiff consulted another physician and an X-ray picture of the leg was taken. The next day the defendant was paid for his services and discharged from the case. On Friday, after a consultation of physicians, the plaintiff went to St. Barnabas Hospital in Portland where, on the following morning, an operation was performed on his leg by cutting down upon the bones, removing the fibrous tissues adhering to the ends of the fractured parts, bringing the scraped ends of the broken bones together in normal alignment as near as possible, and putting the leg in proper splint and dressing. He remained at the hospital two weeks, was then removed to his home and his leg kept in the splint for four weeks more, after which it was put in a plaster cast for six weeks. Since the cast was taken off the leg has been massaged professionally, with daily treatments for about two months and thereafter with two or three treatments a week.

The principles of law applicable to the case are well established and not in dispute. A physician impliedly agrees with his patient that he possesses that reasonable degree of learning and skill in his profession which is ordinarily possessed by other physicians under like conditions, that he will use his best skill and judgment in diagnosing his patient's disease or ailment and in determining the best mode of treatment, and that he will exercise reasonable care and diligence in the treatment of the case. *Patten* v. *Wiggin,* 51 Maine, 594; *Cayford* v. *Wilbur,* 86 Maine, 414; *Ramsdell* v. *Grady,* 97 Maine, 319.

The defendant is admittedly a physician of eminent learning and skill in his profession, and the plaintiff predicates his right to recover in this action on the contention that, notwithstanding the defendant's qualifications, he did not give to his case the exercise of his best knowledge and skill, but carelessly and negligently examined his

leg and thereby failed to discover the fractures which he would have discovered had he exercised reasonable care and diligence.

The defendant, on the other hand, contended that he made a careful and painstaking examination of the leg by manipulating it, by testing for crepitus, for deformity and for any preternatural movements, using his best knowledge, skill and judgment to determine the nature of the plaintiff's injuries and to detect any evidence of fracture, and that he was unable to find any, and that thereafter during his treatment of the plaintiff he discovered nothing indicating to him that his diagnosis was wrong, until his examination of the leg on February 4, when the fact of the fracture was obvious.

The plaintiff not only contended that the defendant did not make a reasonably thorough and careful examination of the leg by manipulation or otherwise, but he also strongly urged that the defendant was remiss and negligent in relying upon an examination by manipulation under the circumstances, and that he should have had an X-ray picture of the leg taken as suggested to him, and which all admit would have disclosed the fractures. And upon this point there was testimony introduced by and in behalf of the plaintiff from which the jury could well have found that the defendant was informed at the outset that Dr Brown had not been able to determine with certainty whether the injury was a fracture or sprain, and had proposed that an X-ray picture of the leg be taken, and that the advisability of using the X-ray for safety was suggested to the defendant both before the plaintiff was taken from the carriage into his house on the day of the accident, and while he was making his first examination, and that he declined the suggestion with the statement that he could readily tell if the bones were broken by manipulation. The plaintiff also testified that two or three days after the accident he asked the defendant if there was any possibility of any trouble with the bones, and if he thought an X-ray ought to be taken, to which he replied in the negative. This the defendant did not really contradict, but testified that while he did not recall if the plaintiff made that inquiry of him, yet if he did he gave a negative reply as to the advisability of it.

There was considerable testimony of physicians, on the one side and the other, as to the difficulty of diagnosing injuries to the lower leg or ankle, and as to the methods of examination for such injuries,

and the relative utility of the different recognized tests that are used to detect fractures in the lower leg or ankle. While that testimony was not altogether in harmony, it disclosed a concensus of opinion that there are certain recognized methods of examination or tests to be used when the nature of such injuries is not obvious, but hidden and difficult of diagnosis. And all agree, that an X-ray picture of the injured parts will disclose with almost absolute certainty whether any fracture exists, that the next most useful mode of examination or test to detect a fracture is manipulation and moving of the injured parts while the patient is etherized, and that manipulation without etherization is the least efficient method, because it is necessarily more or less limited on account of the pain thereby caused to the patient.

That the defendant was perfectly familiar with all the methods and tests recognized by the profession to be used in such examinations, and understood their relative usefulness, is conceded. He concluded that it was unnecessary in the plaintiff's case to have an X-ray picture taken of the leg, or to etherize the patient, and he relied upon his manipulation of the injured parts and his examination for deformity or other possible indication of fracture, as affording him sufficient information upon which to base his diagnosis. He made a mistake, however, and his diagnosis was wrong. But that fact alone is not sufficient to render him liable. Something else must be shown. And the issue before the jury in this case necessarily was, whether that mistake was the result of a failure of the defendant to use painstaking care and diligence, and to exercise the best of his admitted learning, skill and judgment in his examination and treatment of the plaintiff's injuries. That issue the jury found in the plaintiff's favor. It will serve no advantage to undertake to analyze here all the evidence presented bearing on that issue. We have studied it with care, and are not convincd by it that the jury's finding as to the defendant's liability is so clearly and unmistakably against the weight of the evidence that it should not be permitted to stand.

But the court is of opinion that the amount of damages awarded by the jury is excessive.

The plaintiff is entitled to such damages as resulted to him from the defendant's failure to correctly diagnose the nature of his injuries and treat them accordingly. Those damages should be com-

pensatory to the plaintiff, so far as possible, for his increased pain and suffering, his additional loss of time, his reasonable and necessary expenses incurred, and for any increased physical impairment shown to have been caused by the defendant's negligence.

In determining to what extent the plaintiff suffered increased pain and additional discomfort and inconvenience on account of the delay in reducing and treating the fractures, the fact should not be lost sight of that if the fractures had been discovered at the outset and properly treated the plaintiff would have been subjected to pain and suffering, and been put to the inconvenience incident to the prolonged and uncomfortable treatment necessary to be adopted for the cure of such injuries. And the evidence shows that an ordinary uncomplicated fracture requires from six to ten weeks to make a good bony union. Undoubtedly the plaintiff's pain and discomfort were increased and prolonged somewhat as the result of the defendant's negligence, and for that, whatever it was, full compensatory damages should be awarded.

As to the plaintiff's damages for loss of time, the evidence shows that his annual salary at the time of the accident was $2700, that he remained away from his office and employment some six or eight weeks, but receiving his salary just the same, and that he is now holding the same position with the same compensation as before.

The evidence shows that at the time of the trial the plaintiff was still suffering some inconvenience in the use of his foot. Dr. Abbott, the surgeon who performed the operation on the leg and treated it thereafter, testifying in direct examination as to the condition of the leg when the cast was taken off, about eight weeks after the operation, stated that the bony union was "very good indeed" and that so far as the union of the bones was concerned the leg was practically as good as ever. He examined the leg and foot a few days before the trial and found that its condition "was very good," that there had been "a gradual improvement," but that there was not full motion to the ankle, and he expressed as his opinion "that there will always be some restriction at the ankle joint." As indicating the extent of that restriction we quote the following from the direct examiation of the witness:

"Q. Would it be possible for him to hurry, to run with his foot? A. I think he could. Q. Would it cause him great pain to do so?

A. I don't think the pain would come from running. He would tire out in a long continued use from it and it would become painful in standing upon it for a length of time. Q. Providing his business called upon him to be on his feet, walking around all day long, what have you to say about his condition? Would he be able to do it? A. He might be able to do it, but I think it would be somewhat inconvenient for him." The gist of Dr. Abbott's testimony as to the permanency of the plaintiff's injuries appears to be that there is now some restriction at the ankle joint caused partly by a shortening of the heel cord, which can be lengthened by an operation, and that such restriction is likely to continue to some extent at least.

Dr. Seth C. Gordon, called by the plaintiff, expressed it as his opinion that the function of the plaintiff's ankle joint will never be as good as it was before the injury, and that "he will never get an absolutely healthy normal foot," which result, in his judgment, is due "very much" to the delay in reducing the fractures, but he could not say how much. The evidence does not disclose that there is any material shortening or deformity of the leg, and, as already mentioned, the bony union of the fractured parts was complete.

A finding that the plaintiff had at the time of the trial an impairment of motion in his ankle joint, which may continue and cause him inconvenience, is undoubtedly justified; but we do not think the evidence shows the extent of that impairment, and the inconvenience that may result from it, to be such as to authorize extraordinarily large damages therefor.

It will serve no useful purpose to make further comment here on the evidence in detail relating to the matter of damages. It is sufficient to say, that after a careful consideration of the elements of the damages which the plaintiff is entitled to recover, and a study and weighing of all the evidence relating thereto, the court is constrained to the conclusion that the jury manifestly erred in fixing the plaintiff's damages at $5000. That amount we think is clearly excessive. And the opinion of the court is that the evidence does not justify an award of damages in excess of three thousand dollars.

If the plaintiff, within 30 days after the certificate is filed, remits all of the verdict in excess of $3000, motion overruled, otherwise motion sustained.

BELONIE BOUCHARD *vs.* DIRIGO MUTUAL FIRE INSURANCE COMPANY.

Somerset. Opinion January 5, 1916.

Gasoline Engine. *Fire Policy.* *Negligence.* *Increase of Risk.* *Nonsuit.* *Insurance.*

Action on fire insurance policy. The jury returned a verdict for the plaintiff in the sum of $1,534.63, and the case is before the court on the defendant's general motion for a new trial.

Held:

1. The question whether or not there was a custom to thresh grain by the use of a gasoline engine for motive power, and its relation to the case if there was such custom, with all other issues of fact, were for the jury.
2. Gross negligence is the synonym for wilful and wanton injury.—the intentional failure to perform a manifest duty.
3. How much care will, in a given case, relieve a party from the imputation of gross neglect, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances, which the law cannot exactly define. It was for the jury to decide the question whether gross negligence was, or was not, proved in this case.
4. We are not authorized to say that using a gasoline engine in a barn, for threshing grain, as in this case, is gross negligence as matter of law. The case was tried by able counsel, and in the absence of exceptions we must assume that the charge of the presiding Justice correctly stated the law, as well as the issue.

On motion for new trial by defendant. Motion overruled.

This is an action on a fire insurance policy issued on plaintiff's buildings and personal property. The property was destroyed by fire on the 28th day of November, 1912. The jury returned a verdict for the plaintiff for $1534.63, and the defendant filed a general motion for a new trial.

The case is stated in the opinion.

Fred F. Lawrence, for plaintiff.

S. W. Gould, Newell & Woodside, and Turner Buswell, for defendant.

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

HANSON, J. This is an action on a fire insurance policy issued August 22, 1911, on the plaintiff's buildings and personal property. The property was destroyed by fire on the 28th day of November, 1912. The jury returned a verdict for the plaintiff in the sum of $1534.63, and the case is before the court on the defendant's general motion for a new trial.

At the first trial of this case the presiding Justice ordered a nonsuit, and the plaintiff excepted. The exceptions were sustained. The issue in the former trial was "whether the fact that the fire was caused by the operation of a gasoline engine by the plaintiff for threshing grain, in the barn floor, avoided the policy either because it violated the prohibited articles clause or the clause against increase of risk."

Inasmuch as the testimony at both trials is substantially the same, we find nothing in the case at bar to justify a reversal of our opinion as in 113 Maine, 17. But before the second trial the defendant was allowed to file an amendment alleging that "the fire causing the damage in suit was caused through the gross negligence of the plaintiff and his servants and agents in the management of a gasoline engine used on the premises for threshing grain at the time of the fire." In their brief, counsel for the defendant say "the defendant does not base its contention upon the mere definition of the plaintiff's negligence as 'gross negligence,' but upon the conduct of the plaintiff under all the circumstances of the case as tending to show his want of good faith and misconduct." The other issues having been determined in the former case, it remains to consider the question of gross negligence thus raised, as set out in the amendment.

Counsel cite *Davis* v. *Western Home Insurance Company,* 81 Iowa, 496, in support of their claim that the negligence of the plaintiff relieves the defendant from liability. In the policy in that case one of the conditions was, "that said policy shall be void and of no effect if, . . . there be any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured." A careful reading of the case discloses that the decision turned upon the construction given

to the clause containing the word "exposure," and the court say: "It will be observed that the condition of the policy in question is against 'change in exposure.' The word 'exposure' means 'the state of being exposed,' 'openness to danger; accessibility to anything that may affect, especially detrimentally.' It is a word much used in the business of insurance, in the sense of this definition, to indicate danger of destruction or injury by fire, to property insured, from external sources, and not inherent to the property itself. . . . Exposure from 'the erection or occupation of adjacent buildings' is especially prohibited by specific language. All exposures 'by any means whatever' are forbidden by general language."

Defendant's counsel say, that the use of the gasoline engine was not negligence merely, the doing of a thing carelessly, that he had a right to do, but rather misconduct in that he had no right to place the engine and exhaust so that fire would probably result, and that his act was culpable negligence under the reasoning laid down by Shaw, C. J. in *Chandler* v. *Worcester Mutual Fire Insurance Company,* 3 Cush., 328.

The illustrations used in *Chandler* v. *The Worcester Fire Ins. Co.,* 3 Cush., 328, supra, of the instances where inaction or non-action in the presence of actual danger, with opportunity and ability to control the same, as in the neglect to remove burning coals, or to put out a fire which with the least attention could be extinguished, present situations where the conclusion is irresistible that such neglect amounts in law to constructive intent, and would render a policy void. But no such condition existed here. The plaintiff had used the same machinery several times before, both in and outside of his barn, and no fire had occurred. The machine was equipped for use in and out of buildings. It had been so used in the neighborhood. This fact was well known in the neighborhood, if not known to the company, and it must have had an important bearing upon the issue when presented to the jury, justifying at least the conclusion that the plaintiff had not been guilty of great or gross negligence. The following is the controlling doctrine in this class of cases, and is uniformly accepted as the true one:

"Unless there be in the policy specific limitations, the risk extends to all losses by fire, death or accident, or whatever cause of loss or

injury be insured against, however they be occasioned. May on Insurance, Sec 402. "And where a fire policy expressly excepts certain occasions of fire, all other occasions or causes of fire are included in the risk. "Idem. citing *Insurance Co.* v. *Transp. Co.*, 12 Wall., 194, 197 . . . "Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy." Idem. Sec. 408, and cases cited. That writer further says: "One of the principal objects of insurance against fire is to guard against the negligence of servants and others; and therefore while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule." And that text writer is equally positive in his statement of the rule, "that negligence in a matter as to which the insurers expressly stipulate that they will not assume the risk,—as where ashes are placed by a boy in wooden vessels, the insurers stipulating that they will not assume the risk if ashes are allowed to remain in wood, although the fact was unknown to the insured, and was done without his orders, and contrary to the usual practice,—will work a forfeiture." Idem. Sec. 408, note 3.

The doctrine of the last citation is the same as in *Davis* v. *Insurance Co.*, supra, where there was an express stipulation as to exposure by erection or occupation of adjacent buildings. In *Campbell* v. *Monmouth Mutual Fire Insurance Co.*, 59 Maine, 430, cited by May, 408, supra, there was a condition in the policy that in case of gross negligence on the part of the insured, the policy should be absolutely void. The plaintiff recovered a verdict, and the case came up on exceptions and motion. The defendant complained of the definition of gross negligence given by the presiding Justice. He told the jury that "it is the utter disregard of those precautionary measures which men of ordinary prudence would adopt in such case. . . . It may be that this definition was neither so full nor so accurate as might have been desirable; but we think the plaintiff was more likely to be injured by it than the defendant. The entire omission of those precautionary measures which men of ordinary prudence would adopt in such case, might not constitute gross negligence. Gross negligence is the want of that diligence which even careless men are wont to exercise . . . But it is quite apparent

that the case must have turned here upon the finding as to the actual condition, etc. . . . about which the evidence was conflicting, and not upon any nice definition of what would or would not constitute gross negligence."

Defendant's counsel urges that: "It was the custom in the vicinity where the fire occurred, to thresh grain by the use of a gasoline engine for motive power." . . . "There was no custom to locate the engine in the barn. This engine had been used by plaintiff's son five times previously, twice located in the barn and three times out of doors," and counsel say that "a local custom must be certain, general, frequent and so long continued as to be generally known. It is upheld on the presumption that the parties made the contract with reference to it," and cites *Leach* v. *Perkins,* 17 Maine, 462, as authority for the position. The question whether or not there was a custom as claimed, and its relation to the case if there was such custom, with all other issues of fact, were for the jury. *Bodfish* v. *Fox, et al.,* 23 Maine, 90; *Ulmer* v. *Farnsworth,* 80 Maine, 500; *Noyes* v. *Shepard,* 30 Maine, 173; *Stuart* v. *Machiasport,* 48 Maine, 477; *Eaton* v. *Lancaster,* 79 Maine, 477; *Bouchard* v. *Insurance Company,* 113 Maine, 26, supra; May on Insurance, Sec. 408. *Leach* v. *Perkins,* 17 Maine, 462, supra.

What is gross negligence, and may we say that using a gasoline engine in a barn floor for threshing is gross negligence as matter of law? "Gross negligence" is the synonym for wilful and wanton injury. Words and Phrases, N. S., 792; the intentional failure to perform a manifest duty; *Pratt* v. *Grand Rapids, & I. Ry. Co.,* 171 Mich., 216, Words and Phrases, (N. S.) 792. The term "Gross negligence" signifies wilfulness and involves intent, actual or constructive, which is a characteristic of criminal liability. *Ridout* v. *Winnebago Traction Co.,* 123 Wis., 297, 69 L. R. A., 601, Words and Phrases, (N. S.) Vol. 2, 792. In *Chandler* v. *The Worcester Mutual Fire Insurance Co.,* 3 Cush., 328, supra, the court having under consideration the same question where the trial court excluded evidence tending to show gross negligence, in granting the motion for a new trial said: "Whether the facts relied on to show gross negligence and gross misconduct, of which evidence was offered, would have proved any one of these supposed cases, or any like case, we have no means of knowing; but as they might have done

so, the court are of the opinion, that the proof should have been admitted, and proper instruction given in reference to it."

In *Storer* v. *Gowen,* 18 Maine, 174, the court, in considering the question of negligence raised in the case, say: "How much care will, in a given case, relieve a party from the imputation of gross neglect, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances, which the law cannot exactly define." It was for the jury to decide the question whether gross negligence was, or was not, proved in this case. *Sawyer* v. *Arnold Shoe Co.,* 90 Maine, 369. See *Raymond* v. *Railroad Co.,* 100 Maine, 529; *Pomroy* v. *Railroad Co.,* 102 Maine, 497; *Palmer* v. *Penobscot Lumbering Association,* 90 Maine, 193.

We are not authorized to say that using a gasoline engine in a barn, for threshing grain, as in this case, is gross negligence as matter of law. The case was tried by able counsel, and in the absence of exceptions we must assume that the charge of the presiding Justice correctly stated the law, as well as the issue. We are not convinced that the jury erred.

The entry will be,

Motion overruled.

RALPH S. SWEENEY, by his next friend,

vs.

CUMBERLAND COUNTY POWER & LIGHT COMPANY.

Cumberland. Opinion January 31, 1916.

Discretionary power of Court. Evidence. Exceptions. Rule 39 of the Revised Rules of the Supreme Judicial Court.

Action on the case for the recovery of damages for personal injuries suffered by the infant plaintiff while attempting to board a car operated by defendant and alleged to have been occasioned by its negligence. The plaintiff excepts to a ruling of the trial court excluding evidence offered by him.

Held:

1. Where evidence is introduced by the defendant that an accident happened at a place other than that shown by the evidence of the plaintiff, the introduction of such evidence by the defendant does not make a fresh case which the plaintiff is entitled to meet, and the exclusion of evidence offered as in rebuttal by the plaintiff, corroborative of his evidence in chief, is within the discretion of the trial court.
2. It will be presumed that the ruling of the court receiving or rejecting evidence was right, unless the exceptions show affirmatively it was wrong.
3. Testimony in rebuttal must be confined to new matter brought out in the defendant's case, and is not admissible, unless by leave of court, if it merely tends to corroborate the facts brought out as part of the plaintiff's case in chief, and is merely cumulative in respect thereto.
4. A party having rested his case cannot afterwards introduce further evidence except in rebuttal unless by leave of court.

This is an action on the case in which the plaintiff, by his next friend, seeks recovery of damages for personal injuries suffered by plaintiff while attempting to board a car operated by defendant and alleged to have been occasioned by its negligence.

The plaintiff offered evidence as to how the injuries were received and then rested his case. The defendant then offered testimony in contradiction of the testimony of the plaintiff. After this evidence

was submitted, the plaintiff then sought to introduce testimony bearing on the question as to how the injuries were received. The court excluded the evidence on the ground that it was simply cumulative and not in rebuttal. The plaintiff excepted to certain rulings and instructions of the presiding Justice. Exceptions overruled.

Cases cited by defendant: *Eastman* v. *Howard,* 30 Maine, 58; *Lewis* v. *Hodgdon,* 17 Maine, 267; *Hathaway* v. *Williams,* 105 Maine, 565; *Yeaton* v. *Chapman,* 65 Maine, 126; *Pettengill* v. *Shoenbar,* 84 Maine, 104; *Field* v. *Long,* 89 Maine, 454; *Dunn* v. *Kelley,* 69 Maine, 145.

Case stated in opinion.

Hinckley & Hinckley, for plaintiff.

Howard R. Ives, for defendant.

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

BIRD, J. This is an action on the case in which the plaintiff, by his next friend, seeks recovery of damages for personal injuries suffered by plaintiff while attempting to board a car operated by defendant and alleged to have been occasioned by its negligence. The presiding Justice directed a verdict for defendant, and plaintiff excepts to a ruling excluding evidence offered by him.

It appears from the bill of exceptions that "the plaintiff testified in substance that the car stopped at one of the regular stopping places on Commercial street near its junction with Park street in Portland; that he walked along the side of the car and attempted to board at the rear end while it was at a stop; that while his hand was on the handle provided for that purpose and one foot on the step, the car started and the conductor at that moment pushed him; that he was thrown to the ground; that the head end of the car went a little way around the corner of Commercial and Park streets where the track turns up hill into Park street, which intersects Commercial street at a right angle, and stopped with its head end around the corner up the hill; that the rear end of the car was then nearly a car length from him as he lay on the ground before he got up, and that the conductor alighted and came back to him and that he then boarded the car. The defendant introduced the testimony of

the motorman, conductor and five passengers to the effect that the plaintiff attempted to board the car when it was moving quite rapidly; that it had been so in motion for a considerable distance back; that after the plaintiff fell the car was stopped and that the entire length of the car when so stopped was on the straight track on Commercial street and was not partly around the corner of Park street, as appears from report of their testimony made a part hereof. The plaintiff then called three witnesses in rebuttal, all of whom had been in court during the entire trial, for the purpose of showing that the car was at a stop when the plaintiff attempted to board it, that the accident took place as claimed by the plaintiff, where the accident took place, and where the car was when it stopped after the accident.

"The evidence of these witnesses was excluded by the court upon objection made by defendant for the reason as the court stated that this testimony should have been offered as part of the plaintiff's case in the first instance, that the testimony merely tended to corroborate the testimony of the plaintiff, and that the testimony was not rebuttal. To the exclusion of this testimony the plaintiff duly excepted which exceptions were at that time allowed."

In *Dana* v. *Treat,* 35 Maine (1853), 198, this court, while recognizing the right of the trial Judge to direct in what stage of a case a party shall introduce his testimony, stated that "it has not been the practice to preclude a party, that has once stopped in the introduction of his evidence, from presenting further evidence of a cumulative character" and it is there held that a party who has rested his case may introduce further, though merely cumulative, evidence, unless, before resting, the court notifies him that such testimony will not subsequently be received. See also *Moore* v. *Holland,* 36 Maine (1853), 14, 15; *Erskine* v. *Erskine,* 64 Maine (1874), 214; *Yeaton* v. *Chapman,* 65 Maine (1876), 126, 127. In the Commonwealth of Massachusetts, however, it was stated in 1848, that the order in which witnesses are to be examined, on a trial at bar, and the number which a party is allowed to call to the same point, are matters within the discretion of the judge. *Cushing* v. *Billings,* 2 Cush., 158. In the course of the opinion, Shaw, C. J., says "The orderly course of proceeding requires, that the party,

whose business it is to go forward, should bring out the strength of his proof, in the first instance; but it is competent for the Judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence. This depends upon the circumstances of each particular case, and falls within the absolute discretion of the Judge, to be exercised or not as he may think proper." We consider this case to declare what then was, and theretofore had been, the common law of the Commonwealth. *Ashworth* v. *Kittridge,* 12 Cush., 192, decided five years later, holds that the decision of the presiding Judge, admitting testimony for the plaintiff in reply, is within his discretion and not subject to exception and the same learned Chief Justice in delivering the opinion of the court says "It is not always easy to determine in such cases, whether the evidence is strictly original or rebutting but we consider it is for the Judge in his discretion to determine whether such evidence shall be received or not." In close adherence to this rule follow numerous decisions, among which may be instanced *Morse* v. *Potter,* 4 Gray, 192; *Chadbourne* v. *Franklin,* 5 Gray, 312, 314; *Macullar* v. *Wall,* 6 Gray, 507; *Robinson* v. *Railroad,* 7 Gray, 92; *Martin* v. *McGuire,* Id., 177; *Ray* v. *Smith,* 9 Gray, 141, 144; *Corey* v. *Janes,* 15 Gray, 543, 545; *Burnside* v. *Everett,* 186 Mass., 4, 7. These cases not only abide by and confirm the earlier decisions but afford interesting instances of the application of the law; see also 116 Mass., 297; 104 Mass., 593; 115 Mass., 44. In *Lansky* v. *West End Street Railway Co.,* 173 Mass., 20, an action for personal injuries where evidence was introduced by the defendant, that the accident happened at a place other than that shown by the evidence of the plaintiff, it is held that the introduction of such evidence by the defendant does not make a fresh case which the plaintiff is entitled to meet, and that the exclusion of evidence offered as in rebuttal by the plaintiff, corroborative of his evidence in chief, is within the discretion of the Justice presiding.

In 1907 this court adopted as an additional rule the following: A party having rested his case cannot afterwards introduce further evidence except in rebuttal unless by leave of court. 102 Maine, 535. It is now rule XXXIX of the Revised Rules, 103 Maine, 534. It was considered in *Hathaway* v. *Williams,* 105 Maine, 565. The effect of that decision is to construe the rule as an enunciation and

adoption of the rule of law prevailing in Massachusetts. We agree with the Justice presiding in holding the evidence offered to be cumulative and not in rebuttal. *Hathaway* v. *Williams,* supra; *Lansky* v. *Railway Co.,* supra. But even if this were otherwise, it is doubtful if exceptions would lie unless error amounting to abuse of judicial discretion is manifest; *Ashworth* v. *Kittredge,* supra; *Water District* v. *Water Company,* 100 Maine, 268, 270. It will be presumed that the ruling of a Judge, receiving or rejecting evidence, was right, unless the exceptions show affirmatively it was wrong. *Parmenter* v. *Coburn,* 6 Gray, 509, 510.

The exceptions therefore must be overruled.

So ordered.

TRIBUNE PUBLISHING COMPANY *vs.* C. R. DAVIS.

York. Opinion January 31, 1916.

Assumpsit. Commissions. Conversion of moneys. Principal and Agent. Trover.

In an action of trover for a balance of moneys collected by defendant from sundry parties under a contract between him and the plaintiff, by the terms of which the defendant was to conduct a "contest" for the purpose of securing subscribers for a newspaper published by plaintiff, in which contract the defendant was to receive for his services commissions on all money received on account of subscribers.

Held:

1. In determining from the circumstances and relation of the parties whether trover or assumpsit is the proper remedy, it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question.
2. The title to money, from its nature, passes by delivery, and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe keeping and transmission.
3. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover, but might be the ground for an action of assumpsit.

4. When the defendant is the agent of the plaintiff for the collection and paying over not of a single subscription, but of all subscriptions secured and he is entitled to receive as commission a certain percentage of such subscriptions, an action of trover to recover such subscriptions may be unjust to the agent as depriving him of his right of set-off and other legal defenses.
5. Where the relation of principal and agent existed between the plaintiff and the defendant and the principal brought an action of trover against the agent for moneys alleged to have been received by him and converted to his own use, under the circumstances of the case an action of trover could not be maintained.

This is an action of trover to recover certain moneys which were in the hands of the defendant at the close of a newspaper contest which was the subject of a contract between the parties. There remained in the hands of the defendant $476.40, a balance of moneys collected by him. The plaintiff made demand upon him for said money. The defendant claimed that he was entitled to retain said sum as his commission, while the plaintiff claimed that the commissions constituted part of the costs of the newspaper contest and denied the right of the defendant to retain said sum for his commissions, and brought this action of trover for the recovery of said sum of money so retained by said defendant.

On conclusion of plaintiff's case in chief, the presiding Justice ordered a non suit. To this order plaintiff excepts. Exceptions overruled.

Case stated in opinion.

John V. Tucker, and Allen & Willard, for plaintiff.

Lucius B. Swett, for defendant.

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

BIRD, J. Upon the close of the contest which was the subject of the contract between the parties there remained in the hands of the defendant four hundred and seventy-six dollars and forty cents, a balance of moneys collected by him. The defendant claimed, upon demand made by plaintiff, that he was entitled to retain this sum as commissions while the plaintiff, claiming that the commissions constituted part of the costs of the contest, denied the

right of defendant to any commissions and brought this action of trover for the recovery of the sum so retained. At the close of evidence of the plaintiff the court ordered a non suit and the plaintiff excepted.

It is the opinion of the court that this case cannot be distinguished from that of *Hezelton* v. *Locke,* 104 Maine, 164. That case was an action of trover brought by the manager of a life insurance company against an agent appointed by him to solicit business and to collect the premiums on policies secured by him, for a premium collected by the latter, who had undertaken to pay over all premiums collected to the manager. There, as here, a non suit was ordered and exceptions taken. After discussing trover as a remedy for the recovery of money and the rights of plaintiff as against defendant, the court, in overruling the exceptions, says: "In determining from the circumstances and relation of the parties whether trover or assumpsit is the proper remedy it is necessary to consider the distinctive quality of money as differing from other kinds of property, and the character and conduct of the defendant in receiving and retaining the money in question. From its nature the title to money passes by delivery and its identity is lost by being changed into other money or its equivalent in the methods ordinarily used in business for its safe keeping and transmission. An agent unless restricted by the terms of his contract would violate no duty assumed by him by adopting these methods in dealing with the money of his principal. Mere failure to deliver such property in specie on demand would not be technical conversion, nor would the refusal to pay over its equivalent be conclusive evidence of conversion in the sense of the law of trover but might be the ground for an action of assumpsit. *Orton* v. *Butler,* 7 Eng. C. L., 224; *Hennequin* v. *Clews,* 111 U. S., 676; Vol. 1, Federal Statutes annotated, 580, 582.

The defendant was the agent of the plaintiff for the collection and paying over not of a single premium of insurance but such as were payable for all policies effected by him in his business of canvassing, and he was entitled to receive as commission a certain percentage of these premiums when paid over. An action of trover by the principal might, under these circumstances, be unjust to the

agent by depriving him of his right of set-off and other legal defenses. *Orton* v. *Butler,* supra."

See 1 Chit. Pl. (13th, Am. Ed.), 147.

The exceptions must be overruled.

So ordered.

LEVI H. MAY *vs.* DOCITE LABBE.

Aroostook. Opinion January 31, 1916.

Adverse Possession. Deeds. Disclaimer. Judgment. Lines agreed upon. Nul disseizin. Occupation of land. Pleading. Presumption. Prima facie title. Proof of plaintiff's title. Revised Statutes, Chapter 106. Writ of Entry.

1. In a real action, pleading disclaimer as to part of the land demanded, and the general issue as to part, does not relieve the demandant from the necessity of proving title to the part not disclaimed.
2. In a real action, when the tenant claims a part only of the land demanded and disclaims the remainder, the plaintiff may show title to, and recover, a specific part of the premises, though less than he has demanded.
3. Clear and unambiguous calls in a deed cannot be set aside and different ones substituted in their place by parol proof of the acts of the parties, either before or after the deed was made.
4. In the defendant's title deed his westerly line is described as "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;" *held,* that the brook was the boundary as far as the post at the brook, as the brook run at the date of the deed, and a line parallel with the east line of the lot was the boundary from the post to the rear end of the lot.
5. Upon the evidence the plaintiff is clearly the owner of a part at least of the disclaimed premises, and a verdict for the defendant for the whole of it was unmistakably wrong.

Writ of entry to recover tract of land in Aroostook county. Part of the land claimed in the plaintiff's writ is marked on the plan or sketch shown in the opinion of the court and called "disputed tract."

The defendant disclaimed as to all of the land lying westerly of the line marked C D on the sketch or plan and pleaded nul disseizin as to the strip between the line A B and the line C D, called the disputed tract.

The jury rendered a verdict for the defendant, and the case was before the court on motion by plaintiff for new trial and exceptions to certain rulings of the presiding Justice. Exceptions not considered. Motion for new trial sustained. So ordered.

Case stated in opinion.

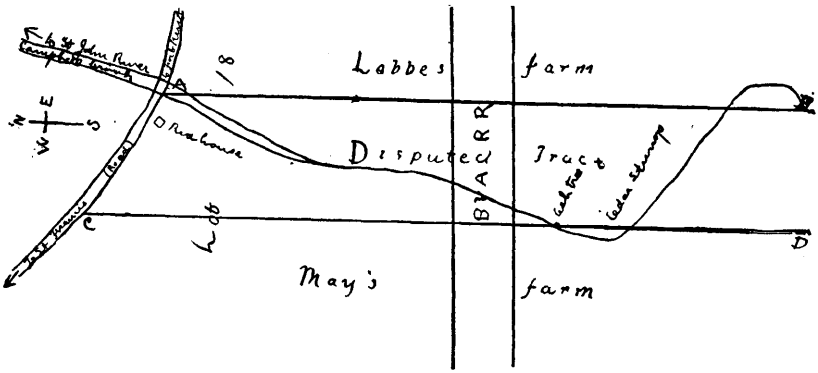
James D. Maxwell, for plaintiff.

A. S. Crawford, Jr., and J. A. Laliberte, for defendant.

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

SAVAGE, C. J. Writ of entry to recover a tract of land in Fort Kent. The case has been before this court once before on exceptions to the direction of a verdict for the defendant. The court held that there was at least prima facie evidence that the plaintiff had title to the disputed strip or to some part of it. *May* v. *Labbe,* 112 Maine, 209. Upon a second trial the jury found for the defendant. And the case comes up on plaintiff's motion for a new trial and exceptions.

The plaintiff owns the westerly part of Lot 18, south of the St. Francis road so called, and the defendant the easterly part. Their lands adjoin. The controversy relates to the location of the dividing line. The situation is shown approximately upon the following sketch:



The description of the land in the plaintiff's writ commences "at an iron pin driven near the center of Campbell brook at the bridge where the St. Francis road crosses said brook," which is the point A in the sketch. It proceeds thence southerly to point B, westerly to the westerly lot line of Lot 18, northerly to the St. Francis road, and easterly by the road to the place of beginning. The defendant has disclaimed as to all of the land demanded westerly of the line C D on the sketch, and has pleaded nul disseizin as to the strip between the line A B and the line C D. The strip in dispute is 183.8 feet wide, and nearly three-fourths of a mile long.

By their verdict the jury must have found that the plaintiff did not have title to the disputed strip, nor to any of it.

A brief statement of the legal rights of the parties as affected by the pleadings will tend to simplify the discussion of the evidence. Disclaimer pleaded is a plea of non-tenure, and must be pleaded in abatement, R. S., ch. 106, sect. 6. If, under it, the tenant shows that he was not in possession of the premises when the action was commenced, the action is entirely defeated; but if he was in possession of any part of the land disclaimed, the demandant prevails. *Putnam Free School* v. *Fisher,* 34 Maine, 172. If the tenant disclaims as to part, and pleads nul disseizin as to the remainder, the plea admits the tenant to be in possession of all land not specially disclaimed, and if it appears that he has not in his disclaimer described the true boundary line and has failed to disclaim some part of the demandant's land, the demandant may have judgment for the part disclaimed, as well as for the part of his land not disclaimed. *Perkins* v. *Raitt,* 43 Maine, 280. When a tenant claims, or is in possession of a part only of the premises he may describe such part in a statement filed in the case, and disclaim the remainder, and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part, and not for the portion disclaimed. R. S. , ch. 106, sect. 6.

But pleading disclaimer as to part, and the general issue as to part, does not relieve the demandant from the necessity of proving title to the part not disclaimed. He can recover only upon the strength of his own title, and not upon the weakness of the tenant's. *Morse* v. *Sleeper,* 58 Maine, 329; *Coffin* v. *Freeman,* 82 Maine, 577; *Hazen* v. *Wright,* 85 Maine, 314. The same rule applies as in

ordinary cases of real actions. The tenant may hold the demandant to the proof of his title, though he, himself, has none. *Brown* v. *Webber,* 103 Maine, 60. But the controversy is limited to the part not disclaimed. As in other real actions, the demandant may recover a specific part of the premises to which he proves title, although less than he demanded. R. S., ch. 106, sect. 10. But he cannot recover more than he shows title to. See *Kimball* v. *Hilton,* 92 Maine, 214. The matter of pleadings, and the rights of parties thereunder is regulated by statute. R. S., ch. 106, and the construction we have given harmonizes all the statutory provisions.

The facts in this case, either undisputed, or such as a jury would be warranted in finding may be summarized as follows:

The land in controversy is a part of lot number 18 in the town of Fort Kent. The title to lot 18 until 1876 was in the State of Maine. But it had been settled upon by one Joseph Wildes. Although Wildes had no title he gave a deed of the westerly half to his daughter and of the easterly half to his son, Joseph Wildes, Jr. Before the deeds were made, the parties went to the north end of the lot, started at a point at the center as nearly as they could estimate, and with a pocket compass run a course, and marked it, to the south end of the lot, intending to divide the lot into two parts about equal in size. This conventional dividing line is claimed by Labbe to be coincident with the line C D on the sketch, which is the line to which he has disclaimed. The conventional line at least touched the ash tree and the cedar stump in line C D. The deeds of Wildes to his children are not in evidence, and we do not know what lines they described. Later, but prior to 1876, other deeds were made of the easterly part of the lot, the part now owned by Labbe. At one time it came into the possession, under deed, of Edward Eaton, who made a deed of it in 1874 to George Fitzgerald. A small tract seems to have been deeded by Joseph Wildes, Jr. to one Smith, who later deeded to Eaton. The deeds are not in the case, and the precise location of that tract is in dispute.

The State, September 28, 1876, gave Norman Campbell a deed of the whole lot, and July 4, 1877, Norman Campbell conveyed the easterly part of the lot to one Cunliffe. It does not appear that Norman Campbell ever made any other conveyance. October 3, 1877, Fitzgerald conveyed to Eaton, and on the next day Cunliffe

conveyed to Eaton. September 28, 1881, Eaton conveyed to the defendant. In all these deeds of the easterly part, beginning with Eaton's deed to Fitzgerald in 1874, the descriptions were substantially alike. In the defendant's deed, the land conveyed is described 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." In some of the deeds, as in that of Campbell to Cunliffe, the westerly line was described as "running in a southerly or southwesterly course up said brook to a post on the south side of the county road," etc.

The plaintiff claims title to the westerly part of lot 18 under warranty deeds, which were construed in *May* v. *Labbe,* supra. By his deeds his land is bounded "on the easterly side by land occupied by Docite Labbe," the defendant. When the case was before the court the first time, it was held that the plaintiff's warranty deeds afforded sufficient evidence of title in him to justify a verdict in his favor unless the defendant proved a better title. And inasmuch as the plaintiff is bounded on the east "by land occupied by" the defendant, it was also held that the defendant's occupation, in the absence of proof to the contrary, is presumed to be under and in accordance with his deed, and coextensive with the premises therein described.

The defendant in argument does not claim title to the disputed strip by adverse possession. There is not sufficient evidence to warrant such a claim. He makes the broad claim that his deed by proper construction includes the whole strip. He says that the "post" named in the description of the westerly line, as "a post on the south side of the county road" did not mean a post at or in the brook, but a post at the northwesterly corner of the disputed strip at the point C. This point is nearly 200 feet from the brook, and the only evidence that a post was ever there is that of a witness who says that a stake was set down near the road for a guide, when the conventional line was run.

The defendant relies much upon the conventional line. He says that it was not only agreed upon, but was so lived up to, recognized

and occupied to, by the parties on both sides of the line, and that it affords convincing evidence that Campbell's deed of the easterly part, and all the other deeds down to the defendant's were intended to convey to the recognized conventional line, and would do so by the insertion of a call from the brook to the northwest corner. He also relies upon the doctrine that when in a deed or grant the line is described as running from a given point, and this line is afterwards run out and located and marked upon the face of the earth by the parties in interest, and is afterwards recognized and acted upon as the true line, the line thus actually marked out and acted upon is conclusive, though it varies from the course given in the deed. *Knowles* v. *Toothaker,* 58 Maine, 172.

It is clear that this case does not come within the doctrine of *Knowles* v. *Toothaker,* supra. There is no evidence that the parties to this deed at the time of making the deed, or after, went upon the land and marked upon the face of the earth the line supposed to be described in the deed. The case rather falls within the rule that clear and unambiguous calls in a deed cannot be set aside and different ones substituted in their place by parol proof of the acts of the parties, either before or after the deed is made. *Ames* v. *Hilton,* 70 Maine, 36.

Whether or not there was a conventional line along the line C D, is material only as its existence may aid in the construction of the defendant's deed, and upon another phase of the case, upon the nature and extent of the defendant's occupation. It is well settled that a line agreed upon by the parties in interest and occupied up to for more than twenty years is conclusive, *Walker* v. *Simpson,* 80 Maine, 143, though it does not appear that the occupation has been such as would amount to a continuous disseizin for that time. *Faught* v. *Holway,* 50 Maine, 24. Possession in accordance with agreement after an acquiescence for twenty years gives title. *Moody* v. *Nichols,* 16 Maine, 23. The title does not pass to the occupier on either side by agreement, for that would contravene the statute of conveyances. It passes by disseizin. Each party claims and possesses to the agreed line adversely to the other, because of the agreement. *Moody* v. *Nichols,* supra. We do not conceive that a conventional line is defeated, although the original agreement was made by parties without title, but in possession, if after they acquired title the agreement was mutually understood to remain in

force, and possession accordingly was acquiesced in for twenty years.

But if there was a conventional line as claimed by the defendant, acquiesced in by the parties in interest for a time long enough to give title, we think it cannot aid the defendant here on the question of his title. However much those before him on the easterly side may have owned, the defendant got and now owns only what his deed conveyed to him. However much they may have intended to convey, they conveyed no more than the deeds properly construed conveyed. The defendant's deed fixes his westerly line by a course beginning where the easterly line of lot 18 intersects Campbell brook thence southerly by the brook to a post on the south side of the county road, thence southerly parallel with the easterly line of the lot to the rear line, etc. All prior conveyances of the easterly part by any persons having title were limited by the same courses. The construction of the deed is a matter of law. As matter of law, the brook was the boundary as far as the post, and a line parallel with the east line was the boundary from the post to the rear end of the lot.

The only question open is the location of the post. Unless controlled by other calls in the deed, or if ambiguous or uncertain, by extraneous evidence, we think by fair construction of the language, the post which was named as the terminus of the course by the brook should be regarded as in or by the brook, and not at an acute angle, nearly two hundred feet from the brook. There are no calls in the deed that suggest any other construction. There is no evidence that there ever was a post at the northeast corner of the disputed tract, except a stake already referred to stuck down as a guide, when the conventional line was run many years before the making of any of the deeds which refer to a post. If there was such a post, and it was intended that it should mark the beginning of the parallel line, it is evident that one call has been omitted from all the deeds of the easterly part of the lot. It is improbable that the error escaped notice so many times. We feel compelled to hold that the post referred to in the deed was a post at the brook, and that the defendant's title by deed extends no farther westerly than a line drawn parallel with the east line of the lot from the post to the rear end of the lot. There is evidence that Joseph Wildes, Jr., deeded a small tract of land westerly of this line to one Smith, and

Smith deeded it to Eaton. But Wildes had no title, and if he had had one, Eaton did not convey it to the defendant.

There is evidence from which a jury would be warranted in finding that the course of the brook at the road has been changed easterly not exceeding thirty feet since the date of the deed. The post therefore at that time may have been thirty feet westerly of the iron pin which the plaintiff describes in his writ as the beginning of the divisional line. And it follows that the defendant may own a thirty foot strip westerly of the line claimed by the plaintiff. If the case should be tried again, that fact may be determined by a special verdict, and judgment entered accordingly.

We have thus defined the limits of the defendant's title. But it is necessary to go further. The plaintiff is bounded on the east "by land occupied" by the defendant, not necessarily by land owned by the defendant. As already stated, in the absence of evidence to the contrary, occupation is presumed to be in accordance with the limits of ownership. But the presumption is rebuttable. There is some evidence that the defendant has occupied at times and for various purposes some portions of the disputed strip. He has cultivated a little of it. He has pastured a little of it. He has cut some wood and timber on the south part of it. It is not important now to go into the extent or effect of his occupation for these purposes. It is doubtful whether his occupation of small, detached tracts, and his occasional cutting of wood and timber, can be regarded as fixing a line of occupation, within the meaning of the plaintiff's deeds. There is no evidence that he has ever occupied any land west of Campbell brook as far south at least as the ash tree. So that, the plaintiff's deeds give him prima facie title at least to the land as far east as the brook and south to the ash tree. Indeed it may fairly be inferred from the evidence that some of the parties in interest on both sides, without much regard to their deeds, have supposed that the brook was the divisional line south of the road as well as north.

We conclude that upon the evidence the plaintiff is entitled to recover at least so much land as lies westerly of where the brook run in 1881. Therefore a verdict for the defendant for the whole of the disputed strip was unmistakably wrong. The exceptions are not considered.

Motion for a new trial sustained.

THERESA L. WHITING, in Equity, *vs.* SAMUEL K. WHITING.

Hancock. Opinion January 31, 1916.

Constructive Trust. Equitable Remedy. Fraudulent Conveyance. Husband and Wife. Interest of Wife in Husband's Real Estate. Laws of 1913, Chapter 40.

1. Upon the death of a husband a proportion of his real estate prescribed by statute descends to his widow in fee.
2. During wedlock, before a husband's death, his wife has a right and interest in his real estate, contingent upon her surviving him. The interest is a valuable property interest.
3. In a case where a husband falsely and fraudulently represented to his wife that a deed which he requested her to sign in release of her right and interest by descent, did not include certain of his real estate, and thereby induced her to sign a deed which did include such real estate, in pursuance of a fraudulent scheme to deprive her right and interest by descent, it is held:—

a. That so much of the money received by him for the land conveyed as is equivalent to the value of her right and interest by descent is held by him under a constructive trust, and that he is accountable to her for it.

b. That the wife in such case may maintain a bill in equity at common law against her husband to impress a trust upon the money received, and for an accounting.

c. That, in such a case, a wife may maintain a bill in equity against her husband under Laws of 1913, Chapter 40, which provides such a remedy when a husband has property in his possession or under his control which in equity and good conscience belongs to his wife.

Bill in equity brought by a wife against her husband to have her share of the purchase price of certain lands sold by her husband declared to be a trust fund, and to compel him to account to her for said share, the wife alleging in her bill that her husband, in order to obtain her signature to the deed, made false and fraudulent statements to her concerning the lands that were intended to be included in the conveyance.

The defendant demurred to the bill and the presiding Justice, all the parties agreeing thereto, ordered the bill to be reported to

the Law Court on bill and demurrer. Demurrer overruled. Defendant to answer.

Case stated in opinion.

Fulton J. Redman, for plaintiff.

Deasy & Lynam, for defendant.

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

SAVAGE, C. J. This bill in equity is brought by a wife against her husband. She alleges in her bill, that her husband being about to execute and deliver a deed of certain of his real estate requested her to sign the deed in release of her right and interest by descent. She alleges further that the defendant, "with intent to deceive the plaintiff in regard to the contents of said deed and to induce her to sign the same, falsely and fraudulently stated and represented to the plaintiff that the said deed had reference" to two certain described lots, and that it did not "refer to or in any way affect" a certain other lot, described in the deed as the "First Lot," that relying upon these statements she signed the deed, as requested, that she did not know the true contents of the deed, that the defendant did know, that the defendant "induced the plaintiff to sign said deed in pursuance of a fraudulent scheme to deprive her of her interest and right by descent in the said "First Lot," and that the value of the defendant's interest in that lot was approximately six thousand dollars.

The bill seeks to have so much of the fund received by the defendant from the sale of the real estate in question as is equivalent to the value of the plaintiff's right and interest therein, of which she claims to have been defrauded, declared to be a trust fund, and that the defendant be ordered to account to her for the same.

The defendant demurred, and the case comes before this court on report on bill and demurrer.

There is an infirmity in the bill in that there is no express averment that the "First Lot" was included in the deed, but no point is made in argument on this ground. Nor is it contended that the allegations in the bill, which upon demurrer are to be taken to be true, do not state a case of fraud within the equity jurisdiction of

the court, if the parties were not husband and wife. The defense, as stated in the brief, "rests upon the proposition that the doctrine of marital unity,—oneness—has not been even in equity so completely abrogated as to authorize suits by one spouse against the other involving strictly marital rights in property." The sole question argued, and to be considered is, whether a wife has a remedy in equity against her husband for wrongs and frauds such as are alleged in the bill.

It is well settled that a wife cannot maintain an action at law against her husband. *Perkins* v. *Blethen,* 107 Maine, 443; *Copp* v. *Copp,* 103 Maine, 51. It is equally well settled that, because there is no remedy at law, their conflicting rights touching property may be adjusted in equity. *Fitcher* v. *Griffiths,* 216 Mass., 174. This general proposition is not denied, but it is contended by the defendant that it is limited to property rights growing out of an ante-nuptial settlement, or relating to separate property, and does not include such rights as grow out of and depend upon the marital relation alone. And the inchoate interest which a wife has in her husband's real estate is claimed to be dependent only on the marital relation.

The discussion will be clarified if we state first what is a wife's interest in her husband's real estate. In this State the common law right of dower has been abolished. Laws of 1895, ch. 157, sect. 2; R. S., ch. 77, sect. 8. In lieu thereof, a larger and more valuable interest is given to the wife. The husband's real estate descends, "if he leaves a widow and children, one third to the widow; if no issue, one-half to the widow; and if no kindred, the whole to the widow." R. S., ch. 77, sect. 1. This right of the wife is called in the statute her "right and interest in the real estate." Upon his death, the fee in the real estate descends to the widow, in the proportion prescribed by the statute. *Longley* v. *Longley,* 92 Maine, 395. During his lifetime her right is, in a sense, inchoate, and is contingent upon her surviving her husband. But it is an interest. The statute terms it such. It is a valuable interest. It is an interest that she cannot be deprived of without her consent, without compensation. It is an interest which can be valued. If she refuses to release her interest by joinder in a deed with her husband, her interest may be determined, and the value thereof ordered paid to

her. R. S., ch. 77, sect. 17. It has been held that she has such an interest during her husband's lifetime that she is entitled to redeem from his mortgage, though she had therein released to the mortgagee her right and interest by descent. *Tuttle* v. *Davis,* 114 Maine, 109; *Fitcher* v. *Griffiths,* supra.

It has been well said that an inchoate right of dower is a kind of property with incidents sui generis. *Fitcher* v. *Griffiths,* supra. It has been said that it is "a valuable interest, which is frequently the subject of contract and bargain. It is more than a possibility, and well may be denominated a contingent interest." *Bullard* v. *Briggs,* 7 Pick., 533. It has been called "a right of value, dependent on the incident of ownership." *Mason* v. *Mason,* 140 Mass., 63. Much more are these definitions to be applied to a right and interest by descent. *Tuttle* v. *Davis,* supra.

It is an ancient doctrine that a bill for an injunction will lie to restrain a husband from transferring property in fraud of the legal or equitable rights of his wife. 2 Story's Eq. Jur. sect. 955. If this is true, it is difficult to perceive why a wife should not have an equitable remedy against the proceeds of his fraud.

And this leads us to consider what we think is the precise issue in this case. This is not a bill to recover damages which have resulted from the fraudulent conduct of the husband. The plaintiff is not now seeking to protect her interest in the land. Her point is that her husband, by means of fraud, has received money for her interest in the land, and that in equity that money belongs to her. She seeks to impress upon that money a constructive trust, a trust ex malificio. She is seeking to recover money which, she says, in equity belongs to her. She is seeking to enforce a property right. We think she may do so. Though her right originated through the marital relation, her right to the fund is not a marital right. It is a property right, equitable in its nature, and enforceable in equity. It is such a property right as a wife may enforce in equity against her husband.

Thus far we have treated the question upon the common law doctrine of the ability or disability of a wife to proceed in equity against her husband. But we think, also, that the case fairly comes within the scope of chapter 48 of the Laws of 1913. By that statute jurisdiction in equity is conferred upon the supreme judicial court to hear and determine property matters between wife and husband.

Section 2 provides that "a wife may bring a bill in equity against her husband for the recovery, conveyance, transfer, payment or delivery to her of any property, real or personal, or both, exceeding one hundred dollars in value, standing in his name, or to which he has the legal title, or which is in his possession, or under his control, which in equity and good conscience belongs to her." The fund upon which the plaintiff seeks to impress a trust is undoubtedly property. It is property in his possession and under his control. It is property which, if her allegations are true, in equity and good conscience belongs to her. We think it is property within the meaning of the statute, and property which she may recover in this proceeding.

Demurrer overruled.
Defendant to answer.

RICHARD B. STOVER, Trustee, *vs.* EVELINE T. WEBB, et als.

Penobscot. Opinion February 3, 1916.

Contingent Bequests. Rights of After born children. Trust Estate. Will.

When a will was made the testator had living one son, Edwin, and one daughter, Anna, both children. Afterwards, before his death, he had another daughter born. After his death another son was born. By a trust provision in the will, one thousand dollars was to be paid to the son Edwin when he should be twenty-one years old, and a like sum was to be set apart at the same time for the daughter, Anna; three thousand dollars was to be paid to Edwin when he should arrive at the age of twenty five, and a like sum was then to be set apart for Anna. Edwin died, still a child, in the lifetime of his father. The will provided that "whenever any sums of money shall be paid to or set aside for my said children as hereinbefore provided, a like sum shall be set aside for each of such children hereafter to be born. * * * It being my meaning to place any child or children hereafter to be born upon the same footing with my children now living." In a bill in equity to construe the will it is held:

1. That the provisions for Anna were not contingent upon Edwin's living to be twenty-one and twenty-five years old. She was entitled to have the specified sums respectively set apart for her whenever Edwin would have been twenty-one and twenty-five, had he lived.
2. That after born children are entitled to share equally with those living at the time the will was made.
3. That in construing a will, the court will not advise a trustee as to the propriety or legality of acts already done.

Bill in equity brought by a testamentary trustee for the construction of will. Questions arose as to right of trustee to pay certain bequests in said will. Decree in accordance with the opinion.

Case stated in opinion.

Morse & Cook, for trustee.

Astor Elmassian, for defendants.

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

SAVAGE, C. J. Bill brought by a testamentary trustee for the construction of the will of Jahaziah S. Webb, late of Bangor. The cause is reported to this court on bill and answer.

The will was executed September 16, 1865, and the testator died February 11, 1890. When the will was made the testator had one son, Edwin, then about three years old, and a daughter named in the will as Anna, now called Mary Louise. After the will was made, but before the testator's death, a second daughter, Anna L., was born; and after his death a second son, Jahaziah, was born. The son Edwin died in 1888 in his father's lifetime.

The residuum of the estate was left in trust, mainly for the benefit of his widow and children. Among the trust provisions are the following:

"When my son Edwin shall be twenty-one years old, if the condition of my estate shall allow the maintenance of the family in accordance with the foregoing provisions being considered, I direct said trustee to pay to him the sum of one thousand dollars, and at the same time, if my daughter Anna shall then be alive, to set aside a like sum of one thousand dollars the net income of which shall be paid to her guardian for her during her minority, and

thereafter to her, and when my said son shall be twenty-five years old, should the condition of my estate allow under the same consideration, I direct said trustee to pay to him the further sum of three thousand dollars, and at same time should my daughter Anna be then alive to set aside a like sum of three thousand dollars, the net income of which shall be paid to her. And at any time after my said daughter shall be twenty-one years old, whenever, in the judgment of said trustee, it will be better for her to have the principal sums so set aside, the income of which is to be paid to her as aforesaid or any part thereof, paid over to her, said trustee is authorized to pay over to her such principal sums or any part thereof, in which case, of course she shall no longer be entitled to receive from such trustee the income of such principal sums so paid over to her." . . .

"From and after the time when my said daughter Anna shall be twenty-one years old, after satisfying all the foregoing provisions in this will, the balance of the net income . . . shall be paid one-half to my said son and one-half to my said daughter during their respective lives."

Then follow provisions for the contingency of the death of both the children during their mother's life, and that of the death of the mother during the life of one or both of the children.

The will then provides as follows: "I further direct that whenever any sums of money shall be paid to or set aside for my said children as hereinbefore provided, a like sum shall be set aside for each of such children hereafter to be born, the net income whereof shall be paid to their respective guardians during their several minorities, and the said principal sums shall be paid to each boy upon arriving at the ages of twenty-one and twenty-five respectively, and to be held for each girl subject to the same provisions as are hereinbefore made for my daughter Anna, and unless paid to such girls in their lifetime, to be paid to their heirs upon the decease of each. The balance of the net income of my estate after satisfying all the provisions of this will shall be divided proportionally among all my children both those now living and those who may be hereafter born during their respective lives. . . . It being my meaning and intention to place any child or children hereafter to be born upon the same footing with my children now living so that each

and the heirs of each shall be entitled to the same proportional part of the income and of the principal of my estate."

The bill states that the condition of the trust estate is such as to allow the maintenance of the family in accordance with the provisions of the will after the payment of the sums of one thousand and three thousand dollars to the daughters and the surviving son of the testator. It also states that one thousand dollars was advanced to the surviving son, when he became twenty-one years old.

The bill asks that the court will determine (1) whether the trustee was authorized to pay to the surviving son the one thousand dollars, and whether he is authorized to pay each of the daughters an equal sum if in his judgment it is better for them to have it, and (2) whether he is authorized to pay to the surviving son, and to set aside for, or to pay to, each of the daughters, the sum of three thousand dollars.

It should be noted, with respect to the request that we give our opinion concerning the propriety or legality of the payment already made to the surviving son, that it is not the province of the court in construing a will to advise a trustee as to things already done by him, but as to things he may be called upon to do in the future. With this qualification both questions are answered in the affirmative. The specific provision made in the will for Anna, now Mary Louise, who was then born, was that upon Edwin's arriving at the ages of twenty-one and twenty-five years respectively, sums should be set apart for her equal in amount to those given to Edwin. The tenor of the entire will makes it clear that these provisions for Anna were not intended to be contingent upon Edwin's living to be twenty-one and twenty-five. We think the intention of the testator was that these sums should be set apart for her in any event, and the phrase "when my son Edwin shall be twenty-one years old" and so forth, fixed the time when they should be set apart for her. The testator doubtless expected both children to live, and he intended them to share alike. The fact that Edwin died did not deprive Anna of her bequest.

And it was the manifest intention of the testator that after born children should share equally with those living at the time the will was made. The intention could not be more clearly expressed. It appears again and again in the will. The question requires no

discussion. It hardly admits of any. The children now are all over the age of twenty-five years, and the provisions of the testamentary trust for their benefit may now be carried completely into effect. A decree may be entered below accordingly.

So ordered.

THE ARTHUR E. GUTH PIANO COMPANY

vs.

THEODORE M. ADAMS and Trustee.

Penobscot. Opinion February 3, 1916.

Conditional sale. Independent Agreement. Lease. Warranty.

By written contract, the defendant "hired and received of the plaintiff a piano, and expressly agreed to pay the agreed value of the piano in instalments. The title was to be retained by the plaintiff until all instalments were paid when the title was to pass to the defendant. In a suit to recover an instalment of the price, it is held:—

1. That the written contract was a conditional sale.
2. That when the vendee in a conditional sale agrees expressly to pay the price, the vendor may maintain an action against him on his promise, and may also enforce his security.
3. That, when such a contract contains the vendee's agreement that the vendor is not to be holden for any agreements made with his salesman other than those specified in the lease, evidence of a warranty of quality made by a salesman, not specified in the contract, is inadmissible against the vendor.
4. That the refusal to give a requested instruction which is foreign to the issue and irrelevant is not exceptionable.
5. That the jury were not entitled to know what the effect of their verdict might be with respect to the other rights and remedies of the plaintiff.

The defendant hired and received of the plaintiff company a certain piano, known as the Kohler & Campbell, style K, agreeing to

pay certain monthly instalments until the full sum of three hundred dollars had been paid. Defendant signed a certain writing or contract, commonly called a lease, in which lease or writing it was agreed that the plaintiff company should not be holden for any agreements made with the salesmen of the plaintiff other than those specified in the contract or lease. Defendant did not meet any payments, offered to return the piano and rescind the contract, claiming that it was not as represented by the agents and servants of the plaintiff company. Plaintiff company refused to accept the piano. This action was brought to recover the monthly payments or instalments then due.

Defendant pleaded the general issue with a brief statement, alleging an express warranty of the quality and condition of the piano, a breach thereof, and on that account a seasonable rescission of the contract by him, the defendant. And defendant further claimed on that account an entire failure of consideration for the contract.

Verdict for plaintiff for full amount of instalments claimed as then due by plaintiff. The case comes before this court on the defendant's exceptions to the exclusion of evidence, and to instructions and refusals to instruct, by the presiding Justice. Exceptions overruled.

Case stated in opinion.

George H. Worster, for plaintiff.

Charles J. Hutchings, and Edward P. Murray, for defendant.

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

SAVAGE, C. J. Action of assumpsit to recover three instalments of fifteen dollars each, which the plaintiff claims to be due to it according to the terms of the following written contract:

"BANGOR, MAINE, Dec. 7, 1914.

I have this day hired and received of the Arthur E. Guth Piano Co., one Kohler & Campbell Piano Style K, No. 155,759 of the agreed value of $300.00 for which I agree to pay $15.00 Jan. 7, 1915 and $15.00 per month with interest.

It is understood and agreed that I neither claim, dispose of, nor can I acquire any title whatever to the above property, until said

payments shall amount to the sum of $300.00 with interest, at which time it is agreed that said Arthur E. Guth Piano Co. shall sell and deliver to me said property with good and effectual receipted bill of sale thereof.

I also agree to make payments promptly, as agreed above, on the 7th day of each month and any failure to comply with the terms herein mentioned I do hereby authorize and empower and direct said Arthur E. Guth Piano Co. or their authorized agent or attorney, without process of law, to enter and retake, and may enter and retake immediate possession of said property, wherever it may be, and remove the same, I forfeiting all that has been paid thereon.

THEODORE M. ADAMS."

Under the contract the piano was delivered to the defendant. Nothing has been paid.

The case comes before this court on the defendant's exceptions to the exclusion of evidence, and to instructions and refusals to instruct by the presiding Justice.

The defense is two fold; first that the defendant's promise in the written instrument to pay the monthly payments was not a promise for the breach of which the plaintiff can maintain a suit, and that the plaintiff's only remedy is to retake the piano; and secondly, that the plaintiff's agent, in the negotiations for the piano, expressly warranted its quality and condition, that the representations were not true, and that in consequence thereof the defendant seasonably rescinded the contract.

I. We think this contract crudely drawn in the guise of a lease was a conditional sale. The vendor retained the title as security for the purchase price. The title was to be passed on condition that the vendee made the payments. *Gross* v. *Jordan,* 83 Maine, 380; *Morris* v. *Lynde,* 73 Maine, 88; *Reynolds* v. *Waterville,* 92 Maine at p. 304; *Robinson* v. *Berry,* 93 Maine, 320; *Franklin Motor Car Co.* v. *Hamilton,* 113 Maine, 63. In a conditional sale the vendee may expressly promise to pay or he may not. If he does not promise to pay, the vendor's remedy is to retake the property; he cannot recover the price of the vendee. Such were the contracts in the cases of *Hopkins* v. *Maxwell,* 91 Maine, 247, and *Campbell* v. *Atherton,* 92 Maine, 66, on which the defendant relies. These cases, therefore, are not authority for a doctrine that the vendee in

a conditional sale who has expressly promised to pay is not liable upon his promise. If the conditional vendee expressly promises to pay, suit may be maintained against him on his promise, and the vendor may also enforce his security. *Westinghouse Electric &c. Mfg. Co.* v. *A. & T. R. R. Co.,* 106 Maine, 349. And we cannot conceive that it makes any difference whether the promise is in the form of a promissory note, or is otherwise expressed in the contract. Since this suit is between the original parties to the contract, it is immaterial whether it was recorded or not. R. S., ch. 113, sect. 5. The presiding Justice refused to instruct the jury that an action could not be maintained for a breach of the defendant's promise to pay. His ruling was right, and the defendant's exceptions to the ruling cannot be sustained.

II. The defendant offered to show a warranty of quality and condition by the plaintiff's selling agent. The evidence was excluded, and exception was taken. The defendant claims that the alleged warranty was an independent agreement, the breach of which is available to him in an action on the contract, and relies upon *Tainter* v. *Wentworth,* 107 Maine, 439. The plaintiff contends that the evidence was inadmissible because it tended to vary, add to and modify the written agreement. It is unnecessary to consider the question thus raised, for upon the contract is a certificate, signed by the defendant, "that the Arthur E. Guth Piano Co. are not to be holden to me for any agreements made with their salesmen other than those specified within this lease." This certificate was an agreement that the written lease contained all the agreements, terms and conditions of the contract. It was notice to the defendant that selling agents had no authority to vary, add to, or modify the terms of the lease as written. If notwithstanding this, the defendant relied upon representations of the agent, outside the written instrument, he did so at his peril. The agent may be liable for his false representation, but the principal is not made liable for them. The evidence was properly excluded.

III. The defendant requested an instruction that "if the plaintiff fails in its suits for the several payments alleged to be due by virtue of the written instrument declared on, there still remains to it the right to take back the piano as provided in the contract." The request was refused. To this refusal and to an instruction

given in lieu thereof, the defendant excepted. The exceptions cannot be sustained. However correct the requested instruction might be as an abstract statement of law, it was foreign to the issue, and irrelevant. So, as to the instruction given. The case is not concerned with any other remedies the plaintiff may have. The jury were not entitled to know what the effect of their verdict might be as to other rights and remedies. They were bound to settle the single issue before them, irrespective of other matters. The issue was not, whether the plaintiff had security of which it could avail itself, but whether the defendant made a binding promise.

IV. The defendant claims to have rescinded the contract for breach or warranty. But since evidence of the alleged warranty was excluded, the defendant shows no ground for rescission. And furthermore, there are no exceptions which touch the question of the right of rescission, except those relating to the warranty, which have already been considered.

Exceptions overruled.

CONSOLIDATED RENDERING COMPANY *vs.* JESSIE O. HARRINGTON.

Piscataquis. Opinion February 3, 1916.

Amending account in writ. Evidence. Exceptions. New cause of action. Ruling of court; Discretionary or as matter of law.

1. When a bill of exceptions to the allowance or disallowance of an amendment does not show that the ruling was made as a matter of law, it is to be presumed that the ruling was made as a matter of discretion.
2. Exceptions do not lie to the exercise of discretion in allowing or disallowing amendments.
3. In an action upon an account annexed for the price of "potatoes, roots and vegetables," it is not allowable to amend the account by inserting the words "Fertilizer for" before the word "potatoes."
4. Evidence to explain the wording of the account annexed and show that it properly set forth the trade name of a brand of fertilizer sold to the defendant was properly excluded.

This action was dated May 24, 1911, and entered at the September term of court, Piscataquis county, 1911, and was then continued from term to term until the September term, 1915. At September term, 1915, plaintiff filed a motion to amend by inserting the words "fertilizer for" in their appropriate places. To this, defendant objected on the ground that such amendment would introduce a new cause of action. Before the court ruled, the plaintiff offered to introduce evidence which it claimed would show that the words "potatoes, roots and vegetables" in the account annexed was a trade name for a certain brand of fertilizer. Defendant objected to the introduction of such testimony on the ground that it was not competent to introduce parol testimony to show what either party understood the writing to mean when the words of the writing were plain and unambiguous, and especially where the writing to be explained is a declaration in a writ. The court refused to admit the testimony and denied the motion to amend, to both of which rulings plaintiff excepted. Exceptions overruled.

Case stated in opinion.

C. W. Brown and W. E. Parsons, for plaintiff.

C. W. Hayes, for defendant.

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

SAVAGE, C. J. The plaintiff brought this action upon the following account annexed:

ESSEX FERTILIZER COMPANY.

HIGH GRADE FERTILIZERS.

39 No. Market St.

STATEMENT.

BOSTON, MASS., May 9, 1911.

Mr. J. O. Harrington,
Dover, Maine.

No. Bags.	Size.	Brand	Price	Amount	Total
3/9/10	72 112½ Lb. Bbls. Potatoes, Roots, and Vegetables, 8 tons,		38.50	308.00	
	40 1000 Lb. Bags ditto, 2 tons,		37.50	75.00	383.00

The plaintiff asked leave to amend the account annexed by inserting the words "Fertilizer for" before the words "Potatoes, Roots and Vegetables" in the first item, and the same after the word "Bags" in the second item. It offered evidence to explain the wording of the account annexed to show that the wording properly set forth the trade name of a brand of fertilizer which it sold to the defendant. The evidence was excluded, the amendment disallowed, and the plaintiff excepted.

The bill of exceptions does not show that the rulings complained of were made as to a matter of law. When a bill of exceptions is silent on this point it is to be presumed that the trial court ruled as a matter of discretion not to allow the amendment. Exceptions do not lie to the exercise of discretion in allowing and disallowing amendments. *Gilman* v. *Emery,* 54 Maine, 460; *Clark,* Applt., 111 Maine, 399. The exceptions therefore cannot be sustained.

But we will add that if the rulings had been made as a matter of law the result must have been the same. On the face of it, the plaintiff has sued for the price of "potatoes, roots and vegetables." Take it for granted that "potatoes, roots and vegetables" is a trade name for a brand of fertilizer, and that the plaintiff intended to sue for the price of such fertilizer, the plaintiff in its declaration has used only the descriptive part of the trade name, and not the name of the thing itself. He has sued to recover well known articles of commerce, "potatoes, roots and vegetables," and he seeks now to recover for "fertilizer." The plaintiff places much reliance upon the word "brand" which is over the items. It is true that the word 'brand" is not appropriate to potatoes and is appropriate to fertilizers. But no mention is made of fertilizer. There is nothing in the items to indicate fertilizer. It may be true that the plaintiff made a mistake in making out its bill, but we think we cannot remedy that mistake. Having plainly sued for "potatoes," and so forth, to permit it now to amend so as to recover for fertilizer would allow it to introduce a new cause of action, which is not permissible.

Exceptions overruled.

FLORENCE E. PHILBROOK, et al., *vs.* ANNE BATES RANDALL, et al.

Cumberland. Opinion February 3, 1916.

Appeal. Construction of the words "of the balance or remainder." Intention of testator. Intention of testator governing over language used. Presumption. Wills.

1. The expressed intention of a testator as gathered from the language of the whole will, read, in case of doubt, in the light of surrounding conditions, must control, unless in contravention of positive rules of law.
2. Words in a will may be supplied, transposed, altered, or disregarded, when the language is contrary to the apparent intention of the testator, not to discover the intention, but to express it properly when discovered.
3. A testator disposed of the residuum of his estate by using the following language:—"Of the balance or remainder of my property both real and personal of which I may die possessed, I give, devise and bequeath to my wife Anne Bates Randall," held, in a bill for the construction of the will, that the whole will read in the light of existing conditions, discloses an intention on the part of the testator to make his widow the residuary devisee and legatee of all of his estate which remained after satisfying the prior bequests in the will, and that the word "of" may be disregarded.

Bill in equity asking for construction of will. Testator left wife, no children, and one sister as his only heir. A bequest of a certain sum of money was made to his sister. A bequest was also made of the household goods and furniture to his wife. The testator added a residuary clause using the words "of the balance or remainder of my estate I give to my wife."

The plaintiffs claimed that the words "of the balance or remainder" made the residuary clause void, because it was uncertain and indefinite as to what part of the residuary estate was left to the wife.

The presiding Justice ruled that said clause or paragraph was a valid devise and bequest to the wife of all the residuary estate. Plaintiff entered appeal to the Law Court. Appeal denied. Decree below affirmed.

Case stated in opinion.

Fanning & Fellows, and Horace W. Philbrook, of counsel, for plaintiffs.

Wheeler & Howe, for defendants.

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

SAVAGE, C. J. This bill is brought by Mrs. Philbrook, who has unnecessarily joined her husband as a party plaintiff, to obtain a construction of the will of her brother, Humphrey A. Randall. The case comes before us on appeal from the decree of a single Justice.

Mr. Randall died leaving a widow, the defendant Randall, but no issue, and Mrs. Philbrook is his only next of kin, and would be his sole heir. He left an estate appraised at the value of $56,750. His will was written by himself. In it he bequeathed his household goods and furniture to his wife. He gave $500 to a cousin, and $5,000 to the plaintiff, Mrs. Philbrook. Then follows the paragraph in question: "Of the balance or remainder of my property both real and personal of which I may die possessed, I give, devise and bequeath to my wife Anne Bates Randall." He appoints Mrs. Randall executrix without bonds.

The difficulty, such as it is, arises from the use of the word "of" at the beginning of the residuary clause. Mrs. Philbrook contends that, grammatically and properly construed, the word "of" in this connection signifies "a part of," and hence that the residuary clause is uncertain and indefinite, and on that account void. If so the residuum becomes intestate property and goes to Mrs. Philbrook.

If it were true that "of" in this connection, grammatically considered necessarily means "a part of," there is another rule of more importance in the construction of wills than the rules of grammar. 40 Cyc., 1404. And that rule is that the expressed intention of the testator as gathered from the language of the whole will, read, in case of doubt, in the light of surrounding conditions, must control, unless in contravention of positive rules of law. *Crosby* v. *Cornforth,* 112 Maine, 109. The intention is to be found by study of the whole instrument, aided by a knowledge of the nature and extent of his estate of the testator, the size of his bounties, the relationship, needs and conditions of his beneficiaries. *Bryant* v. *Plummer,* 111 Maine, 511.

If the language used is of doubtful meaning, if it is inapt, crude or imperfect, interpretation may aid in ascertaining the intent. And words may be supplied, transposed, or altered, or disregarded, when the language is contrary to the apparent intent of the testator, not to discover the intention, but to express it properly when discovered. *Pickering* v. *Langdon,* 22 Maine, 413; *Torrey* v. *Peabody,* 97 Maine, 104; 40 Cyc., 400. The language will be subordinated to the intention. But, of course, the court cannot supply or disregard words except to express an intention otherwise gathered, but defectively expressed.

In this case, the testator was a man of wealth. He had a wife, but no children. His relations to his wife may be assumed to have been pleasant and affectionate, nothing appearing to the contrary. He owed her the duty of making provision for her. He at least had such faith and confidence in her that he made her the executrix of his will, and relieved her from the necessity of giving bond as such in the probate court. He gave to her specifically only the household goods and furniture. He gave to his sister and only next of kin $5,000. He indicates in the will no purpose of giving her any more. If he did not intend his residuary estate to go to his wife, Mrs. Philbrook will get more than he expressed any intention of giving her. There is a presumption against an intention of intestacy. The will indicates that he did not leave out of mind the residuum of his estate. It indicates that he intended to make provision for his wife by the residuary clause. By that clause he made provision for no one else. No other "part" is devised to any other person.

It is suggested in argument that the testator may have intended to leave his wife unprovided for, and to avoid the imputation thereof craftily used the language in the residuary clause so as to seem to provide for her, but not to do so. There is nothing in the case to justify the suggestion. It is repugnant to every presumption. The most that can be said is that the testator in attempting to write his own will inaptly expressed himself, not an infrequent occurrence in that class of wills.

We think that the testator intended to make his widow, Anne Bates Randall, the residuary devisee and legatee of all of his estate which remained after satisfying the prior bequests in the will; and

that the expression of this intention is found in the will. This being so, the word "of" may be disregarded.

Such was the construction placed upon the residuary clause by the single Justice from whose decree this appeal was taken. The certificate will be,

Appeal denied.
Decree below affirmed.

JOHN KOLASEN *vs.* THE GREAT NORTHERN PAPER COMPANY.

Somerset. Opinion February 4, 1916.

Contributory Negligence. Nonsuit. To what degree must servant or employee appreciate the dangers of his work to be guilty of contributory negligence.

It is a well established rule in this State that a motion for a nonsuit will not be granted when there is any evidence in the case, competent to be submitted to the jury, tending to show the liability of the defendant.

Action on the case for injuries received by plaintiff while employed as a painter by the defendant corporation in its mill at Madison, Maine. The printed record tends to show that the plaintiff had worked about this mill in different capacities for a period of two or three years; that he had worked around different machines in said mill; that he was engaged with three other men painting the ceiling of the room in which he was injured, in which room was a shaft on which was a collar held in place by a set screw. This piece of machinery revolved with great rapidity when in operation. The plaintiff was working in close proximity to the set screw when his clothing was caught and he received the injuries complained of in his writ. The printed record further tends to show that the set screw was within a few inches of where the plaintiff was working; that this room was poorly lighted, especially in the early hours of

the morning and that the plaintiff had no knowledge of the set screw.

At the close of the testimony on behalf of the plaintiff, counsel for defendant moved that a non suit be granted. Motion was granted pro forma and exceptions were noted for the plaintiff. Exceptions sustained.

Case stated in opinion.

S. W. Gould and Maurice P. Merrill, for plaintiff.

Newell & Woodside, and White & Carter, for defendant.

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

PHILBROOK, J. This is an action on the case to recover damages for personal injuries received by the plaintiff while employed as a painter by the defendant corporation in its mill, and comes before this court on the plaintiff's exceptions to a non suit ordered pro forma at the close of the plaintiff's evidence.

It is a well established rule in this State that a motion for a non suit will not be granted when there is any evidence in the case, competent to be submitted to the jury, tending to show the liability of the defendant. *Union Slate Company* v. *Tilton,* 69 Maine, 244.

Briefly stated, the plaintiff's contentions are these. At the time of the accident he was only a little more than twenty years of age, a native of Austria Hungary, had been in this country about four years and during those years had worked as a common laborer. On the day of the accident he was engaged with three other men in painting the ceiling of the mill. The crew arranged their own staging which was suspended by ropes attached to iron girders near the ceiling. The room in which the work was being done was slightly more than one hundred eighty feet long and seventy-three feet wide. The southerly end of the room contained partitions making what was called an alcove at the trial. Along the westerly side of the alcove was a shaft located two feet from the ceiling and a foot and eleven inches from the westerly partition of the alcove. On this shaft, which revolved with great rapidity when the machinery of the mill was in operation, was a collar held in place by a set screw projecting three-fourths of an inch from the collar. It was

claimed that this collar was not an essential part of the machinery at the time of the accident but had remained unused upon the shaft for more than five years. The testimony tends to show that the portion of the mill included within the alcove was poorly lighted, especially in the early hours of a winter morning. The accident occurred February sixteenth and the lack of sufficient light that morning prevented the painting crew from beginning their tasks until after the regular hour for starting the machinery and commencing labor in the other mill work. The plaintiff had no knowledge of the fact that the set screw was protruding from the collar, and when the shaft was revolving rapidly, as it was before he reached the scene of the accident, he could not discern its presence, especially in the dimly lighted alcove. In performing some portion of his work, while in close proximity to the revolving shaft, his clothing was caught by the set screw and he was thrown violently around the shaft, receiving very severe injuries. He says he received no warning as to the danger he might encounter in the place where he was to work, had no knowledge of it, and could not discover it by the use of ordinary care under the conditions as they then and there existed. He also introduced evidence which he claimed would establish his own due care.

Under all the evidence, which we have carefully examined, and under rules of law too familiar to need citation of authorities, we are of opinion that the facts relating to the question of liability of the defendant should have been submitted to the jury.

Exceptions sustained.

MOSES T. PHILLIPS *vs.* A. W. JOY COMPANY.

Penobscot. Opinion February 4, 1916.

Agency. Negligence of maker of note or check. Negotiability. Rights of innocent holders of stolen notes or checks. Theft of negotiable securities.

When a check, or bank draft, is signed by a person having authority to do so, addressed to a bank in which the drawer has funds subject to check, with blanks for date, amount and name of payee left unfilled, and, by reason of the negligence of the drawer as to the safe keeping of such check after signature, the same is unlawfully obtained by a stranger, the blanks filled, and thereafter the check comes into the hands of a bona fide holder, for value, without notice, the drawer is liable thereon.

In this case negligence of the drawer is established sufficient to bring it within the above rule.

The printed record discloses that each day three to ten checks of the defendant company were signed in blank by some person having lawful authority, the same being left with the clerk in the office of the defendant, she having authority to fill in the blank places. Check in question was supposedly stolen and blank places filled in and cashed by plaintiff, who was admitted to be an innocent holder thereof. Payment of same refused by bank. Action of assumpsit was brought to recover upon said check. Defendant pleaded general issue.

At close of testimony, questions of law having arisen, the case was reported to the Law Court to determine rights of parties and render judgment. Judgment for plaintiff for amount sued for and interest from date of the writ.

Case stated in opinion.

John Wilson, for plaintiff.

U. G. Mudgett, for defendant.

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

PHILBROOK, J. The plaintiff is one of the ticket agents of the Maine Central Railroad Company at Bangor. On the evening of February 10, 1915, while attending to his duties at the office of the company, his telephone bell rang and he answered the call. He says he was as sure as one could be that the voice coming over the wire was that of Mr. Wheaton, who, as the evidence shows, was acting manager of the defendant company at that time. The sender of the message, whoever he might have been, asked the plaintiff if he would cash one of the defendant's checks, stating that the funds of the defendant were locked up and there was a man who wanted a mileage ticket. The plaintiff consented, and in the course of twenty minutes or half an hour a man came to the window of the ticket office who presented a check for $113.75 payable to the order of Earl S. Woodbury, drawn on the Eastern Trust and Banking Company, and signed "A. W. Joy Co. by J. F. Wheaton, Treas." The name of the company in the signature was printed but the name and designation of the signer were written. In the upper left hand corner were printed the name and business of the defendant company and just below this printing, made by a protectograph stamp, were the words and figures "Not over one hundred twenty 120." The plaintiff asked the man if he were Earl S. Woodbury, and if he were the man about whom Mr. Wheaton telephoned, to both of which questions affirmative answers were given. The check bore the earmarks of genuineness and plaintiff says he recognized the signature of Mr. Wheaton. Upon request, therefore, the mileage book was delivered and the balance of the amount paid in cash, the check having been first endorsed by the payee. In due time the check was presented to the Trust Company but payment was refused. While denying that he ever telephoned, as claimed by plaintiff, Mr. Wheaton admitted the signature upon the check to be his own, but said this check was signed by him in blank and that after such signature it had been stolen, the date, amount, and name of the payee having been written in, and the protectograph stamp used, after the stealing. As soon as the theft had been discovered the Trust Company was directed not to pay the check when presented. Mr. Wheaton testified that it was his custom, to sign enough checks in blank during the morning for use during the day and that Miss Butler, the clerk and bookkeeper, filled in the dates, amounts and

names of the various payees as occasion demanded. The testimony shows that after such signature by Mr. Wheaton, the check book was kept sometimes in the office safe, sometimes in the drawer of a desk in the office and sometimes on top of the desk. The plaintiff testified that the bookkeeper told him it would be easy for anybody to come in and abstract one of the checks while she was out making change for the men. This testimony was not contradicted by Miss Butler. Mr. Wheaton testified that there was nothing to prevent the general help from access to the office although either he or Miss Butler was supposed to be there all the time. On cross examination he stated that the office might have been left alone, that he had been in the store when there was no one in the office and that there was no lock on the office door. Miss Butler, the bookkeeper, stated that occasionally the office had been left alone for ten or fifteen minutes or perhaps a little longer at times. On cross examination she said the check book was left on the desk quite often during business hours.

It is claimed by plaintiff, practically admitted by defendant, and we have no hesitation in finding from the record of the case, that the plaintiff is a bona fide holder of the check for value, that he took it without notice of any facts which would impeach its validity between the antecedent parties, and that he took it under an indorsement made before the same became due. *Goodman* v. *Simonds,* 20 How., 343. Under the decisions of some courts, whose opinions are entitled to great consideration, this would settle the controversy in favor of the plaintiff.

But without discussing the facts the defendant claims that it is not liable, and cites one case, and only one, as its authority for non-liability, viz., *Salley* v. *Terrill,* 95 Maine, 553. In that case the court upheld the doctrine that when a negotiable security had been stolen from the maker before it had become effective as an obligation, by actual or constructive delivery, it cannot be enforced by a subsequent innocent holder. But in that case the court also held that there may be such gross carelessness or recklessness of the maker in allowing an undelivered note to get into circulation as will justly estop him from setting up non-delivery in defense when the paper is in the hands of an innocent third party. Except in cases of such negligence, there is conflict of authority as to the

doctrine held in *Salley* v. *Terrill,* supra, but we are not now called upon to attempt a reconciliation of those authorities since the case at bar, to our minds, presents elements which readily distinguish it from *Salley* v. *Terrill.* In the latter case the paper, an order for payment of wages alleged to be due an employee, was completed in all its details, while in the case at bar there was only a signature upon a check, and all spaces for date, name of payee, and amount, were left blank.

In *Abbott* v. *Rose,* 62 Maine, 194, the defendant voluntarily signed a blank out of which a promissory note was made when he supposed the blank was to be filled out for another purpose. In that case the court said: "The note, then, owed its existence to some instrumentality on his part. The perfected note was the result of his putting his name to the blank; a result which might have been contemplated as the natural and even probable effect of such an act. The signature contributed to that end very materially, and that end was reached by the confidence, misplaced though it was, which he had in the payee. If, then, this act resulted from negligence, or a want of due care on the part of the defendant, however innocent he might be, he would be responsible to any person equally innocent with himself who is injured by that act. This results not only when the person committing the fraud is the appointed agent of the defendant, but where no such relation exists." In the same case the court cited with approval the case of *Trigg* v. *Taylor,* 27 Misso. R., 245, in which that court declared: "If, however, a bill, note or check is so negligently drawn, with blank spaces left for the addition of other words or figures, that alterations can be so made as not to excite suspicion, the loss ought to fall upon the person in fault, according to the familiar rule, that when one of two persons must suffer by the act of a third, the one who affords the means to the wrong-doer must suffer the loss." Our court further added that upon this question of negligence it can make no difference that the party did not intend to deliver a note and further said that if the delivery itself was through a want of care the effect is equally injurious as if the delivery was intentional but with blanks carelessly left unfilled.

In *Kellogg* v. *Curtis,* 65 Maine, 59, the court said, referring to *Abbott* v. *Rose,* supra: "It was there held that a person who neg-

ligently signs and delivers to another a blank note not knowing it to be such, but supposing it to be some other agreement, was liable thereon, if the blanks were afterwards wrongfully filled and the note then transferred to a bona fide holder for value, without notice of the fraud."

Through all these cases, and those holding similarly, there runs a distinction between a completed piece of commercial paper with all its blanks filled, including the name of the payee to whom delivery had not been made, either actually or constructively, and a paper signed by the maker with blanks left unfilled as in the case at bar. The element of negligence on the part of the signer also plays an important part. It is conceded that this check was signed in blank. Was there such negligence on the part of the defendant company, or its agents, as will permit this plaintiff to recover. The case seems to show quite clearly that the check book was left about the office in such a way that this check was in fact undoubtedly stolen, and as we have already seen, according to the plaintiff's undisputed testimony, the bookkeeper admitted that "it would be easy for any body to come in and abstract one of the checks." Under all the circumstances it seems to us, in view of the character of the paper stolen, its condition as to signature when stolen, the negligence in leaving the signed checks in such environment that theft was easy, and the apparent care of the plaintiff before cashing the check, that we should apply the rule of estoppel noted in *Salley* v. *Terrill,* supra, as well as the rule that when one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it.

Judgment for plaintiff for $113.75 with interest from date of the writ.

STATE OF MAINE *vs.* WARREN M. MUNSEY.

Lincoln. Opinion February 4, 1916.

Complaint and warrant. Complaint and warrant following the wording of the Statute. Demurrer. Exceptions.

Demurrer to complaint and warrant issued under provisions of R. S., Chap. 41, Sec. 23.

Held:

1. Every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the complaint or indictment.
2. In complaints or indictments charging violation of a statutory offense, it is sufficient to charge the offense in the language of the statute without further description, providing the language of the statute fully sets out the facts which constitute the offense.
3. The complaint or indictment is sufficient if it should state all the elements necessary to constitute the offense either in the words of the statute or in language which is its substantial equivalent.
4. The complaint or indictment is sufficient if it follows the statute so closely that the offense charged and the statute under which the indictment is found may be clearly identified.
5. But in every charge of a statutory offense the respondent still has the right to insist that the complaint or indictment, whether in the language of the statute, or otherwise, shall state the facts alleged to constitute the crime, with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him, and to plead any judgment, which may be rendered upon it, in bar of a subsequent prosecution for the same offense.
6. In ruling upon a demurrer to a complaint or indictment charging a statutory offense, the court will carefully examine the statute under which the charge is made, with a view of ascertaining the intention of the Legislature and the evil which that body desired to correct; also to ascertain whether the Legislature expressed itself in language sufficiently full, certain and precise, so that a person of average intelligence, who may be subject to the inhibition pronounced by the statute, may understand and obey.

If, when tested by the court, both examinations result affirmatively, and the complaint or warrant follows the language of such a statute, the complaint or indictment should not be held defective upon captious or hypercritical grounds.

The complaint in the case at bar follows the statute with sufficient accuracy, and the statute is sufficient in its expression, to require us to overrule the demurrer.

Complaint and warrant issued under Revised Statutes, Chapter 41, Section 23. Respondent filled demurrer. The presiding Justice overruled demurrer. Complaint adjudged good. Respondent files exceptions to Law Court. Exceptions overruled. Judgment for State.

Case stated in opinion.

James B. Perkins, county attorney, for State.

W. M. Hilton, for respondent.

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

PHILBROOK, J. This case arises from an alleged violation of one of the provisions of R. S., c. 41, sec. 23, relating to carving or branding the owner's name upon cars in which lobsters are kept, and buoys attached to traps used for catching lobsters. That part of the section alleged to be violated reads thus: "All traps, nets or other devices for the catching of lobsters, shall have, while in the water, the owner's name carved or branded in like manner (i. e. in letters no less than three-fourths of an inch in length where it might be plainly seen) on all the buoys attached to said traps or other devices, under a penalty of . . . Five Dollars for each trap or device not so marked."

The complaint, omitting formal parts, charges that "Warren M. Munsey of Bristol in the county of Lincoln at Bristol in said county of Lincoln, on the 22nd day of August, in the year one thousand nine hundred fifteen, was the owner of thirteen traps used for the catching of lobsters, which said traps while in the water did not then and there have his the said Munsey's name carved or branded on all the buoys attached to said traps, where it could be plainly seen, in letters no less than three-fourths of an inch in length."

The respondent filed a general demurrer which was overruled and the case is before us upon exceptions to that ruling.

The charge against the respondent is of conduct not criminal at common law but made so by statute. It is an elementary rule of criminal pleading that every fact or circumstance which is a necessary ingredient in a prima facie case of guilt must be set out in the complaint or indictment. It has been also frequently declared that in complaints or indictments charging violation of a statutory offense it is sufficient to charge the offense in the language of the statute without further description, providing the language of the statute fully sets out the facts which constitute the offense. Again it has been held that the complaint or indictment is sufficient if it should state all the elements necessary to constitute the offense either in the words of the statute or in language which is its substantial equivalent. It has also been held that the indictment or complaint is sufficient if it follows the statute so closely that the offense charged and the statute under which the indictment is found may be clearly identified. But even where a charge of a statutory offense is made the respondent still has the right to insist that the indictment, whether in the language of the statute or otherwise, shall state the facts, alleged to constitute the crime, with that reasonable degree of fullness, certainty and precision requisite to enable him to meet the exact charge against him, and to plead any judgment, which may be rendered upon it, in bar of a subsequent prosecution for the same offense. *State* v. *Snowman,* 94 Maine, 99; *State* v. *Lynch,* 88 Maine, 195; *State* v. *Bushey,* 96 Maine, 151; *State* v. *Doran,* 99 Maine, 329.

From the foregoing rules, well supported by authorities, it is safe to say that in deciding upon a demurrer to a complaint or warrant charging a statutory offense, it is the first duty of the court to carefully examine the statute under which the complaint or indictment is drawn, with a view of ascertaining the intention of the Legislature and the evil which that body desired to correct. The next consideration is whether the Legislature expressed its intention in language sufficiently full, certain, and precise, so that the person of average intelligence who may be subject to the inhibition pronounced by the statute may understand and obey. If, when tested by the court, both examinations result affirmatively, and the complaint or warrant follows the language of such a statute, it should not be held defective upon captious or hypercritical grounds.

The expressed will of the Legislature should be a chart to guide and not a chess board upon which the more skillful player may checkmate his unwary opponent.

The complaint in the case at bar follows the language of the statute with sufficient accuracy and the statute is sufficient in its expression, to require us to rule against the demurrer upon principles herein set forth.

The respondent says in his brief that permission of the court was granted to plead over if the demurrer was overruled upon final judgment, but the record does not so disclose, consequently judgment goes automatically for the State. *State* v. *Cole,* 112 Maine, 56.

Exceptions overruled.
Judgment for the State.

R. J. CALDWELL COMPANY *vs.* CUSHNOC PAPER COMPANY.

Kennebec. Opinion February 5, 1916.

Contract. Damages. Evidence. What is seasonable notice under Rule of Court, Number XXVII.

From the exceptions it appears that the case was assigned on the first day of the term for trial upon the morning of Friday following and that about five o'clock in the afternoon of the preceding Wednesday, or second day of the term, the defendant served upon the attorney of plaintiff a written notice to produce numerous letters sent by defendant to the agent in Boston, of the plaintiff, who was a resident of New York. The attorney of plaintiff, upon whom service of the notice was made, was employed by plaintiff's attorney who also resided in New York, with whom alone he had had communication. The local attorney, upon receipt of the notice, made no effort to secure the production of the letters, it being his opinion that the time in which to do so was insufficient. Alleged carbon copies of the letters were offered and excluded, the court holding the notice not seasonably given.

Held:

1. Notice to produce evidence must be seasonably served, allowing sufficient opportunity for compliance. What is seasonable service is a question addressed to the discretion of the trial judge.

2. The determination of the question of seasonable service must vary with the circumstances of each particular case, in so much so that it has been stated that the numerous rulings on the subject should not be treated as precedents.
3. Upon a careful examination of the circumstances of this case, no abuse of judicial discretion is found.
4. The court is of the opinion that there was sufficient evidence upon which the verdict of the jury may be sustained.

Action of assumpsit to recover balance of agreed price of thirty-six dryer felts furnished defendant by plaintiff under written contract. The defendant pleaded the general issue, together with a brief statement claiming the right to recoup in damages on account of the failure of the plaintiff to deliver these felts according to agreement. During the trial, the defendant offered certain copies of letters written by the defendant to the agent of the plaintiff in Boston. The plaintiff's counsel excepted to the admission of these copies, claiming that seasonable notice had not been given to produce the originals.

The presiding Justice ruled that, under the circumstances, the notice given by defendant's counsel was not a seasonable notice and excluded the copies, to which ruling defendant's counsel excepted. Verdict rendered for plaintiff. Defendant filed exceptions to the exclusion of certain evidence and also general motion for a new trial. Exceptions and motion overruled.

Case stated fully in opinion.

Walter M. Sanborn, for plaintiff.

Melvin S. Holway, for defendant.

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

BIRD, J. This is an action on the case for the recovery of the balance of the agreed price of thirty-six dryer felts furnished defendant by plaintiff under written contract, or four hundred twenty-nine dollars and sixty cents with eleven dollars and eighty-eight cents interest. The general issue is pleaded by defendant with brief statement claiming the right to recoup from plaintiff two hundred and ninety-one dollars and ninety-six cents which it alleges it expended in excess of the contract price for felts which

it was compelled to buy of others by reason of the failure of plaintiff to deliver felts in accordance with the terms of the contract and the further sum of two hundred ninety-one dollars and sixteen cents, damages suffered by it by shut downs of its mill occasioned by the like failure to deliver by plaintiff.

The jury found for the plaintiff in the sum of two hundred thirty-six dollars and sixty-three cents and the case is here upon exceptions to the exclusion of evidence and a motion for new trial.

The exceptions are not sustained. The writ, pleadings, the excluded evidence and testimony are made part of the bill of exceptions. From it, it appears that the case was assigned on the first day of the term for trial upon the morning of Friday following and that about five o'clock in afternoon of the preceding Wednesday, or second day of the term, the defendant served upon the attorney of plaintiff a written notice to produce numerous letters sent by defendant to the agent, in Boston, of the plaintiff, who was a resident of New York. The attorney of plaintiff, upon whom service of the notice was made, was employed by plaintiff's attorney who also resided in New York with whom alone he had had communication. The local attorney, upon receipt of the notice, made no effort to secure the production of the letters, it being his opinion that the time in which to do so was insufficient. Alleged carbon copies of the letters were offered and excluded, the court holding the notice not seasonably given.

The rule of court, number XXVII, regarding notice to produce written evidence introduces no new principle but is simply in affirmance of a well established rule of evidence. *State* v. *Mayberry,* 48 Maine, 218, 239; *Overlock* v. *Hall,* 81 Maine, 348, 350. The notice must be seasonable, allowing sufficient opportunity for compliance. *Emerson* v. *Fisk,* 6 Maine, 200, 206; *Overlock* v. *Hall,* supra. What is seasonable service is a question addressed to the discretion of the trial Judge. Its determination must vary with the facts of each particular case, in so much so that it has been stated that the numerous rulings on the subject should not be treated as precedents. Upon a careful examination of the circumstances of the case, we find no abuse of judicial discretion by the presiding Justice. See *Augusta Water District* v. *Water Company,* 100 Maine, 268, 270; *Dunn* v. *Kelley,* 69 Maine, 145; *Bourne* v.

Buffington, 125 Mass., 481, 482; 1 Green. Ev., § 560; II Wig. Ev., § 1208.

The motion of defendant is based upon alleged inadequacy of the amount of damages allowed defendant upon his claim in recoupment. One witness only, testified as to the amount of such damages. The credibility of a witness is a question for the jury. As with other witnesses, the presumption is that he speaks the truth, but the presumption may be overcome by his manner and demeanor, the character of his testimony, the circumstances under which he testifies, the unreasonableness and improbability of his statements and his interest in the result of the trial.

If the jury refused to allow the damages claimed to flow from the first shut down of ten and one-half hours, it cannot be said that its action was without warrant upon the evidence. The defendant claimed that the shut down resulted from failure of plaintiff to comply with the provision of the contract or memorandum to be observed by plaintiff, "1 roll of each style to be kept in stock." It seems clear from the contract and the understanding of defendant that these felts, required to be kept in stock, were to be shipped when an emergency occurred. Otherwise, if they were subject to shipment on the customary order, it would require plaintiff to keep in stock not one, but two or even three felts of each class. Assuming failure on the part of plaintiff, compliance, however, with this undertaking would not have prevented the shut down since the shortest period, after receipt of an order in which a felt could be delivered was twenty-four hours. Moreover, there is no evidence of any order given plaintiff by defendant at the time of the shut down. The contract is silent as to the time within which the felts were to be made up and delivered after receipt of an order. At best, therefore, it was within a reasonable time under all the circumstances. Nor do we think the jury without warrant upon the evidence in disallowing damages claimed to arise from the second shut down.

Regarding the claim of defendant for damages in recoupment arising from the purchase of felts from others, when defendant was compelled, as claimed, to do so by reason of failure of plaintiff to fill orders with reasonable promptness:—in four instances felts were purchased at a discount of only twenty per cent, thirty per

cent being the discount given by the contract. Twenty-five per cent was the ruling discount. It was the discount given defendant on purchases from all parties other than plaintiff except the party from whom the four felts in question were purchased, and the latter in fifteen sales to defendant, occurring partly before and partly after the sale of the four felts, made a discount of twenty-five per cent. Can it be said that the jury was not justified in finding that defendant did not purchase to the best advantage? Such finding would result in reducing the claim by the sum of $31.31. So the jury may have found, from the non-production of orders of the defendant therefor, and other circumstances, that the last five purchases in 1913 of a dealer other than plaintiff were not made by reason of the failure of plaintiff to comply with terms of the contract. Such finding would effect a further reduction of $44.36, being the amount of the diminished discounts allowed. These two sums aggregate nearly the amount disallowed by the jury upon the claim to recoup for excess paid for felts and we are not prepared to say that there was no warrant for the jury so finding in another or other instances. The burden to show the contrary is upon defendant.

We conclude the motion for new trial must be overruled. *Wait* v. *McNeil,* 7 Mass., 261, 264, 265; *Harding* v. *Brooks,* 1 Pick., 244, 248; *Lee Sing Far* v. *U. S.,* 94 Fed., 834, 838, 839; *Barrett* v. *R. R. Co.,* 45 N Y., 628.

Exceptions and motion overruled.

ELIZABETH GOULD

vs.

THE MAINE FARMERS MUTUAL FIRE INSURANCE COMPANY.

Penobscot. Opinion February 5, 1916.

Insurance. Principal and agent. Right of mortgagor and mortgagee to insure their respective interests in property.

1. As mortgagor and mortgagee have several distinct interests in the mortgaged property, insurable by either for his own benefit, the mortgagee may insure for himself and at his own cost and, when so insuring, the mortgagor is not to be benefited thereby.
2. Additional insurance procured by the mortgagee upon the mortgagor's interest without the consent or knowledge of the mortgagor will not affect the rights of the mortgagor.
3. Ratification as used in the law of principal and agent is the adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract without authority to do so. A knowledge of all material facts is indispensable.
4. Mortgagor acquiring knowledge of additional insurance on property is not obliged to give notice of new policy to insurance company and obtain its assent thereto in writing, in the absence of any such requirement in his policy.

An action on a policy of insurance in the Maine Standard form issued by defendant to the amount of eleven hundred and fifty dollars on the buildings, and contents, of the plaintiff. At the date of the policy the buildings were subject to a mortgage given by plaintiff and the policy was made payable to the mortgagee as her interest might appear. Some months later, the mortgagee at her own expense and without knowledge of the plaintiff procured other insurance upon the buildings. The assent of defendant thereto was never given. There is no evidence tending to prove that plaintiff ever saw, or knew the terms of, the policy procured by the mortgagee.

Some weeks before the fire which destroyed the buildings, she learned that the mortgagee had procured other insurance. After the fire, some member of plaintiff's family endorsed the check given by the company issuing the later policy, which was collected by the mortgagee who applied the avails upon the mortgage debt, but there is no evidence that such application was made pursuant to agreement with the plaintiff. The verdict was for the plaintiff. Defendant asked certain instructions which were refused, to which refusal defendant excepted. Exceptions overruled.

Case stated in opinion.

L. B. Waldron and Mayo & Snare, for plaintiff.

Arthur J. Dunton and H. E. Coolidge, for defendant.

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

BIRD, J. This is an action on a policy of insurance in the Maine standard form issued by defendant to the amount of $1150, on the buildings, and contents, of the plaintiff.

"The principal contention of the defence at the trial" quoting the statement of defendant's counsel "and the only one which is of any real importance at the present time, was that the plaintiff had, subsequent to the taking out of a policy with the defendant company placed additional insurance to the amount of $1650, with the Providence Washington Insurance Company, which under the terms of the Maine standard form of policy, . . . avoided the defendant's policy, no permission being given for this subsequent insurance."

The uncontroverted facts appear to be: At the date of the policy on which this suit is brought, June 3, 1910, the plaintiff was the owner of the property insured and the buildings were subject to a mortgage given by her and held by one Hannah Brown, as assignee, and the policy, upon which the suit is brought, was made "payable in case of loss to Mrs. J. A. Brown, as her interest may appear as mortgagee." It contained the prescribed provision as to other insurance. "This policy shall be void . . . if the insured now has or shall hereafter make any other insurance on said property without the assent in writing or in print of the company." R. S., c. 49, § 4. Early in the year 1911, the mortgagee, at her own expense

and without the knowledge of plaintiff, procured other insurance in the Providence Washington Insurance Company. This policy was apparently issued in the name of plaintiff, the loss being payable to Mrs. Brown as her interest might appear as mortgagee and was always in the possession of Mrs. Brown in her lifetime and of her representatives after her decease. The buildings insured were totally consumed by fire on the fifth day of March, 1912. At no time previous to the fire did plaintiff give defendant notice of the issuance of the policy by the Providence Company or obtain its consent thereto from defendant. The plaintiff was undoubtedly aware as early as January, 1912, that some policy affecting the property had been procured by the holder of the mortgage, but there is no evidence that she ever saw the policy or knew its terms.

There was evidence tending to prove that plaintiff had no knowledge of the existence of the policy of the Providence Company earlier than January, 1912, while defendant claimed that there was at least evidence from which it was inferable that she knew of and consented to it at the time of its issuance. There was also evidence tending to prove that the check given by the Providence Company in settlement of its policy to the administratrix of Mrs. Brown was endorsed by some member of the family of plaintiff and returned to the administratrix, who cashed it and credited the avails upon the note secured by the mortgage. But there is no evidence that this was done pursuant to any agreement of the plaintiff and the administratrix. Nor does the record show what, if any, was the provision of the mortgage as to insurance.

The verdict was for plaintiff and defendant filed a motion for new trial and a bill of exceptions, of which the writ, pleadings, evidence and instructions of the court are made part. The motion is now waived as well as all exceptions save to the refusal to give the following requested instructions:

"1. If you are satisfied that the plaintiff, Mrs. Gould, received the check of the Washington Providence Insurance Company in settlement of her loss under their policy, and knowing what it was for, endorsed that check so that it was collected by the representative of the Brown estate and credited on her mortgage, it would constitute a ratification by her of the act of the Browns in placing the policy and would make it her policy.

"2. If you are satisfied from the conduct of and the statements made by the plaintiff, Mrs. Gould, that she ratified the act of the Browns in taking out in her name the policy in the Providence Washington Insurance Company, it would render her policy in the Maine Farmers Mutual Fire Insurance Company void and prevent her recovery in this action.

"3. If you are satisfied that Mrs. Gould, the plaintiff, before the fire of March 5th, 1912, knew that a policy in her name and payable to the mortgagee had been taken out in the Providence Washington Insurance Company subsequent to the issuing of the policy in the Maine Farmers Mutual Fire Insurance Company and on the same property, and that she failed to give notice of such new policy to the Maine Farmers Mutual Fire Insurance Company and obtain the assent of said company thereto in writing, such failure would render void the policy in the Maine Farmers Mutual Fire Insurance Company and that she cannot maintain this action and recover therein."

It is elementary law that the mortgagor and mortgagee have several distinct interests in the premises mortgaged, which either may insure for his own benefit. And equally so, that when a mortgagee insures his own interest without any agreement beween him and the mortgagor therefor, and a loss accrues, the mortgagor is not entitled to an allowance of the sum paid upon such loss, to be applied to the reduction or discharge of his mortgage debt, but the mortgagee may, notwithstanding, recover the whole amount due; or, as otherwise stated, that the mortgagee may insure for himself and at his own cost and, when so insuring, the mortgagor is not to be benefited thereby. *Concord Un. Mut. Fire Ins. Co.* v. *Woodbury*, 45 Maine, 447, 453, 454; *McIntire* v. *Plaisted*, 68 Maine, 363, 365; *Cushing* v. *Thompson*, 34 Maine, 496, 499.

It has been held that if the policy of the mortgagor is made payable to the mortgagee as his interest may appear, this is regarded as an insurance of the mortgagor, and hence a subsequent insurance by the mortgagor, vitiates the policy. *Continental Ins. Co.* v. *Hulman*, 92 Ill., 145, 34 Am. Rep., 122; see however, *Wheeler* v. *Watertown Ins. Co.*, 131 Mass., 1, 9; but insurance by the mortgagee does not affect the contract. *Titus* v. *Glen Falls Ins. Co.*, 81 N. Y., 400, 416. Additional insurance procured by the mortgagee

upon the mortgagor's interest without the consent or knowledge of the mortgagor will not affect the rights of the mortgagor. *Fox* v. *Phoenix Fire Ins. Co.,* 52 Maine, 333, 334; *De Witt* v. *Agricultural Ins. Co.,* 157, N. Y., 353, 360; *Church of St. George* v. *Sun Fire Office Ins. Co.,* 54 Minn., 162, 166. See also *Lumber Exchange* v. *Ins. Co.,* 183, Pa. St., 366, 385; *Johnson* v. *Ins. Co.,* 1 Holmes, 117, 119. See also *Burke* v. *Niagara Fire Ins. Co.,* 12 N. Y., Supp., 234.

Without, or practically without, exception cases holding that the insured ratified policies of insurance procured by others upon his interest, have based their conclusions upon ratification as between principal and agent. See *The German etc. Ins. Co.* v. *The Emporia etc. Asso.,* 9 Kans. App., 803; *Hughes* v. *Ins. Co.,* 40 Neb., 626. Ratification as used in the law of principal and agent is the adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract without authority to do so. 31 Cyc., 1245. See also II Kent. Com., (13th Ed.) 616, note 3. And a knowledge of all material facts is indispensable. *Coombs* v. *Scott,* 12 Allen, 493, 497; see also *Barnard* v. *Wheeler,* 24 Maine., 412, 419.

The exceptions to the refusal of the first request must be overruled. We find no evidence that the check was received by the plaintiff in settlement of her loss. The endorsement of the check by some one authorized by her, or even by her, does not under the circumstances make the procuring of the policy her act by relation. Such endorsement of the check was as ineffectual for the purpose as the making of the formal proof of loss in *Titus* v. *Glen Falls Ins. Co.,* supra;— especially in the absence of any evidence showing, or tending to show, any undertaking or agreement for credit of the amount of the check upon the mortgage debt.

It is the opinion of the court that the evidence does not warrant the second requested instruction. There is an entire lack of evidence that the mortgagee assumed to act as agent of the plaintiff or intended to insure the interest of the plaintiff. See *Nichols* v. *Fayette, etc. Ins. Co.,* 1 Allen, 63, 69; *Humble v. Ins. Co.,* 85 Kans., 140; Ann. Cas., 1912 D. 630.

The third requested instruction is to the effect that if plaintiff, with knowledge of the policy procured by the mortgagee, failed to

give notice to defendant of the new policy and obtain its assent thereto in writing, the policy in suit became void. That policy requires no notice of other insurance and we are aware of no provision of law rendering it necessary, in the absence of such requirement. II May on Ins., § 364; *York* v. *Parker,* 109 Maine, 414, 416.

The exceptions are overruled.

CLARA E. MCKELLAR, Administratrix,

Appellant from Decree of Judge of Probate.

Knox. Opinion February 14, 1916.

Devise or bequest lapsing. Lineal Descendants. Probate Appeal. Who may file probate appeal. Revised Statutes, Chapter 76, Section 10.

1. It is the general rule of law that a devise or legacy is deemed to be lapsed if the devisee or legatee dies in the lifetime of the testator.
2. Revised Statutes, chapter 76, section 10, provides that when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived.
3. By force of the statute, the title to the devise or legacy comes to the lineal descendants directly from the testator through the will, and not through the estate of the deceased devisee or legatee.
4. The wife of such deceased devisee or legatee, either individually or as the representative of his estate, has no interest in such a devise or bequest; and, therefore, had no right of appeal from the allowance of the will or codicil in which such devise or legacy is made.

The testatrix in her will bequeathed to her nephew five hundred dollars, and subsequently, by a codicil to her will, changed that bequest to two hundred dollars; the nephew died before the testa-

trix, leaving three children and a wife, the appellant, who was appointed administratrix of his estate in Massachusetts. As such administratrix, she took an appeal from the decree of the Judge of probate, Knox county, Maine, whereby said codicil was approved, allowed and admitted to probate as a part of the last will and testament of the testatrix. To the decree of the Supreme Court of Probate, the appellant filed certain exceptions.

Exceptions overruled. Appeal dismissed.

Case stated in opinion.

Kennard & Drew, and E. K. Gould, for appellant.

A. S. Littlefield, for appellees.

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

KING, J. Eliza J. Willoughby, late of Rockland, Maine, by her will executed March 27, 1900, bequeathed to her nephew, George A. McKellar, of Reading, Massachusetts, the sum of five hundred dollars. March 28, 1912, by a codicil to the will she changed that bequest to two hundred dollars. The legatee died before the death of the testatrix, leaving three children, and his wife, Clara E. McKellar, was appointed administratrix of his estate in Massachusetts. As such administratrix she took an appeal from the decree of the Judge of probate for Knox county, Maine, whereby said codicil was approved, allowed and admitted to probate as a part of the last will and testament of Mrs. Willoughby. In the Supreme Court of Probate the presiding Justice ruled that the appellant had no interest in the matter of the decree which would enable her to maintain her appeal. The case comes to this court on exceptions to that ruling.

There is no doubt of the general rule, that a devise or legacy is to be deemed lapsed, if the devisee or legatee dies in the lifetime of the testator. But an exception to this rule is created by R. S., ch. 76, sec. 10, which reads as follows: "When a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived."

The purpose and effect of the statute seem clear. It preserves such a devise from lapsing by substituting in place of the deceased devisee his lineal descendants. By force of the statute they take under the will in his place, and they take the same estate he would have taken thereunder Their title to the devise comes to them directly from the testator through the will, and not through the estate of the deceased devisee. His estate, therefore, has no interest in the devise. This statute applies in the present case. The original legatee was a relative of the testatrix, and he left three children. Upon his death, in the lifetime of the testatrix, his children, by force of the statute, were substituted in place of their parent as the persons who should take under the will the same estate which the original devisee would have taken thereunder if he had survived. The appellant, therefore, as administratrix of the estate of the deceased legatee has no interest in the matter of the probate of the codicil to the will of Mrs. Willoughby. Its allowance did not affect that estate in any way. And it is not claimed, of course, that the appellant has any right of appeal from the decree as an individual. She is the widow of the deceased legatee, and not his lineal descendant.

The ruling, therefore, that the appellant has no interest in the decree appealed from which enables her to maintain her appeal was correct.

Exceptions overruled.

STATE OF MAINE *vs.* EUGENE NORTON.

Hancock. Opinion February 15, 1916.

License. Principal and Agent. Public Laws, 1915, Chapter 235, Section 2, construed.

Section 2 of Chapter 235 of the Public Laws of 1915 provides as follows: "No person, firm or corporation, either by themselves as principal, or by their servants or agents, shall, at any time, catch, take, hold, buy, ship, transport, carry, give away, remove, sell or expose for sale, or have in his or its possession, except for the immediate consumption of himself and family, any lobster from any waters in the jurisdiction of this State . . . unless licensed so to do as hereinafter provided."

The respondent at the time of the alleged offense was in the employment of one Clark, assisting him in handling lobsters. Said Clark was himself licensed under this statute, and was present with the respondent when the acts complained of occurred.

Held:

1. That it is unnecessary for employees to be licensed when handling lobsters for commercial purposes and acting under the personal supervision of their employer who is himself duly licensed. It is the principal who is responsible both for his own acts and those of his servants and he alone is required to be licensed.

Respondent was arrested for alleged violation of section 2, chapter 235, Public Laws of 1915.

Case reported to Law Court on agreed statement of facts. Judgment for defendant.

Case stated in opinion.

Fred L. Mason, for State.

H. H. Gray, for respondent.

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

CORNISH, J. The respondent was convicted in the Bar Harbor municipal court on the charge of having in his possession, at the time and place alleged in the complaint, certain lobsters not then

and there for the immediate consumption of himself and family, without the license of the Commissioner of Sea and Shore Fisheries first had and obtained therefor, in violation of section 2 of chapter 235 of the Public Laws of 1915.

The portion of that section under which this complaint was brought reads as follows: "No person, firm or corporation, either by themselves as principal or by their servants or agents, shall, at any time, catch, take, hold, buy, ship, transport, carry, give away, remove, sell or expose for sale, or have in his or its possession, except for the immediate consumption of himself and family, any lobster from any of the waters of the jurisdiction of this State . . . unless licensed to do so as hereinafter provided," with certain exceptions not applicable here. "Every person, firm or corporation, who shall violate any of the provisions of this section . . . shall be fined," etc.

It appears from the agreed statement of facts, that the respondent, at the time of the alleged offense, was in the employ of one James L. Clark, assisting said Clark as his employee in handling the lobsters, and the said James L. Clark was himself then licensed under this statute and was at all times present with the respondent when the acts complained of occurred.

As presented to this court, only one question is involved, viz: is it necessary under this Act for all servants and employees to be licensed when handling lobsters not intended for the immediate consumption of themselves or families, that is to say, handling lobsters for commercial purposes, and while under the personal supervision of their employer who is himself duly licensed. Clearly not. The licensing of the employer meets the requirement of the law. The language of the statute bears no other reasonable construction. The very words we have quoted make a sharp distinction between the principal, the person, firm or corporation carrying on the lobster business and their servants or agents, viz: "No person, firm or corporation, either by themselves as principal or by their servants or agents," etc. It is the principal who is responsible both for his own acts and those of his servants. It is the principal alone who is required to be licensed and he alone is to be fined in case of violation. There is nothing in the section requiring the ser-

vants to be licensed and both the letter and the spirit of the act negative such a contention.

In a sense the license is upon the business and must be paid by the party carrying on the business, whether individual, or firm or corporation. This is shown by the language of section 3, which provides for the issuing of licenses "to any citizens of this State or to any person having resided in this State for one year immediately preceding the date of application for license, or to corporations or firms engaged in the lobster business located in this State or other states," etc.

Any other construction, apart from its wrenching of the plain words of the Act, would be followed by incalculable annoyance and loss. All applications must be in writing and, with the fees, must be forwarded to the office of the commissioner at Augusta and license returned by him. If every employee before he could work a day or even an hour must take these statutory steps or subject himself to a fine of twenty-five dollars for the first offence, the business would be well nigh paralyzed, especially in times of emergency. Such was not the intention of the Legislature and such is not their expressed intention as found in the language of the Act.

Under the stipulation in the agreed statement the entry must be,

Judgment for the defendant.

THE LEHIGH COAL AND NAVIGATION COMPANY

vs.

D. ARCHIBALD MCLEOD.

Penobscot. Opinion February 15, 1916.

Appropriation of payments. Contract. Guaranty. Invoice.

In an action of assumpsit upon a written guaranty dated May 25, 1912, wherein the defendant bound himself as guarantor and surety to the extent of $1,000, in behalf of his brother, Malcolm F. McLeod, on any debt for coal which Malcolm might owe the plaintiff "at the expiration of sixty days from the date of any invoice, during the year from this 25th day of May, 1912, until May 25, 1913," it appeared that various shipments were made in 1912 and were paid for by Malcolm. The coal covered by the account in suit was ordered in April, 1913, and was shipped on cars at Northern Maine Junction as follows: On May 22 coal amounting to $565.79, on May 28, $533.98, on May 29, $156.98, and on May 31, $625.95. The invoices bore the same respective dates. The total charges were $2,418.30 on which a credit of $1,000 was given under date of July 1, 1913, leaving a balance of $1,418.30. Deducting various amounts received in a trustee action, leaves a balance of $936.48 for which this suit was brought.

Held:

1. That the true construction of the agreement is, that the defendant guaranteed payment to the extent of $1,000 of all coal invoiced to Malcolm F. McLeod during the year beginning May 25, 1912, and ending May 25, 1913, in case it was not paid at the expiration of sixty days from the date of the respective invoices. All invoices prior to May 25, 1913, were within its terms, all subsequent thereto were without.
2. The invoice of May 22, 1913, amounting to $565.79 was therefore covered by this guaranty, and the succeeding ones were not.
3. But this first charge was extinguished by the payment of $1,000 on account on July 1, 1913. There was no specific appropriation of this payment to any particular items either by the debtor or creditor and therefore the law applied the credit to the extinguishment of the earliest items in the account.
4. It is too late for either party to claim the right to make an appropriation after a controversy has arisen.

Action of assumpsit upon written guaranty. Defendant pleaded general issue and brief statement. By agreement of parties, cause was reported to the Law Court upon so much of the evidence as was legally admissible, the Law Court to render such final judgment therein as the legal rights of the parties require. Judgment for defendant.

Case is stated in opinion.

Fellows & Fellows, for plaintiff.

George E. Thompson, and James D. Maxwell, for defendant.

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

CORNISH, J. Action of assumpsit upon the following written guaranty:

"BANGOR, ME., May 25, 1912.

To the Lehigh Coal and Navigation Co.,
Philadelphia, Pa.

I, D. Archibald McLeod of Bangor do hereby bind myself to the extent of $1000, as guarantor and surety to that extent, in behalf of Malcolm F. McLeod, of Old Town, on any debt for coal which he may the said The Lehigh Coal and Navigation Company owe at the expiration of 60 days from the date of any invoice, during the year from this 25th day of May, 1912, until May 25, 1913.

In witness I affix my signature.

In case demand is made upon me, this guarantee to be returned to me on payment of said sum of $1000, required to meet any deficiency which may exist.

(Signed) D. ARCHIBALD MCLEOD."

The plaintiff accepted this guaranty and made various shipments of coal during the year 1912, the first being on June 6, 1912, all of which were duly paid for by Malcolm F. McLeod. In 1913, Malcolm F. McLeod became financially embarrassed and full payment was not made by him for the shipments specified in the account annexed to the writ. The coal covered by this account was ordered

in April, 1913, and was shipped on cars at Northern Maine Junction, as follows: May 22, 1913, coal amounting to $565.79, May 28, $533.98, May 29, $156.98, May 31, three shipments of $377., $158.60 and $625.95. The invoices bore the same dates. The total charges amounted to $2418.30 on which a credit was given in the account annexed under date of July 1, 1913, of $1000, leaving a balance of $1418.30. But it is admitted that the plaintiff has received certain further amounts in a trustee action brought against Malcolm F. McLeod and certain parties named as trustees, so that the agreed balance due for the May coal is $936.48. This amount the plaintiff seeks to recover of the defendant as guarantor.

The defendant's liability depends in the first instance upon the construction of the written guaranty above set forth, and especially of the words "on any debt for coal which he may, the said The Lehigh Coal and Navigation Company owe at the expiration of 60 days from the date of any invoice, during the year from this 25th day of May, 1912, until May 25, 1913." What is the true interpretation of this language? When did the guaranty begin and when did it end? The plaintiff contends that the defendant bound himself to pay for all coal ordered or contracted for by Malcolm F. McLeod during the year ending May 25, 1913, and as this coal in question was contracted for in April, and delivery was delayed at the request of the principal debtor, that the defendant is liable for the entire net balance The defendant on the other hand contends that he is not liable for any coal bills which Malcolm F. McLeod owed unless it appears that the invoice of such coal was dated 60 days prior to May 25, 1913, the date of the expiration of the contract; that is, that it must appear that the invoice of the coal was dated on or before March 25, 1913. If this construction is correct the defendant is not liable in this action, because all the invoices were dated in May.

We think neither construction is correct. The plaintiff's theory carries the guaranty beyond its time limit and makes the guarantor liable for coal ordered during the year, but not invoiced or shipped until long after its expiration, while the defendant's theory stops short of the time limit and creates a liability not for a year but only for ten months. The true construction lies between the two and flows naturally from the plain and unambiguous terms of the instru-

ment itself. It is this. The defendant guaranteed payment to the extent of $1000, of all coal invoiced to Malcolm F. McLeod during the year beginning May 25, 1912, and ending May 25, 1913, if it was not paid at the expiration of sixty days from the date of the respective invoices. Shipments and invoices were practically contemporaneous and to make the date of invoice is the same thing as making the date of shipment the starting point as to time. The defendant in effect guaranteed the payment of all shipments made within the year. This makes it a contract for one year as it states. The first payment under it would not be due for sixty days after the first invoice so that if a shipment had been made and invoice had been rendered even on May 25, 1912, the date of the execution of the guaranty, the liability could not accrue until sixty days thereafter, namely on July 25, 1912; and by the same token if a shipment was made and invoice rendered on the last day of the existing contract, viz, May 24, 1913, the liability therefor could not accrue until sixty days thereafter, namely on July 24, 1913, thus making the duration of liability one year, as was contemplated. The date of the invoice was therefore the test of inclusion in or exclusion from the terms of the guaranty. It is made such in express terms. All invoices prior to May 25, 1913, were within its terms. All subsequent thereto were without. The application of this test brings the invoice of May 22, 1913, amounting to $565.79 within the guaranty, and excludes therefrom those of May 28, May 29, and May 31.

But at this point the plaintiff encounters another difficulty. The total of the May invoices amounted to $2418.30. On July 1, 1913, Malcolm F. McLeod made a payment of $1,000. The receipt given by the local agent under date of June 28, 1913, simply recites "Received of M. F. McLeod one thousand dollars." The fuller receipt from the treasurer's office in Philadelphia under date of July 1, adds "on account of coal bills, May '13." All bills up to that date had been previously paid. The account was square up to May 22, 1913. There is no evidence that the debtor requested any appropriation of this payment, and there was no specific appropriation by the creditor. The agent of the creditor testified that he received it on account of the May coal, precisely as the receipt

states. In the absence of such appropriation by either debtor or creditor the law applies the credit to the extinguishment of the earliest items in the account. This is a familiar principle. *Milliken* v. *Tufts,* 31 Maine, 497; *Cushing* v. *Wyman,* 44 Maine, 121; *Hawkins* v. *Hersey,* 86 Maine, 394; *Manufacturing Co.* v. *Burnham,* 89 Maine, 538.

It is too late for either party to claim a right to make an appropriation after the controversy has arisen. *U. S.* v. *Kirpatrick,* 9 Wheat., 720; *McKenzie* v. *Nevins,* 22 Maine, 138.

As this payment of $1000 more than extinguished the amount of the first invoice ($565.79), which was the only invoice covered by this guaranty, the entry must be,

Judgment for defendant.

FRED V. EDGELL

vs.

WILLIAM PITT HYDE, FIRST NATIONAL BANK OF PORTLAND AND NEW ENGLAND COLD STORAGE COMPANY.

FRED V. EDGELL

vs.

WILLIAM PITT HYDE, FOREST CITY TRUST COMPANY AND NEW ENGLAND COLD STORAGE COMPANY.

Cumberland. Opinion February 16, 1916.

Appeal. Deposition. Equitable relief. Finding of sitting Justice in Equity proceedings. Fraud.

1. The findings of the sitting Justice in equity proceedings, upon questions of fact necessarily involved, are not to be reversed upon appeal, unless clearly wrong, and the burden is on the appellant to satisfy the court that such is the fact.

2. A party may be permitted to introduce a portion of the deposition of the adverse party for the purpose of showing admissions by him against his interest.
3. An equity cause in the appellate court is heard anew, hence the admission of evidence below becomes unimportant, except so far as it shall be deemed competent for consideration on appeal.
4. An examination of the evidence in the cases at bar fails to show that the decrees appealed from are clearly wrong, but on the other hand convinces the court that they are amply justified by the proof.
5. It is the opinion of the court in each case that the appeal must be denied and the decree below affirmed with additional costs.

These are actions in equity brought by Fred V. Edgell as plaintiff against William Pitt Hyde and the New England Cold Storage Company and First National Bank of Portland in one case, and against William Pitt Hyde and the New England Cold Storage Company and the Forest City Trust Company in the other case, as defendants. Upon hearing the court sustained the allegations in the bills of complaint and found for the plaintiff in both cases.

The facts and issues involved in both cases are identical, with the exception that the First National Bank of Portland appears as the defendant in one case, and the Forest City Trust Company in the other, and by stipulation both cases are to be heard together.

The plaintiff was under contract with the New England Cold Storage Company to construct and equip its plant at Portland, Maine. A certain number of shares of stock were to be issued to said plaintiff, the same to be sold as part of the plan for raising money for the construction of the plant. The defendant Hyde made certain representations to the plaintiff, stating that he had certain purchasers for the stock. He obtained the same from the plaintiff, hypothecated it with the two defendant banks, obtaining in each case a loan. Plaintiff brings bill in equity asking for equitable relief against defendants and in each case the presiding Justice filed a decree in plaintiff's favor granting the specific relief asked for. From each decree, the defendant Hyde appealed. Appeal denied. Decree below affirmed with additional costs.

Case stated in opinion.

Frederic J. Laughlin, and Charles E. Gurney, for complainant.

Fred V. Matthews, for defendant Hyde.

Howard R. Ives, for First National Bank.
William H. Gulliver, for Forest City Trust Company.
Ernest M. White, for New England Cold Storage Company.

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

KING, J. The allegations in the bill of complaint in each of these cases are substantially the same. They are in substance, that on the fifteenth day of February, 1915, the plaintiff was the owner of 100 shares of the preferred stock and 20 shares of the common stock of the New England Cold Storage Company, all of which shares the defendant Hyde agreed to purchase for $9000 to be paid immediately; that said Hyde, in pursuance of a false, fraudulent and wrongful design to obtain said stock without making payment therefor, represented to the plaintiff that he had made arrangements to borrow of certain banks, with said stock as collateral security, sufficient money to enable him to pay for said stock forthwith, and that if the plaintiff would entrust said stock to him to deposit in said banks, he would immediately turn over to the plaintiff the proceeds of the loans so obtained on said stock which would be sufficient with his other funds to make the full payment of said $9000; that the plaintiff, relying upon the representations of said Hyde, and in expectation of the immediate payment by him of said $9000 for said stock according to his expressed intent and assurance, caused certificates representing said stock to be issued in the name of said Hyde and to be entrusted to him as he requested; that said Hyde deposited one-half of said stock with the First National Bank of Portland, and the other half with the Forest City Trust Company, as collateral security for his note to each of said banks for $3500, he receiving the proceeds of said loans; and that said Hyde fraudulently, wrongfully, designedly and in utter disregard of his representations and assurances, did not turn over or pay to the plaintiff the proceeds of said loans or any part thereof, and has made no payment whatsoever for said stock.

Briefly stated the relief asked for in each case is, that the stock referred to in the bill be decreed to be the property of the plaintiff, subject to its pledge to the bank as collateral from which the plaintiff may redeem it by paying the bank such sum as may be found

justly due it; that said Hyde be enjoined from transferring or encumbering said stock, or exercising any rights as a stockholder in said New England Cold Storage Company by reason of said shares standing in his name on the books thereof; and that he be ordered to repay the plaintiff such sums of money as he may be required to pay to redeem said stock.

The cases were heard together by the sitting Justice upon bills, answers, replications and proof and he filed in each a final decree in the plaintiff's favor granting the specific relief asked for. In each decree the Justice states that the allegations in the bill are sustained by the evidence, and that the defendant Hyde has no right or title to said stock. From each decree Hyde has appealed.

It is the well settled rule, repeatedly and recently stated by this court, that the findings of the sitting Justice in equity proceedings, upon questions of fact necessarily involved, are not to be reversed upon appeal unless clearly wrong, and that the burden is on the appellant to satisfy the court that such is the fact. *Sposedo* v. *Merriman,* 111 Maine, 530.

Applying that rule to the cases at bar the appeals must be denied, for an examination of the evidence not only fails to satisfy the court that the decrees appealed from are clearly wrong, but, on the other hand, convinces the court that they are amply justified by the evidence.

There was no error in the ruling of the Justice permitting the plaintiff to read into the record certain portions of the deposition of the defendant Hyde as admissions by him against his interests. *Hatch* v. *Brown,* 63 Maine, 410; *Gilchrist* v. *Partridge,* 73 Maine, 214.

And as to the admission against objection of the testimony of Charles G. Keene, it need only be said, that an equity cause in the appellate court is heard anew, "and the admission or exclusion of evidence below is of no consequence, except so far as it shall be considered competent for consideration on appeal." *Redman* v. *Hurley,* 89 Maine, 428. We find sufficient legal evidence in these causes to sustain the decrees below.

It is accordingly the opinion of the court in each case, that the appeal must be denied and the decree below affirmed with additional costs.

So ordered.

ALBERT DICKEY *vs.* FRANK A. BARTLETT.

Waldo. Opinion February 16, 1916.

Evidence. Verdict.

Action to recover an alleged balance of $80.20 for the labor of the plaintiff and his wife under a contract with the defendant. The defense was that the agreed wages were less than the plaintiff claimed, and that full payment had been made. The verdict was for the amount sued for, and the case comes up on defendant's motion for a new trial.

Held:

1. Where contradictory and irreconcilable testimony has been passed upon by the jury, who had the opportunity of seeing the witnesses as they testified, their conclusion in favor of one of the parties should not be set aside, although it may seem to the court, from an examination of the printed testimony, that an opposite conclusion would have been more justifiable.
2. The court does not find sufficient proof in the record to satisfy it that the verdict was clearly wrong.

Action of assumpsit to recover balance due for wages of husband and wife. Plea, general issue. Verdict for plaintiff for full amount claimed. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

A. L. Blanchard, for plaintiff.

James Libby, and R. W. Rogers, for defendant.

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

KING, J. Action of assumpsit to recover an alleged balance of $80.20 for the labor of the plaintiff and his wife under a contract with the defendant. The verdict was for the full amount sued for, and the case comes before this court on defendant's motion for a new trial.

It was undisputed that the plaintiff and his wife worked for the defendant from February 13 to July 21, 1915, under an express contract for a certain monthly wage for the two together. The plaintiff claimed that the monthly wage agreed upon was to be $30 up to June 1, 1915, and $35 thereafter, and that the total amount earned was $165.20, of which he had received but $85, leaving due the balance of $80.20 sued for. On the other hand, the defendant contended that the monthly wage agreed upon was $30 per calendar month, and that the total wages amounted to only $156.50, all of which had been paid.

The testimony was flatly contradictory. The plaintiff was corroborated by his wife as to the terms of the contract, and also to some extent as to the credits to be given. The defendant was likewise corroborated by his wife, both in respect to the terms of the contract and as to payments made to the plaintiff. And each party claimed to have kept in a book an account of the payments made on account of the wages. The plaintiff's book, however, was not produced. He said he destroyed it after giving the account to his attorney for collection. The defendant's book was introduced at the trial, but was not produced at the Law Court. The printed case, however, shows, as we understand, the items of credit as shown on the defendant's book.

We have examined the testimony with care and find it to be irreconcilable. But it has been considered and passed upon by the jury who had the opportunity of seeing the witnesses as they testified, and of examining the defendant's book, an advantage which this court has not. Their conclusion was in the plaintiff's favor, and although we might have reached a different conclusion, we do not find sufficient proof in the record that their conclusion is clearly wrong.

The entry must therefore be,

Motion overruled.

WAMESIT NATIONAL BANK *vs.* ROSE MERRIAM.

WAMESIT NATIONAL BANK *vs.* DELILAH RIPLEY.

Knox. Opinion February 16, 1916.

Agency. Bills and notes. Construction of Rule X, Supreme Court. Contract between indorser and indorsee of promissory note. Meaning of words, "signature" and "execution."

Actions of assumpsit by the indorsee of two promissory notes against the indorser in each who was also the payee. The declaration in each case alleged that the note in question was signed by Eugene G. Russell, by Arthur P. Wedge, Atty. and made payable to the defendant, and that the defendant on the same day indorsed and delivered said note to the plaintiff.

The defendants objected to the introduction of the note in evidence, claiming that before doing so, it was incumbent upon the plaintiff to prove that Arthur P. Wedge was authorized to sign in behalf of the maker. No affidavit denying signature or execution under Rule X was filed by defendant.

Held:

1. That Rule X is not involved in this case.
2. In a suit by an indorsee against an indorser who is also the payee, the latter is estopped from denying the genuineness of the maker's signature or the validity of the promise. By indorsing the note and delivering it to the indorsee, the indorser guarantees both its genuineness and validity.
3. Rule X, when invokable, applies both to the genuineness of a signature and its authorization.

Actions of assumpsit by indorsee of two promissory notes against the indorser in each, who was also the payee. Plea, general issue. Plaintiff offered notes. Defendant seasonably objected to the notes as evidence on the ground that they did not correspond with the declaration, claiming that inasmuch as the plaintiff had alleged in its declaration that the notes declared on were signed by one Eugene G. Russell, by one Arthur P. Wedge, attorney, it was incumbent upon plaintiff to prove said agency. Plaintiff contended that the defendant was estopped, because no affidavit had been filed as

required by Court Rule X. Objections of defendant overruled by presiding Justice. Verdict ordered for plaintiff, to which ruling defendant filed exceptions. Exceptions overruled.

Case stated in opinion.

Arthur Ritchie, for plaintiff.

Rodney I. Thompson, for defendants.

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

CORNISH, J. Actions of assumpsit by the indorsee of two promissory notes against the indorser in each who was also the payee. Both cases involve the same points and will be treated as one.

The declaration in each case alleges that the note in question was dated September 2, 1911, for the sum of three hundred dollars, payable four months after date, signed Eugene G. Russell by Arthur P. Wedge his Atty., and payable to the defendant, and that the defendant thereafterward on the same day indorsed and delivered said note to the plaintiff. The defendants in these suits objected to the introduction of the note in evidence by the plaintiff claiming that it was incumbent upon the plaintiff before doing so to prove that Arthur P. Wedge was authorized to sign in behalf of the maker, although no affidavit denying signature or execution had been filed by the defendant under Rule X of the court. Defendant also claimed that the word "Atty" after the name Arthur P. Wedge was a matter of description only.

The presiding Justice overruled both objections, admitted the note in evidence and directed a verdict for the plaintiff. Defendants' exceptions to this ruling bring the cases to this court.

So far as this rule of court is concerned, it is not involved in this case. Neither Rose Merriam nor Delilah Ripley denied the genuineness nor the authenticity of her signature. If they had, the rule would have applied. But they attempted to set up as an issue, in a suit brought against them as indorsers, the authenticity of the signature of the original maker of the note, that is the agency of Wedge to execute the same in behalf of Russell. This was not open to them. This is not an action against the maker on the original note, the original contract, but by an indorsee against its indorser under the contract of indorsement which is an entirely

new contract and distinct from the original. By indorsing a note and delivering it to an indorsee the indorser guarantees both the genuineness of the instrument and the validity of the promise. So far as the indorsee is concerned the indorser engages that the obligation is genuine and legal as it purports to be. He is estopped from denying either its genuineness or its validity in a suit brought by the indorsee against him. It may be rank forgery, or the promise may be invalid as ultra vires, yet the indorser's liability is unaffected thereby. *Furgerson* v. *Staples,* 82 Maine, 159; *Willis* v. *French,* 84 Maine, 593. The indorser further assumes a conditional liability. He promises that he will pay the note according to its tenor, that is upon proper presentment, demand and notice. It is the breach of this promise which is the ground of the present action, and whether or not Wedge had authority to sign as agent or attorney for the maker, Russell, on the original note is entirely immaterial here. The objections were therefore properly overruled, the notes properly received in evidence, and as no defense seems to have been offered by the indorsers, a verdict for the plaintiff was properly directed in each case.

However, lest our silence may be misconstrued as adopting the construction given to Rule X by the learned counsel for the defendant, and in order to settle a matter of practice, it may not be improper to add that in our opinion Rule X applies both to the genuineness and to the authorization of a signature. As originally adopted in 1822 the terms were as follows: "In actions on promissory notes, orders, or bills of exchange, the counsel for the defendant will not be permitted to deny at the trial the genuineness of the defendant's signature, unless he shall have been epecially instructed by his client that the signature is not genuine, or unless the defendant, being present in court, shall deny the signature to be his or to have been placed there by his authority." Rule XXXIII, 1 Maine, 421. This covers the question of agency or authorization as well as genuineness in explicit terms. The purpose of the rule was to prevent delay and to save unnecessary expense. *McDonald* v. *Bailey,* 14 Maine, 101; *Libby* v. *Cowan,* 36 Maine, 264; and this reason applies with equal force to the genuineness of the signature purporting to be that of the defendant himself and to its authorization when made by another. The present Rule X contains the same

requirement as the original but in abbreviated language, viz: "No party shall be permitted at the trial of any cause to call for the proof of the signature or execution of any paper," etc. "Signature" refers to genuineness as before, but "execution" in the present rule covers the authorization specified in the original. To deny the execution of an instrument is to deny its making, whether by one's own hand or the hand of another. To "sign," one must subscribe in his own handwriting, to "execute" he may use the hand of another. Both words are used in the present rule with the evident purpose of covering both situations. "To say that A 'signed' a note and that he 'executed' a note, as usually understood, may mean very different things. The former conveys the meaning that the act of signing was performed personally by the maker, while the latter imports that the maker either signed it himself, or authorized another to sign for him. The words are by no means equivalent." *Brems* v. *Sherman,* 158 Ind., 300, 63 N. E., 571-2.

The New Hampshire court held in an early case that a similar rule in that State includes the denial of agency as well as genuineness of signature. *Williams* v. *Gilchrist,* 11 N. H., 535.

Exceptions overruled.

HULDA C. TIBBETTS

vs.

NATHAN COOMBS AND H. L. DAY, SON & COMPANY, Trustee.

Penobscot. Opinion March 1, 1916.

Construction of Chapter 75, Public Laws of 1911. Service of writs in Municipal Courts. Repeal of special act by later general act.

1. The provision in the charter of the Bangor municipal court that writs may be made returnable "at one of the five terms next begun and held after the commencement of the action" was impliedly repealed by the later statute, Public Laws of 1911, chapter 75, which provides that "writs in civil actions before any municipal or police court may be made returnable at any term thereof to be held not less than seven and not more than sixty-five days from their date." The latter statute controls.
2. A writ made returnable to the Bangor municipal court at a term to be held more than sixty-five days from its date was properly dismissed for that reason.

Action of assumpsit brought before Bangor municipal court; writ dated June 11, 1915, returnable at a term of said municipal court holden on the first Monday of September following; said first Monday being the sixth day of said month. At return term defendants appeared specially and filed motion to dismiss said action, by reason of it being made returnable to a term of court more than sixty-five days from the date of said writ. Motion of defendant allowed. Plaintiff filed exceptions. By rule of Bangor municipal court, chapter 211, section 6, Private and Special Laws of 1895, case certified to Chief Justice.

Case stated in opinion.

A. L. Thayer and George E. Thompson, for plaintiff.

Terence B. Towle, for defendants.

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

SAVAGE, C. J. This cause comes before this court from the Bangor municipal court, under the provisions of the charter of that court. P. & S. Laws of 1895, ch. 211, sect. 6, on exceptions to an order of dismissal.

The writ was dated June 11 1915, and was made returnable on the first Monday of the following September. The charter of the Bangor municipal court. as amended, provides that terms for the transaction of civil business shall be held on the first and third Mondays of each month, except the month of August, P. & S. Laws of 1895, ch. 211, sect. 10, and that writs may be made returnable "at one of the five terms next begun and held after the commencement of the action." Section 9. By chapter 75 of the Public Laws of 1911 it is provided that "writs in civil actions before any municipal or police court may be made returnable at any term thereof to be held not less than seven nor more than sixty-five days from their date." The writ in this case was made returnable to one of the five terms next begun and held after the commencement of the action, as provided in the amended charter, but not until after the sixty-five days limited in the Laws of 1911 had elapsed. The question therefore is, which statutory provision controls? Is, or is not, the charter provision impliedly repealed by the later general law?

We think the general law was intended to control. We think the legislature intended to secure uniformity with regard to return of writs in municipal and police courts. The general statute, by its terms, is made applicable to "any" municipal court. There is no distinction or exception. The case of *Starbird* v. *Brown,* 84 Maine, 238, is decisive of this question. The action was properly dismissed.

Exceptions overruled.

PHILIP HOWARD, Petitioner, *vs.* CHARLES M. HARRINGTON.

LUCIUS H. DUNCAN, Petitioner, *vs.* HERBERT W. KEEP.

Knox. Opinion March 1, 1916.

Acceptance of and Qualification for an Office Incompatible with one then held. Defective Ballots. Incompatible Offices. Marking of Ballots. Right of Pauper to Vote. Test of Incompatibility.

1. The office of Mayor of Rockland and that of Judge of the police court of Rockland are incompatible, and cannot legally be held by the same person at the same time.
2. If the mayor of a city is appointed to the office of Judge of the police or municipal court of the same city and accepts the latter office, he thereby vacates and resigns the office of mayor.
3. If the holder of any office accepts another and incompatible office, he thereby vacates ipso facto the first office.
4. If a person claiming to have been elected mayor of a city is, after the election, appointed to, and accepts, the incompatible office of Judge of the police court of the same city, he thereby vacates his right to the office of mayor, and has no further interest in it, and cannot maintain a petition under Revised Statutes, chapter 6, section 70, to determine whether he was elected.
5. It is only when a petitioner under Revised Statutes, chapter 6, section 70, is entitled by law to hold the office claimed by him that an order may be issued to the party unlawfully claiming or holding the office to yield it up,
6. Ballots on which the name "L. H. Duncan" is written are counted for Lucius H. Duncan.
7. Where a voter placed a petitioner's sticker upon and partly covering the name of the respondent; and also wrote underneath the name of the petitioner in full, the ballot is counted for the petitioner.
8. In a case where a voter made a cross in a dark space or square at the left of the open white square, above the party designation, the Justices are evenly divided in opinion on the question whether it should be counted; and, therefore, it is not counted.
9. Upon the evidence the Justices are of opinion that the respondent Keep is entitled to three more ballots, and the petitioner, Duncan, to two less, than those presented to the court at the hearing, and that Keep was legally elected alderman.

10. Petitions under Revised Statutes, chapter 6, section 70, to determine the validity of elections cannot properly be reported to the Law Court for decision. They are to be heard and determined by a single Justice, from whose decision an appeal lies to all the Justices, as such, and not to the Law Court.

Petitions brought under provisions of Revised Statutes, chapter 6, section 70, to determine the results of the municipal election March, 1915, in the city of Rockland, so far as it concerns the election of mayor and one alderman. Case reported to Law Court on so much of the evidence as legally admissible.

Case stated in opinion.

Philip Howard, for petitioners.

A. S. Littlefield, for respondents.

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

SAVAGE, C. J. These petitions are brought under the provisions of Revised Statutes, chapter 6, section 70, to determine the results of the election, March 1, 1915, in the city of Rockland, so far as concerns the mayor and one alderman.

I. THE HOWARD PETITION.

The petitioner and the respondent were both candidates for the office of mayor. The respondent was declared elected. The petitioner claims that a majority of the legal ballots were cast for him, but that the counting officers refused to count ballots, on the ground that they were defective, that should have been counted for him, and counted defective ballots for the respondent, which should not have been counted. The case is also concerned with some ballots which were cast by men who, it is claimed, were paupers, and so disqualified, and with the ballot of one man claimed to have been illegally registered. There is also a controversy as to the number of ballots actually cast for each party in Ward 1. The conclusion we have reached makes it unnecessary to consider any of these questions.

It is admitted that the petitioner was appointed Judge of the police court of Rockland by the Governor, March 17, 1915, that the appointment was confirmed, that a commission issued to him,

March 24, 1915, and that since then he has been legally holding that office and performing its duties. And the respondent sets up in his answer and now contends that the offices of Mayor of Rockland and of Judge of the police court of Rockland are incompatible, both under the constitution and at common law, and that the petitioner, even if elected mayor, vacated his election ipso facto by being appointed Judge of the police court and accepting that office. He therefore contends that the petitioner has now no right, title or interest in the office of mayor, and for that reason is not entitled to prosecute this petition.

It is well settled that one person cannot hold two incompatible offices, and that the acceptance of the later office vacates ipso facto the prior one. In this State, the question was first discussed in the Opinions of the Justices, 3 Maine, 484. It was there considered that the offices of sheriff and justice of the peace were incompatible, on the ground that sheriffs belong to the executive department of the State, and justices of the peace, to the judicial, and that for one person to hold both of these offices would be in violation of the Constitution, Art. III, sect. 1, which provides that "no person or persons belonging to either of these departments [legislative, executive and judicial] shall exercise any of the powers belonging to either of the others, except in cases herein expressly directed or permitted." In *Bamford* v. *Melvin,* 7 Maine, 14, the offices of deputy sheriff and justice of the peace were held to be incompatible, for the reason given in 3 Maine, 484, supra. In *Stubbs* v. *Lee,* 64 Maine, 195, this court said: "Where one has two incompatible offices, both cannot be retained. The public has a right to know which is retained and which is surrendered. It should not be left to chance, or the uncertain and fluctuating whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public." And the court in that case held that an acceptance of the office of deputy sheriff was a surrender of the office of trial justice. See to same effect, *Pooler* v. *Reed,* 73 Maine, 129.

That the Judge of the police court of Rockland belongs to the judicial department of the State cannot be questioned. The court

was created under that provision of the Constitution, Art. VI, sect. 1, which declares that "the judicial power of the State shall be vested in a Supreme Judicial Court, and such other courts as the legislature shall from time to time establish." Whether a mayor of a city belongs to the executive department of the State we think is a question which need not now be expressly decided. It has been pointed out that a distinction may exist between a municipal officer whose functions relate exclusively to local concerns of the particular community, and one whom the law vests with powers and charges with duties which concern the general public. *Atty. Gen. ex. rel. Moreland* v. *Detroit,* 112 Mich., 145; 1 Dillon, Mun. Corp., sec. 58. In this State the duties of a mayor are not limited to the performance of mere municipal functions, and attending to the municipal business. As will be seen hereafter, he is charged by the public statutes with certain duties which concern the public interest. He is required specially to enforce certain criminal statutes enacted for the general public good, and which are a part of the general machinery adopted to suppress crime and promote the public well being. We think there is much ground for holding that he is a part of the executive department of the State, within the meaning of the Constitution. But it is unnecessary in this case to decide that question. We prefer to place our decision upon another ground.

The answer to the question before us does not necessarily depend upon constitutional or statutory provisions. The doctrine of the incompatibility of offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is, what constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense. We cite a few examples. "Two offices are incompatible when the holder cannot in every instance discharge the duties of each. The acceptance of the second office, therefore, vacates the first." The *King* v. *Tizzard,* 9 B. & C., 418. This language is cited with approval by this court in *Stubbs* v. *Lee,* supra. "Incompatibility must be such as arises from the nature of the duties, in view of the relation of the two offices to each other." *Bryan* v. *Cattell,* 15 Iowa, 535. "Incompatibility arises where the

nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." *Abry* v. *Gray,* 58 Kan., 148. "Incompatibility between two offices exists when there is an inconsistency in the functions of the two." *People, ex rel. Ryan* v. *Greene,* 58 N. Y., 295. "The functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices." *Kenney* v. *Georgen,* 36 Minn., 190. "The test of incompatibility is the character and relation of the offices, as where the function of the two offices are inherently inconsistent and repugnant." *State* v. *Goff,* 15 R. I., 505. "The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them." *State ex. rel. Clawson* v. *Thompson,* 20 N. J. Law, 689. The foregoing cases may also be cited in support of the doctrine that acceptances of the later of two incompatible offices vacates the former. See also *Cotton* v. *Phillips,* 56 N. H., 220; *People* v. *Carrigan,* 2 Hill, 93; *Van Orsdale* v. *Hazard,* 3 Hill, 243; *Magie* v. *Stoddard,* 25 Conn., 565; 3 Com. Dig. Tit. Officer (K. 5.) Mechem on Public Officers, sect. 420. An office holder is not at common law ineligible to appointment or election to another and incompatible office, but the acceptance of the latter vacates the former.

Now to apply these principles to the present case. The police court of Rockland has a civil and a criminal jurisdiction. It has exclusive jurisdiction under its charter over all such offences committed within the limits of the city of Rockland, as are cognizable by trial justices. P. & S. Laws of 1909, ch. 368. It has jurisdiction of violations of any statute where the offense is not of a high and aggravated nature. R. S. ch. 133, sect. 4. It has exclusive jurisdiction of all offenses against the ordinances and by-laws of the city of Rockland. P. & S. Laws, 1903, ch. 114, sect. 3. It has jurisdiction of all offenses against the prohibitory liquor statute, except for keeping drinking houses and tippling shops and for being common sellers of intoxicating liquor. R. S., ch. 29, sect. 60. It may, on complaint, cause to be arrested all persons charged with felonies, offenses and misdemeanors, and when an offense is found to be one not within its jurisdiction for trial, it may cause the

offender to recognize with sufficient sureties to appear before the supreme judicial court. R. S., ch. 133, sect. 5.

The charter of the city of Rockland, P. & S. Laws, 1905, ch. 122, provides as follows: Sect. 3. "The mayor of said city shall be the chief executive officer thereof; it shall be his duty to be vigilant and active in causing the laws and regulations of the city to be executed and enforced; to exercise a general supervision over the conduct of all subordinate officers, and cause neglect of violations of duty to be punished."

Sect. 5. "The executive powers of said city generally, and the administration of police and health departments . . . shall be vested in the mayor and aldermen."

The statutes of this State, ch. 29, sect. 15, provide that the mayor and aldermen . . . in every city . . . shall make complaint and prosecute all violations of the chapter, [the prohibitory liquor law] and promptly enforce the laws against drinking houses. For wilful neglect or refusal, after being furnished with written notice of a violation signed by two persons competent to be witnesses in civil suits, containing the names and residences of the witnesses to prove the offence, to institute proceedings therefor, he shall be fined not less than twenty nor more than fifty dollars."

The municipal officers, of whom the mayor is one, R. S., ch. 1, sect. 6, par. XXV, are specially required by statute promptly to enforce the laws against houses of ill-fame, R. S., ch. 125, sect. 9, and against gambling rooms, R. S., ch. 126, sect. 1, and in each case "to make complaint against any person within their respective municipalities, where there is probable cause to believe such person guilty of a violation" of the statute. It is made the duty of the mayor "forthwith to proceed to sue" for an election bet or wager made, as soon as he has the proper evidence, R. S., ch. 6, sect. 97. We think it is unnecessary to go further in this direction.

In many instances in the statutes the mayor, either alone, or as one of the municipal officers, is charged with the performance of duties, and for neglect or refusal to perform the same is made liable to fine or forfeiture, criminally or civilly. And the police court of Rockland has exclusive jurisdiction upon complaint to try the mayor for such neglect or refusal in some classes of cases, and may hold the offender for the Supreme Judicial Court in others.

And where the forfeiture is recoverable in an action at law, it likewise has jurisdiction, sometimes exclusive. See R. S., ch. 4, sects. 53, 57, 112; ch. 6, sect. 98; ch. 23, sect. 92; ch. 28, sects. 42, 46, 53; ch. 44, sect. 5; ch. 124, sect. 11; ch. 128, sect. 10. It needs no argument to show that the mayor cannot be respondent and Judge of the police court at the same time. If he is Judge he cannot be prosecuted in that court for his defaults as mayor, nor anywhere else in cases within the exclusive jurisdiction of that court.

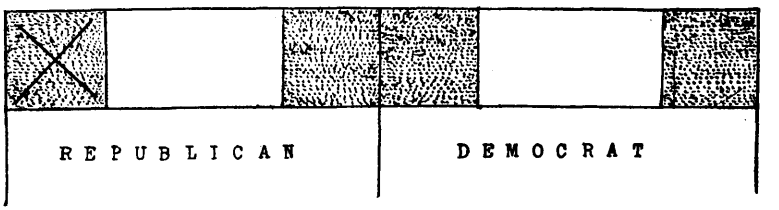
Discussion cannot make the situation clearer. As mayor it would be the duty of the petitioner to prosecute certain classes of offenses, if any have been committed, in the police court. As Judge of the police court it is his duty to hear and determine complaints for offenses which come within these classes. He cannot do both. He cannot be both prosecutor and Judge. The duties are repugnant. He can only perform the duties of one office by neglecting to perform the duties of the other. It is not for him to say in a particular instance which he will perform and which he will not. The public has a right to know with certainty. *Stubbs* v. *Lee,* supra. Thence it is that two such offices must be held to be incompatible. And we are all of opinion that when one who has the office of mayor of Rockland, or one who has the right of office, accepts the incompatible office of Judge of the police court, he thereby abandons, surrenders and vacates ipso facto, such election, or right of election, as he had to the office of mayor.

Since the petitioner has vacated and surrendered his right to the office of mayor, we think that he cannot maintain this petition. The ultimate purpose of the petition is to oust the respondent, by showing that the petitioner is entitled to the office. And it is only when a petitioner "is entitled by law to the office claimed by him," R. S., ch. 6, sect. 71, that the Justice hearing the case may issue an order to the party unlawfully claiming or holding said office, commanding him to yield up said office to the officer who has been adjudged to be lawfully entitled thereto. Sect. 73. The petitioner has now no interest in the proceeding. *Heald* v. *Payson,* 110 Maine, 204; *Libby* v. *English,* 110 Maine, 449; *Murray* v. *Waite,* 113 Maine, 485.

II. THE DUNCAN PETITION.

The petitioner and the respondent were both candidates for the office of alderman in Ward 1, and the respondent was declared elected.

At the hearing, it was agreed that each had received an equal number of the ballots before the court. This included four disputed ballots, three for the petitioner and one for the respondent. The total number is not stated in the record. In one case the voter made a X in a dark space or square at the left of the open, white square, above the party designation, within which latter square it is claimed was the appropriate place to mark, thus:



Upon the question whether this ballot should be counted for the respondent, the Justices are evenly divided in opinion. Therefore it cannot be counted.

On two ballots the voters erased the name of the respondent, and wrote underneath "L. H. Duncan." Under the rule laid down in *Bartlett* v *McIntire,* 108 Maine, 161, we think these ballots should be counted for the petitioner.

On one ballot the voter placed a petitioner's sticker upon and partly covering the name of the respondent. He also wrote underneath the name of the petitioner in full. We think under the rule in *Crosby* v. *Libby,* 114 Maine, 35, this ballot should be counted for the petitioner. Upon the ballots before us, then, the petitioner holds the three disputed ballots already counted for him in the tie vote, and the respondent loses one, which so far gives the petitioner one majority.

However, another question is presented. There is evidence offered by the respondent that at the count of the ballots in Ward 1, at the close of the election, there were 97 straight ballots for each party, that is, the petitioner had 97 straight ballots, and the respondent 97. At the time the ballots were counted in court, April 16, 1915, the straight ballots for the petitioner were only 94 in number, and those for the respondent were 99. And as we understand the record, it was upon these ballots, with the addition of split ballots,

that the result was tied. There is no explanation of the discrepancy. The testimony is undisputed. No witness was called by the respondent to contradict. The ward returns were not offered in evidence. No officer who at any time had custody of the ballots was called upon to show that there had been no opportunity for tampering with them. It does appear that the ballots had been several times inspected by interested parties, but the counts, if any were made, do not appear. Under these circumstances we all think the actual count in ward meeting should be taken as the truth. Three votes should be added to those counted for the respondent, and two deducted from the petitioner's count. And the result upon the whole is that the respondent has a majority of four.

III. PROCEDURE.

We think these cases are not properly before the Law Court on report, and were it not for the fact that the term of the offices in dispute is drawing towards the end, and that the shortness of the time will probably not permit the cases to go through the statutory channels before the end, the proper course would be to remand them for hearing before a single Justice. Although by reason of the exigency thus disclosed, we have persuaded ourselves with much reluctance to consider the cases on their merits, we cannot let the occasion pass without calling attention to the correct procedure.

The statutes provides for a hearing by a single Justice and an appeal from his decision and judgment to the remaining Justices. It requires the appellant to cause copies of the petition, pleadings, findings and testimony, upon which such judgment is rendered, approved by the Justice before whom the hearing is had, to be printed and transmitted to the Chief Justice within twenty days after such appeal is taken with written argument thereon. Section 72. In these cases there has been no decision and judgment. There has been no appeal. The cases have not been transmitted to the Chief Justice. They have not been printed. But the cases have been sent before us on report, and are entered on the law docket.

We think that the Law Court as such has no jurisdiction of these cases. The statute provides that on appeal, the Justices of the court "shall consider said cause immediately, and decide thereon, and transmit their decision to the clerk of the county where the suit is pending, and final judgment shall be entered accordingly."

The Law Court is a statutory court of limited jurisdiction. The Justices of the Supreme Judicial Court are not the Law Court except when they are sitting and acting within the limits of the jurisdiction of the Law Court. By statute causes may be reported to the Law Court, R. S. c. 79, s. 46. But there is no provision for the report of a case to the Justices of the Supreme Judicial Court. There are provisions in other statutes by which cases may be transmitted to the Chief Justice, argued in writing, considered and decided by the Justices, and their decision transmitted directly to the clerk of the county in which the suit is pending. In such cases the Justices never consider the matters as in Law Court. The cases are not entered on the law docket. The decisions are not certified to the clerk of the Law Court for record, nor are mandates of the decisions sent by him to the clerk below. The Justices certify their decision directly to the latter clerk, as is the provision in the election statute under consideration.

A petition to determine a contested election is not an action at law. It is not a bill in equity. It is a special, statutory proceeding which confers upon a single Justice, and upon the other Justices on appeal, jurisdiction to inquire into and determine contested election cases. The evident purpose of the statute is to provide a simple, inexpensive and prompt remedy for one who has been unlawfully deprived of the fruits of an election. It takes the place of quo warranto to oust an officer who has not been legally elected, to be followed by mandamus to instal the rightful claimant.

It is true that the statute says that the petitioner "may proceed as in equity," but that does not make the petition a bill in equity, nor make an election contest one of equitable jurisdiction. In *Bartlett* v. *McIntire,* 108 Maine, 161, this court holding that the findings of the single Justice do not on appeal have the same force as in appeals in equity, said: "The procedure is somewhat anomalous. It is true that section 70 of chapter 6 provides that the claimant "may proceed as in equity" by petition returnable before any Justice of the Supreme Judicial Court, but it does not say he shall bring a bill in equity, and the subsequent proceedings bear slight resemblance to those required by the equity rules. Moreover section 72 provides that an appeal from the decision of the single Justice shall set forth the reasons therefor. This is not required in an

appeal in equity, but is in probate appeals; and the appeal itself is taken, not to the Law Court as such, but to the Justices. A careful consideration of the entire statute and its object leads to the conclusion that the purpose of the Legislature in providing for an appeal, was to obtain the decision of the appellate Justices de novo upon all disputed questions of law and fact, and the clause in the statute providing that the claimant "may proceed as in equity was used merely in contradistinction to proceedings on the law side of the court, with its stated terms, and more rigid rules of procedure." In all election cases heretofore, with one exception, within the experience of the present members of the court the statutory procedure has been strictly followed. In one case, in which there was an appeal properly transmitted, the Justices for convenience heard oral arguments during a term of the Law Court, but the case was not entered on the law docket.

And it may be questioned whether the immediate parties by consenting to this procedure have effectively waived the requirements of the statute. Certainly waiver cannot confer jurisdiction upon the Law Court. Besides, the question of the validity of an election to public office affects public interests as well as private ones, and it may be doubted whether under such circumstances, a party should be permitted to waive. However this may be, despite the fact that these cases are irregularly before us on report, rather than on appeal, they have been argued in writing as the statute provides, and have been considered by all the Justices, as the statute contemplates.

The order in each case will be,

Petition dismissed with costs.

EVA C. TURNER, Complainant, *vs.* CITY OF PORTLAND.

Cumberland. Opinion March 7, 1916.

Assessment of Damages. Laws, 1913. *Construction of Chapter 130, Public Ways.*

In a complaint brought under R. S. chapter 23, section 68, to recover damages for a change of grade made in Washington avenue, Portland, in the summer of 1914, it is held:

1. That the change of grade was made in pursuance of an order duly passed by the City Council and duly approved by the Mayor on May 4, 1914, in accordance with the report of the City Commissioner of Public Works filed April 23, 1914.
2. That the work was done between July 18 and December 1, 1914, under a contract entered into between the city and the Hassam Paving Company, dated June 11, 1914.
3. That this statutory liability on the part of the city was not affected by the fact that on February 5, 1914, the State Highway Commission under sec. 8 of chap. 130 of the Public Laws of 1913, designated Washington avenue as a State highway, nor by the fact that the State made a contract with the City under date of July 2, 1914. That contract did not affect the prior contract between the city and the Hassam Company nor did it change the relations between the city and the complainant.
4. That under section 14 of the Act of 1913, the state through its Highway Commission has power to change the grade of any street and on proper proceedings damages may be assessed therefor; but this power was not exercised here. The city's liability remained unchanged.

Complaint brought under Revised Statutes, chapter 23, section 68, to recover damages for changing of grade of a certain street or highway opposite plaintiff's property. The changing of grade was done by a contractor acting by and under the authority of the proper officials of the city of Portland. The plaintiff claimed damage on account of said changing of grade. Liability was denied on the part of the city of Portland, because it claimed the changing of grade was done under and by virtue of chapter 130, section 14, of Public Laws of 1913, relating to State Highway Commission. The plaintiff entered an appeal to the Supreme Judicial Court, at

which term referees were appointed and damages were awarded the plaintiff in the sum of eight hundred dollars. Case was reported to the Law Court on agreed statement and stipulations of the parties, together with the report of referees on damages, the Law Court to dispose of the case in accordance with the stipulations of the parties. Judgment for complainant for eight hundred dollars.

Case stated in opinion.

Scott Wilson, and E. L. Bodge, for complainant.

James A. Connellan, for respondent.

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

CORNISH, J. This is a complaint brought under R. S., ch. 23, sec. 68, in which the complainant, as an abutting owner, seeks to recover damages for a change in grade made in Washington avenue, Portland, in the summer of 1914. The question of the amount of damages sustained has already been fixed by referees at $800, their report being filed on November 24, 1915. The question of liability on the part of the defendant has been reserved for this court under an agreed statement of facts.

It appears that on May 4, 1914, the City Council of Portland passed an order, which was duly approved by the mayor, establishing the grade of a portion of Washington avenue in accordance with the report of the city commissioner of public works filed April 23, 1914. The complainant's premises abutted the portion so changed.

On June 11, 1914, the city, through its commissioner of public works duly authorized, entered into a contract with the Hassam Paving Company for the reconstruction and resurfacing of Washington avenue which contract required the lowering of the street in front of the complainant's premises to the grade established by the order of May 4, 1914. Work began under this contract on July 18, and was completed on December 1, 1914. These facts taken by themselves, give the complainant an undoubted claim for damages under R. S., ch. 23, sec. 68. What has occurred to deprive her of this statutory right? How has that right been extinguished?

The defendant's contention is that in consequence of the designation of Washington avenue as a State road and subsequently by certain acts on the part of the State Highway Commission, the city has been relieved of the liability otherwise resting upon it. This position we think is untenable.

In the first place it appears that as far back as June 20, 1908, upon the petition of the municipal officers, Washington avenue was designated as a State road under the provisions of chapter 112 of the Public Laws of 1907. No work upon this avenue followed that designation, however, and had such work been done, section 11 expressly provided that all damages for change of grade should be assessed by the municipal officers and paid according to the provisions of statute. Therefore this designation of 1908 is of no legal significance here.

In the second place it is agreed that on February 5, 1914, the State Highway Commission, under section 8 of chapter 130 of the Public Laws of 1913, designated Washington avenue as a State aid highway, but that no work of reconstructing or improving the street was done by the State under section 11 of that Act prior to July 18, 1914. The contract between the city and the commission was executed on July 2, 1914, about three weeks after the contract between the city and Hassam Company had been made, the reason for the city entering into the Hassam contract in advance being the assurance from the engineer that the State contract with the city had been practically determined upon and would be entered into as soon as possible, and it was necessary to close the contract with the Hassam Company on June 11, as the officer of the Hassam Company having power to execute the contract was about to leave the city for a considerable length of time.

We do not, however, see that these facts deprive the complainant of her rights under the statute. The change of grade was made by the city on May 4, the contract was made by the city on June 11, and the work was done by the city through its contractor under that contract. No other contract was made with the Hassam Company. True, the State made a contract with the city under date of July 2, but that did not affect the prior contract between the city and the Hassam Company, nor did it change the relations between the complainant and the city. The only change of grade has been made

by the city, and therefore the city is liable for the damages arising therefrom. Section 14 of the Act of 1913 provides that the State through its Highway Commission has power to alter, widen or change the grade of any street whenever in its judgment public exigency may require, after due notice and hearing, and if done may assess damages therefor; but this power was not exercised. No step was taken in that direction. The agreed statement says: "that the State of Maine through its State Highway Commission, acting under section 14 of chapter 130 of the Public Laws of 1913, has made no change in the grade of said Washington avenue in front of the complainant's said premises as it existed on May 4, 1914." In short, the State adopted and perhaps paid for the work performed by the contractor of the city, but it did not take the necessary steps to render itself liable therefor under section 14 of chapter 130 of Public Laws of 1913, nor did it thereby relieve the city of its existing liability under section 68 of chapter 23.

Judgment for complainant for $800.

WILLIAM M. ELDRIDGE *vs.* J. FRED O'CONNELL, Sheriff.

Penobscot. Opinion March 7, 1916.

Burden of proving verdict wrong. Service of warrant.

In an action of trover against a sheriff for the misconduct of one McKenney, his deputy, in illegally converting the plaintiff's team to his own use, a verdict having been rendered for the plaintiff, it is held.

1. That McKenney, at the time of the alleged tort, held the office of deputy sheriff and also was licensed as a State Agent for the prevention of cruelty to animals, and that the vital issue of fact for the jury was the determination of the official capacity in which McKenney was acting at the time, it being practically conceded that the acts themselves were unauthorized.
2. That this is not a case where the evidence is contradictory, imposing upon the jury the duty of determining where the truth is as between irre-

concilable testimony, but one where the evidence is overwhelmingly on the side of the defendant. The jury failed to distinguish between McKenney's acts as a deputy sheriff, for which the defendant would be liable and his acts as a State Agent for which he would not be liable. The verdict was manifestly wrong.

Action of trover against sheriff of Penobscot county for alleged wrongful acts of one of his deputies. The defendant pleaded general issue and brief statement, setting forth that his deputy, at the time of the committing of the alleged wrongful acts, was acting in his capacity as State agent of the Humane Society of the State of Maine and not in his capacity as deputy sheriff. Verdict for plaintiff. Motion for new trial filed by defendant. Motion sustained.

Case stated in opinion.

George E. Thompson, for plaintiff.

Benjamin W. Blanchard, for defendant.

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

CORNISH, J. Action of trover against the sheriff of Penobscot county for the alleged misconduct of his deputy. The following facts are undisputed. On May 13 1913, one Edward J. McKenney called at the plaintiff's home, notified him that he had received a complaint that the plaintiff was not properly feeding his horse, examined the horse, cautioned the plaintiff and said that he would take the horse away in a month unless it was properly fed and cared for. On July 14, 1913, the plaintiff drove to Dexter village, and hitched his horse in a shed. McKenney, without the knowledge of the plaintiff, took the entire team, horse, harness and carriage into his possession. On September 18, 1913, McKenney obtained a warrant from the Dexter municipal court against the plaintiff for a violation of R. S., ch. 125, sec. 34, in unnecessarily and cruelly failing to provide his horse with proper food, drink, shelter, etc. On this complaint the plaintiff was convicted and sentenced.

During all this time, McKenney was a deputy sheriff, appointed by the defendant and was also a State agent for the prevention of cruelty to animals duly appointed and commissioned under R. S., ch. 125, sec. 54.

Under this state of facts it is not seriously controverted by the defendant that the action of McKenney in appropriating the property in question was not justifiable. That however creates only a personal liability on the part of McKenney. In order for the plaintiff to recover here it was necessary for him to prove further that McKenney was, at the time, acting as a deputy sheriff. The jury must have so found because they rendered a verdict in favor of the plaintiff, and the burden now rests on the defendant, under his general motion, to convince this court that the verdict was manifestly wrong. We think he has sustained that burden.

The evidence introduced by the plaintiff is barren of any proof that in taking this property McKenney was acting in the capacity of a deputy sheriff. Given its full effect it amounts simply to proof that McKenney took the property and that at that time he was a deputy sheriff. The connection between the two is missing. The plaintiff admits on cross examination that he did not know whether McKenney was acting as deputy sheriff or as a State agent. The plaintiff's case falls by its own weakness.

On the other hand McKenney positively declares that he was acting as such agent, during this whole time that he told the plaintiff at the first interview that he was acting in that capacity, and that he had been sent there by reason of a complaint concerning the care of the horse. This evidence is reasonable and credible.

The plaintiff introduced what purported to be a copy of the original complaint, warrant and return in the Dexter municipal court, dated September 18, 1913, which showed that the officer's return was signed by McKenney as deputy sheriff.

But the original was subsequently produced by the defendant, containing a schedule of the fees, which the copy did not, and this original return was signed by McKenney as "Humane Officer," a designation often colloquially used for the longer title of agent for the prevention of cruelty to animals. So far as this has any bearing it aids the defendant.

On the whole, this is not a case where the evidence is contradictory, imposing upon the jury the duty of determining where the truth is as between irreconcilable testimony, but one where the evidence is overwhelmingly on one side. The jury evidently did not sufficiently distinguish between McKenney's acts as a deputy sheriff,

for which the defendant would be liable, and his acts as a State agent for which he would not be liable, it being conceded that the acts themselves were unauthorized.

The entry must therefore be,

Motion sustained.

ELMER L. HARLOW et al. *vs.* FRED A. PERRY.

Androscoggin. Opinion March 8, 1916.

Declaration of agent as binding principal. Defendant's silence. Principal and agent. Scope of agent's authority.

An action on the case for deceit in the sale of a stock of goods by the defendant, administrator of the estate of one J. K. Haslan, who in his lifetime kept a crockeryware and variety store in Lewiston, by falsely representing to the plaintiffs that the stock had been appraised as of the value of $8,038, without including damaged and unsalable goods, and that the goods, as they were arranged on the shelves and as they appeared were similar in character and quality to those in sight on the shelves and to those contained in the various boxes and receptacles holding the goods. In an action for deceit, held;

1. A declaration of the agent at the time of sale, in reference to the condition of the goods which he was selling for his principal was admissible as part of the res gestae accompanying the act of the sale.
2. A principal is liable for such acts of his agent as were done within the scope of his authority as agent, which included representations made by the agent to plaintiff as to condition and kind of goods for which negotiations of sale were in progress.
3. Defendant having offered testimony as to the appraisal, it opened the door for the plaintiffs to show all that was done at the time of the appraisal that bore upon the value of the goods sold.
4. Before the silence of a party is admissible against him, it must appear that he had the right, and it was his duty, to speak; that he had an opportunity for the denial, and that when called as a witness in his own behalf, and there has been positive testimony as to his declarations that were material to the issue, and he does not deny them, the jury have the right to consider his silence under such circumstances as tending to prove the truth of the testimony given.

Action for deceit in the sale of stock of goods, plaintiff alleging misrepresentations as to kind and quality and appraisal value of said goods. Defendant pleaded general issue. Verdict for plaintiff. Exceptions filed by defendant to admission of certain testimony and rulings of court. Exceptions overruled.

Case stated in opinion.

Oakes, Pulsifer & Ludden for plaintiff.

R. W. Crockett for defendant.

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

HALEY, J. This is an action on the case for deceit in the sale of a stock of goods by the defendant, administrator of the estate of one J. K. Haslan who in his lifetime kept a crockeryware and variety store in Lewiston, by falsely representing to the plaintiffs that the stock had been appraised as of the value of $8035, without including damaged and unsalable goods and that the goods, as they were arranged on the shelves and as they appeared were similar in character and quality to those in sight on the shelves and to those contained in the various boxes and receptacles holding the goods. The store was about 25 by 80 or 90 feet in size, and included a basement and two general stores and an attic, in all of which there was a large amount of goods. The case has been before this court before (113 Maine, 239), and upon the second trial the verdict was for the plaintiffs and the defendant brings the case to this court upon exceptions. The testimony showed that one D. P. Andrews acted as agent of the defendant in making the sale to the plaintiffs. The first exception is to certain parts of the testimony of Mr. Andrews, who was called as a witness for the plaintiffs. The testimony is as follows: "Q. What did Mr. Andrews tell you about the stock of goods for you to report to prospective customers? A. He told me the appraisal of the stock was eight thousand dollars. MR. CROCKETT: I wish to reserve that point. I object to that testimony. The COURT: You don't claim that is a substantial ground for damages, do you, Mr. Pulsifer? MR. PULSIFER: No, I think not. The COURT: You had better leave that out for the present, as that part of it goes. He is not asked what was told the plaintiffs.

Q. Well, Mr. Andrews, what representation did you make to Mr. Harlow and Mr. Thurston about the stock? The COURT: State the conversation, the whole of it. A. I told them Mr. Perry told me the stock was appraised at $8035, with all damaged stock throwed out. MR. CROCKETT: I object. The COURT: That may stand as a part of the conversation. MR. CROCKETT: I would like to have the point reserved. The COURT: I shall instruct the jury about it. MR. CROCKETT: I wish the point reserved. The COURT: Certainly."

The rest of the testimony of this witness is not given, but there can be no question but that the declaration of the agent at the time of sale in reference to the condition of the goods which he was selling for his principal was admissible as a part of the res gestae accompanying the act of the sale, and the witness to answer the question was bound to state all that he stated to the plaintiffs as an inducement for them to make the purchase. The defendant claims that the false and fraudulent representations concerning the appraisal of the property by appraisers as to the value placed upon it, was not sufficient to sustain an action for deceit in the sale of property, which is the law of this State as held in *Bourn* v. *Davis*, 76 Maine, 223, and the above testimony of Mr. Andrews was not admitted for the purpose of charging the defendant for damages by reason of the false statements as to the value of the goods. The counsel stated that he did not rely upon it, it was not admitted for that purpose, but it was admitted as a part of the conversation between the plaintiffs and the defendant's agent, whereby the plaintiffs were induced to purchase the goods, and in repeating the conversation it was necessary for the witness to repeat all that was said, or all in substance that was said, between them at the time, and if immaterial testimony was given that had no bearing on the case, it was not a subject of exception, because the witness was called upon to give the conversation, and if matters were stated that had no bearing upon the case, it was the duty of the court to give to the jury proper instructions in regard to it, and the court stated he would give the jury proper instructions in regard to the testimony, and it is not claimed that proper instructions were not given. As Mr. Andrews was the agent of the defendant in making

the sale of the goods to the plaintiffs, the defendant was liable for such acts of the agent as were done within the scope of his authority as agent, which included representations made by the agent to the plaintiffs as to the condition and kind of goods that they were negotiating for. *Leavitt* v. *Seaney,* et al., 113 Maine, 119, and authorities cited.

The defendant proved by the testimony of two of the appraisers of the estate of James K. Haslan that they looked the stock over, inventoried and appraised it, with an allowance for damaged goods, at $8038, which inventory was not filed in the probate court. Upon cross examination, subject to exception, the witnesses were allowed to testify that at the same time they made another inventory of the same goods, and that their estimate of the value of the goods, as shown by the second inventory, was $2300, which inventory was returned by them to the defendant. The defendant having offered evidence of what appeared to be the estimates of the witnesses of the value of the stock, it was proper for the plaintiffs to show, by cross examination, that they had placed a different value upon the goods. The defendant having offered testimony as to the appraisal, it opened the door for the plaintiffs to show all that was done at the time of the appraisal that bore upon the value of the goods. The testimony tended to prove that that value placed upon the goods by the witnesses was not a fair value, and tended to prove that the defendant to whom the inventory was returned, knew, or ought to have known, that the representations made by his agent as to the condition and value, were untrue, and the defendant, having offered evidence of the appraisal, had no right to prevent the plaintiffs from showing how it was made. The defendant having shown a part of the transaction and the value placed upon the goods by the witnesses, the plaintiffs had a right, upon cross examination of the witnesses, to show how the value was fixed by them, and that at the same time they fixed a much lower value.

The remaining exceptions are to the admission of the testimony of the plaintiffs and their witnesses that at the previous trial, at which the defendant was a witness, the plaintiffs testified to statements made by the defendant to the plaintiffs, that the goods had been so arranged as to give a fair representation, that they were

as shown on the front, and to the permitting of the plaintiffs' attorney to ask defendant, on cross examination after he had testified, he probably heard the above testimony, "Did you make any denial of that statement? A. I didn't confirm or deny it, to my knowledge." At the previous trial one of the plaintiffs testified that he stated to the defendant, "I was not used to that kind of stock at all, and I would simply have to go on what he said in regard to the character of it. . . I was going on his statement."

It is urged that the failure of the defendant to deny at the former trial, at which he was not only a party but a witness, the testimony given in his presence which was material to the issue, was an admission by silence and acquiescence that tended to prove the truth of the testimony given.

In *Blanchard* v. *Hodgkins,* 62 Maine, 119, it was held that such a failure to deny testimony given in the presence of the defendant, who was a witness at the former trial, was admissible in the following language: "We think the testimony was competent as tending to show an implied admission on the part of the defendant, that the bargain was as stated by the witnesses before the referee. Its force in that direction, and its value, were for the jury. It was subject to rebuttal, explanation and comment, and if an inference prejudicial to the defendant, and not well founded in fact was likely to be drawn, . . . and if he did hear and understand it, as might fairly be inferred from the plaintiff's testimony, and allowed it to pass as true, unchallenged on his part at that time, the fact was one which the jury might properly weigh."

And the doctrine of *Blanchard* v. *Hodgkins* was approved in *Thayer* v. *Usher,* 98 Maine, 468, and the same rule was sustained in *Connell* v. *McNett,* 119 Mich., 329; *State* v. *Dexter,* 115 Ia., 678.

There are many cases that contain the statement that the fact that a person present at a trial did not deny the statements made in their presence, are inadmissible in cases in which they are parties, but an examination of the cases show that it would not have been proper for them to deny the statement at that time. Many of the cases are where a witness was giving his deposition, others where the complainant, in proceedings similar to bastardy proceedings in this State, was making her statement in writing before the magis-

trate. Another where the wife of a poor debtor in supplemental proceedings had heard her husband testify to different facts than she afterwards testified to in a case in which she was a party. Another in which the wife of the defendant heard testimony at a former trial and did not deny it, not being a witness, and in criminal cases where the accused did not take the stand in the lower court, and did not deny a statement made by a witness, in all of which, as stated by the court, the party against whom the silence was offered had no right to interrupt the proceedings to make a denial. If attempted it would have been a violation of the rules of order in judicial proceedings, and would have rendered the interrupting party liable for contempt, and in many cases the statement might not be material to the issue being tried. Before the silence of a party is admissible against him, it must appear that he had the right, and it was his duty, to speak, and that he had an opportunity for the denial, and when a party is called as a witness in his own behalf, and there has been positive testimony as to his declarations that were material to the issue, and he does not deny the testimony, we think the doctrine of *Blanchard* v. *Hodgkins* applies, and that the jury should have the right to consider his silence under such circumstances.

There are cases that hold the law to be as claimed by the defendant. *Blackwell Durham Tobacco Co.* v. *McElwee*, 96 N. C., 71; *Enos* v. *St. Paul Fire and Marine Ins. Co.*, 4 S. D., 639; but most of the other cases in which the rule is stated were not cases similar to the case at bar.

In this case the statements were material. If made by the defendant, as testified, they showed the false statements as to the condition and character of the goods being sold, and that the plaintiffs relied upon such statements in the purchase. The truth of those statements was being determined in court, in a suit between these parties. The purpose of that trial was to determine whether the false statements were made. Its object was to discover and declare the truth in relation to the statements, and if the defendant preferred to allow the testimony to stand uncontradicted, when he was a witness after the testimony was given and had an opportunity to deny it, we think the plaintiffs had the right to have that fact

offered in evidence, and the jury the right to draw the inference from his neglect to deny it when he had the opportunity to do so, unless his silence was explained, as conduct by the defendant that raised a presumption of the truth of the testimony, that at that time he knew he could not truthfully deny the testimony were he to speak upon the subject.

Exceptions overruled.

LLEWELLYN G. BARTER, Petr.,

vs.

MAYOR AND ALDERMEN OF THE CITY OF ROCKLAND.

Knox. Opinion March 8, 1916.

De Facto Officer. *De Jure Officer.* *Municipal Corporations.* *Writ of Certiorari.*

1. Under an ordinance of the city of Rockland, providing that the city marshal should, with the approbation of mayor and aldermen, appoint annually one of the police force as a deputy, one not a member of the police force, whom the marshal appointed his deputy, and who served as such, was de facto the deputy marshal during his time of service.
2. Where the deputy marshal of the city of Rockland, during the time of his service was merely deputy marshal de facto because an ordinance of the city required that a member of the police force be appointed deputy, while the incumbent was not such a member, he ceased to be such by the appointment of a police officer as deputy, who qualified over the incumbent and performed the duties of the office, since there cannot be an officer de jure and one de facto in possession of the same office at the same time.
3. Possession of an office is necessary to give a de facto officer any rights in proceedings to try title to the office, since possession of the office is essential to his title to consideration as an official.

4. A person not a member of the police force of the city of Rockland, who was appointed to the office of deputy marshal under an ordinance requiring the appointment of a police officer, after his removal by the mayor and aldermen and the appointment of his successor de jure, could not have certiorari to quash the removal proceedings, since the appointment of his de jure sucecssor terminated even his de facto character, while only parties having an interest in proceedings other than a public interest are entitled to certiorari.

Petition for writ of certiorari. Defendants filed answer and case reported to the Law Court for determination, upon so much of the evidence as legally admissible. Petition dismissed with costs.

Case stated in opinion.

E. K. Gould, for petitioner.

E. C. Payson, for respondents.

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

HALEY, J. This is a petition for a writ of certiorari, asking that certain records of the Board of Mayor and Aldermen of the City of Rockland be certified to the court, adjudged illegal and quashed. The defendants filed their answer, testimony was taken and the case reported to this court for determination.

The case shows that the petitioner was appointed deputy marshal of the City of Rockland April 18, 1913, and served as such until July 17, 1914, and did not act as deputy marshal after that date. August 3, 1914, charges having been filed against him, notice was issued for him to appear August 13th and show cause why he should not be removed from the police force of said city. The notice was served upon him and a hearing had, he did not appear, and, upon hearing, the petitioner "was dismissed from the Rockland police force as patrolman and deputy marshal." It is the claim of counsel for the petitioner that the notice was not a legal notice, because of the lack of time, and the charges were not specific enough to authorize the Board of Mayor and Aldermen to act upon the petition; and because the Mayor and Aldermen, after said hearing and before removal, did not adjudicate upon the truth or falsity of the charges as a matter of fact, because the Mayor concurred with the Board of Aldermen in the vote of removal of

the petitioner, and that said Mayor did not remove said petitioner and receive the concurrence of the Aldermen to said action, for which reasons the action of the Board of Mayor and Aldermen was illegal.

The ordinances of the City of Rockland, chapter III, sections 2 and 7, provide as follows:

"2. The city marshall shall, with the approbation of the mayor and aldermen, appoint annually one of the police officers as a deputy, who shall, during the absence or disability of the city marshal, have and exercise all power and authority, and perform all duties pertaining to the office of marshal."

. . . . . .

"7. The police force shall consist of not less than six officers, including the city marshal and deputy marshal, and all except the city marshal shall hold office for the term of three years, ending on the last day of March, or until their successors are chosen and qualified. Appointments to the police force shall be made so that the terms of office of one-third of the entire force, or as near as may be, shall expire each year. Any vacancy shall be filled for the remainder of the unexpired term."

The record does not show that the petitioner was ever appointed a member of the police force, and as the ordinance provides that the deputy marshal shall, at the time of appointment, be one of the police officers, the petitioner was not eligible and not legally appointed deputy marshal, but during the time that he served he was the de facto deputy marshal. After the removal of the petitioner as above, the marshal appointed Albert G. Callamore, a police officer, as deputy marshal for the years 1914 and 1915, and he was unanimously elected by the Board of Aldermen, and qualified as deputy marshal, and has performed the duties of said office ever since, and the petitioner has not attempted to perform the duties of the office since July 17, 1914.

By the appointment of Mr. Callamore as above, and his taking possession of the office, he became the de jure deputy marshal, and the petitioner, not being in possession of the office or performing the duties of the office, ceased to be a de facto officer, for "two different persons cannot at the same time be in actual occu-

pation and exercise of an office for which one incumbent only is provided by law. There cannot, therefore, be an officer de jure and another officer de facto in possession of the same office at the same time." Mechem on Public Officers, sec. 322. Possession of the office is necessary to give a de facto officer any rights in proceeding to try the title to an office, for, as well said, "The possession is indispensable, the very life blood of the claimant's title, to consideration as an official."

The petitioner in this case is not an interested party in the proceedings which he desires quashed. Having no interest therein he is not entitled to certiorari, because only parties who have an interest in the proceedings, other than the interest which the public have, are entitled to the writ of certiorari. *Harkness* v. *Co. Commissioners,* 26 Maine, 353; *Parsonsfield* v. *Lord,* 23 Maine, 516; *Strong* v. *Commissioners,* 31 Maine, 578.

Petition dismissed with costs.

LIZZIE M. MADDOCKS *vs.* MILFORD L. KEENE.

Knox. Opinion March 10, 1916.

Effect of Removal of Seals or Wafers from Deed after Execution and Delivery. Probate Deeds.

Action of trespass quare clausum wherein plaintiff seeks to recover damages on account of defendant tearing down fence and permitting defendant's cattle to trespass upon the close of the plaintiff. The printed record shows that the plaintiff and her predecessors in title had been in possession of the disputed close under warranty deeds for several years and no question was raised as to their title. In making up the chain of title, plaintiff offered an administrator's deed, to which objection was raised by defendant, on account of certain irregularities in not complying with the provisions of the statute relative to probate deeds. The plaintiff also offered original deed conveying title to her, to which deed defendant offered objections, on the ground that said deed was mutilated, that it did not purport to bear any legal seals and for that reason was void.

Defendant offered no evidence of title in himself or any one under whom he claimed or authority from the plaintiff to do the acts complained of, but relied for his defense upon the fact that the plaintiff had neither title nor possession to the disputed premises.

Held:

1. That under and by virtue of section 30, chapter 73, Revised Statutes, referring to the sales of real estate by license of the probate court that "if the validity of such sale is contested by one claiming adversely to the title of the wife, ward, or deceased aforesaid, or by a title not derived through either, the sale is not void on account of any irregularity in the proceedings, if it appears that the license was granted by a court of competent jurisdiction and the deed duly executed and recorded."
2. That the declaration by the signers of an instrument that they had signed and sealed, the declaration of the subscribing witnesses that it was signed, sealed and delivered in their presence, the certificate of the Notary Public who took the acknowledgment that they acknowledged it to be their free act and deed, that the under part of the seals or wafers remained on said instrument, that the signature of the grantor was written to avoid writing on the seal or wafer, all considered together are sufficient proof, without something to overcome it, that the instrument was what it purported to be, a deed duly sealed, and that the attempted removal of the seals was after the delivery of the deed.
3. Such deed or instrument would be a sufficient deed to convey title to the land or premises described therein.

Action of trespass quare clausum. Defendant pleaded general issue with brief statement denying the title in plaintiff and claiming title in defendant. Case reported to the Law Court for determination upon so much of the evidence as was legally admissible. Judgment for plaintiff. Damages assessed at ten dollars.

Case stated in opinion.

M. T. Crawford, and A. S. Littlefield, for plaintiff.

Montgomery & Emery, for defendant.

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

HALEY, J. This is an action of trespass quare clausum wherein the plaintiff seeks to recover damages on account of the defendant tearing down a fence and letting his cattle upon the close of the plaintiff, situated in Camden, and is before this court on report.

The record shows that the defendant admitted to the husband of the plaintiff that he tore down the fence, as alleged in the writ.

The defendant offered no evidence of title in himself or any one under whom he claimed, or authority from the plaintiff to do the acts complained of, but relies for his defence upon the fact that the plaintiff had neither title nor possession to the premises. The record shows the parties under whom the plaintiff claims title had been in possession under warranty deeds, duly recorded, for several years, and no question is raised as to their title, except the defendant questions the validity of the title conveyed by Joslin, administrator of one Perry, claiming that certain provisions of the statute as to notice, etc., were not proved to have been given; but the defendant cannot raise that question. It is provided by section 30, chapter 73, R. S., referring to the sales of real estate by license of the probate court: "If the validity of such sale is contested by one claiming adversely to the title of the wife, ward or deceased aforesaid, or by a title not derived through either, the sale is not void on account of any irregularity in the proceedings, if it appears that the license was granted by a court of competent jurisdiction, and the deed duly executed and recorded." As said by the court in *Webster* v. *Calden,* 53 Maine, 205, the defendant "by section 30 can only contest the demandant's deed on the grounds that the license was not granted by a court of competent jurisdiction, and that the deed was not duly executed and recorded. But the jurisdiction of the court was unquestioned, and the deed under which the demandant claims was duly executed and recorded." In this case the license was issued to Joslin, administrator of Perry, to sell the real estate described in the deed given by Joslin. The probate court which issued the license was a court of competent jurisdiction, the deed was duly executed and recorded. As the defendant does not claim title either in himself or any one under whom he acted adversely to the wife, ward or the deceased, or title derived through either, he cannot contest the plaintiff's title claiming under the deed, except in the above two respects, and there can be no question from the record, but that the court had competent jurisdiction, and the deed was duly executed and recorded.

The defense is that the instrument offered by the plaintiff to prove her title from Lillian S. Ingraham to herself, although in the form of a warranty deed, properly signed, witnessed and acknowledged, was not a deed because it was not sealed. It is true, as claimed by the defendant, that in this State title to real estate can only be conveyed by a deed under seal, and that an instrument which lacks the seal is void as a deed. Formerly the seal was of wax and an impression made thereon. "The annexing of a piece of paper by wafer, wax, gum, or any adhesive substance is now everywhere regarded as equivalent to the impression formerly required, and makes a valid seal." *McLaughlin* v. *Randall,* 66 Maine, 226. The original instrument is before us and it contains the usual clause wherein the grantor and her husband state that they have set their hands and seals to the instrument, which is some evidence that the deed was duly sealed. Two subscribing witnesses signed the deed as signed, sealed and delivered in their presence, which is some evidence that the deed was sealed. In addition, one of the subscribing witnesses took the acknowledgment of the grantor as a Notary Public that the plaintiff acknowledged it as her free act and deed, and an inspection of the instrument shows opposite the signatures of the grantor, Lillian S. Ingraham, and her husband, Edwin Ingraham, that two seals had been attached to the instrument and part of them had been removed, leaving the underside of the seal to which the adhesive substance was attached that caused them to adhere to the instrument, but enough remains upon the instrument so that if it was placed there in the first place it would have been a good seal, answering the requirements of being a piece of paper annexed with "adhesive substance," *McLaughlin* v. *Randall,* supra, and the manner in which the signatures were written upon the instrument shows that the seals were upon it when the signatures were written, the grantor in writing her name being obliged to write the last two letters of her name off the line and between the two seals to avoid writing upon the seals.

The defendant offered no testimony that the instrument was not sealed except as shown by the instrument itself, and we think that the declaration by the signers that they had signed and sealed,

the declaration of the subscribing witnesses that it was signed, sealed and delivered in their presence, the certificate of the Notary Public who took the acknowledgment that they acknowledged it to be their free act and deed, which it could not have been if not sealed, and the parts of the wafers which remain on the paper and which were undoubtedly the under part of the seals at some time attached to the instrument, and the manner that the signature of the grantor is written to avoid writing on the seal, all considered together are sufficient proof, without something to overcome it, that the instrument was what it purported to be, a deed duly sealed, and that the attempted removal of the seals was after the delivery of the deed, and by it the plaintiff obtained the title to the land described in the instrument and in the writ.

The remaining question is one of damages. There being no evidence explaining the defendant's admission, as testified to, that he tore down the fence, and the other evidence that his cattle were on the premises, the case resolves itself into the question of the amount of damages. They were small and the evidence is meagre as to the amount; $10 will not be excessive as damages.

Judgment for the plaintiff.

Damages assessed at $10.00.

WILLIAM H. SMITH *vs.* MAINE CENTRAL RAILROAD COMPANY.

Oxford. Opinion March 10, 1916.

Assumption of Risk. Liability of Master to Invitee or Licensee. Revised Statutes, Chapter 84, Section 146.

Plaintiff arranged to ship cattle over defendant's railroad. After starting to drive them to the station, he learned no car was ready, but there would be one the next morning. On plaintiff's asking where he could put them, defendant's agent said he might use the yard at the station. Plaintiff, without informing the railroad agent and without feeding the cattle, put them in a yard properly fenced, but failed to put up all the gate bars and left no one to guard the cattle. The cattle broke through the gate during the night and some were killed by the defendant's train. One ox was in the possession of the plaintiff for the purpose of selling on commission.

Held:

1. That plaintiff, being a mere invitee, defendant was under no obligation to guard the cattle and was guilty of no negligence.
2. One who takes charge of an animal for sale on commission has such a special property therein that he may sue a railroad for the killing of the animal, where, before suit, he has paid the owner its value.

Action on the case to recover damages for injury to certain cattle in the possession of plaintiff. Defendant pleaded general issue and brief statement alleging negligence on the part of plaintiff. Verdict for plaintiff. Exceptions filed to certain rulings of Justice presiding, and also general motion for new trial. Exceptions overruled. Motion sustained. New trial granted.

Case stated in opinion.

James S. Wright, for plaintiff.

Bisbee & Parker, and White & Carter, for defendant.

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

HALEY, J. This is an action brought by the plaintiff to recover damages for the killing of and injury to cattle that the plaintiff

was intending to ship at Fryeburg over the railroad of the defendant.

Among the cattle which were injured and sued for was an ox that the plaintiff admitted in his testimony he had not actually purchased at the time the right of action accrued, and he had no written bill of sale of the ox, filed no written assignment of the claim of the real owner of the ox with his writ, and never had an assignment of the owner's claim of the ox, but had taken the ox from the owner with his consent to ship and sell and afterwards settle with the owner, and before the suit was brought did settle with the owner.

The defendant's counsel objected to receiving any testimony in regard to the value of the ox because the plaintiff did not own the ox and had no written assignment of the owner's claim, stating that if there was a cause of action the plaintiff could not maintain it because it was a chose in action, and necessary under chapter 84, section 146, R. S., that the assignment should be in writing, and a copy thereof filed with the writ. The evidence was admitted subject to exception.

The verdict was for the plaintiff, and the defendant brings the case to this court upon the above exception and a motion for a new trial.

The evidence shows that in November, 1913, the plaintiff drove twentyone head of cattle to the railroad station at Fryeburg. He had previously telephoned to the station agent at Fryeburg and engaged a car to take the cattle to Auburn the next Monday or Tuesday. The seventeenth day of November, about eleven o'clock in the forenoon, the plaintiff started with the cattle from Fryeburg Center to drive them to the station in Fryeburg, a distance of some twelve miles. Before he arrived at Fryeburg he telephoned to the station agent to see if a car was there to load the cattle in, and was informed that there was no car, but that he could get one at nine o'clock the next morning, and to the plaintiff's inquiry of what he should do with the cattle the agent replied, "We can put them in the yard." The plaintiff drove the cattle to the station and put them in the yard owned by the defendant that was used as temporary quarters for cattle, which was 32 x 38 feet, boarded tight

except one place where there were bars 10 feet and 5 inches in length. The plaintiff testified that he put up four bars, that it was dark and he saw no other bar. The evidence shows that there were five bars, one at least and possibly two laid upon the ground and not used by the plaintiff. After waiting around about half an hour, without notifying any servant of the defendant that he had placed the cattle in the yard and without having fed them, the plaintiff and his men left for the night. Some time during the night the cattle broke through the bars and wandered down the railroad track and some were killed by a locomotive hauling a train upon the track.

EXCEPTION. The plaintiff had a special interest in the ox; having received him to sell upon commission he had such a property in it, especially after he had paid his consignor, as he had when this action was brought, that he could maintain an action if the defendant was liable. *Moran* v. *Portland Packet Co.,* 35 Maine, 55.

MOTION. The defendant was under no obligation to furnish the plaintiff a place to yard his cattle A servant of the defendant informed the plaintiff that he could use the yard. It was no part of the duty of the defendant to see that the cattle remained in the yard. The evidence clearly shows that the yard was well fenced and properly equipped with bars, some of which the plaintiff failed to use. This action is based upon the alleged neglect of duty and carelessness in the performance of its duty by the defendant. The strongest that it can be put is that the plaintiff in the use of the yard was an invitee of the defendant; as such the defendant owed him no duty to guard the cattle. *Moore* v. *Stetson,* 96 Maine, 203; *Austin* v. *Baker,* 112 Maine, 268. The only claimed defect in the yard is that the bars did not restrain the cattle. There was no guaranty upon the part of the defendant that they would. The plaintiff knew as much or more than any of the servants of the defendant as to the condition of the bars. He assisted in putting them up after the cattle were driven in. They were made of two boards each seven-eighths to an inch thick, nailed together so that the bar extended from one post to the other, about six inches in width and some two inches in thickness, and if the plaintiff saw fit to accept the invitation to place his cattle in the yard protected

by such bars, with full knowledge of their condition, he assumed the risk of their breaking through the bars and escaping. No act of negligence is shown on the part of the defendant. It was not even informed that the plaintiff's cattle were in the yard. Upon the other hand, the plaintiff knew all about the condition of the bars, and saw fit to leave twentyone head of restive cattle, unfed and hungry, in a strange yard, when an ordinary prudent man must have known that they would endeavor to obtain food by the breaking of the bars if necessary, and due care upon his part required that he, or some of his men, should have remained in charge and fed them, and the defendant was not guilty of neglect or carelessness in not having some one on guard when it had not been notified that the cattle were in the yard, even if it would have been liable, which it was not, for their safety after the plaintiff yarded them in the yard that had no defects not known to the plaintiff.

Exceptions overruled.

Motion sustained. New trial granted.

STATE OF MAINE *vs.* ANDRE BELIVEAU.

Androscoggin. Opinion March 10, 1916.

Meaning of words "Liquors" and "Intoxicating Liquors." Sufficiency of Indictment.

This is an indictment against the defendant for attempted bribery under section 5, chapter 123 of the Revised Statutes. It charges the defendant with feloniously and corruptly offering to a deputy sheriff in the county of Androscoggin, whose duty it was to enforce the laws against the sale and keeping for sale, and the illegal transporting of intoxicating liquors, a valuable consideration and gratuity "to permit him, the said Andre Beliveau, to receive not exceeding one car-load of liquor per week during said time, the same being shipped over the Grand Trunk Railway, and to refrain from seizing said liquors in whatever names the same might be shipped upon notice from said Andre Beliveau that said liquors were to arrive and to allow the same to be delivered to the order of one Fred

Breton, and not to seize said liquors, it being the duty of said Elmer B. Lyon (deputy sheriff) to seize and libel such liquors as aforesaid, and he, the said Elmer B. Lyons, then and there being authorized and in duty bound to make such seizures against the peace of the State, and contrary to the form of the statute in such case made and provided."

Held:

1. It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the court, from an inspection of the indictment can say that, if all the facts alleged are true, the defendant is guilty.
2. There being no sufficient allegation in the indictment to show that the liquors mentioned were intoxicating liquors, or that they were intended for sale in this State in violation of law, the offer, if made as set forth was not an attempt to bribe the officer to allow the defendant to perform the unlawful act of having intoxicating liquors brought into the State and sold in violation of law.

Indictment brought under section 5, chapter 123, Revised Statutes. By agreement of parties, the indictment was reported to the Law Court: If the Law Court is of opinion that the indictment is good and sufficient, as upon demurrer, case to stand for trial, otherwise, indictment to be quashed.

Case stated in opinion.

W. H. Hines, county attorney, for State.

George S. McCarty, for respondent.

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

HALEY, J. This is an indictment against the defendant for attempted bribery under section 5, chapter 123 of the Revised Statutes. It charges the defendant with feloniously and corruptly offering to a deputy sheriff in the county of Androscoggin, whose duty it was to enforce the laws against the sale and keeping for sale, and the illegal transporting of intoxicating liquors, a valuable consideration and gratuity "to permit him, the said Andre Beliveau, to receive not exceeding one car load of liquor per week during said time, the same being shipped over the Grank Trunk Railway, and to refrain from seizing said liquors in whatever names the same might be shipped upon notice from said Andre Beliveau that said liquors were to arrive and to allow the same to be delivered

to the order of one Fred Breton, and not to seize said liquors, it being the duty of said Elmer B. Lyons (deputy sheriff) to seize and libel such liquors as aforesaid, and he, the said Elmer B. Lyons, then and there being authorized and in duty bound to make such seizures against the peace of the State, and contrary to the form of the statute in such case made and provided."

The question of the sufficiency of the indictment was raised, and by agreement of the parties it was reported to this court with the stipulation that "if the Law Court is of opinion that the indictment is good and sufficient, as upon demurrer, the case is to stand for trial; otherwise the indictment is to be quashed."

Two objections are urged to the indictment: First, the failure to allege that the liquors, the subject of the corrupt offer, were intoxicating liquors. Second, the failure to allege that the liquors, the subject of the corrupt offer, were intended for illegal sale.

It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the court, from an inspection of the indictment can say that, if all the facts alleged are true, the defendant is guilty. *State* v. *Lynch,* 88 Maine, 195; *State* v. *Doran,* 99 Maine, 331.

This indictment sets forth facts that if the offer alleged was a corrupt offer, to induce the deputy sheriff to violate his oath and duty the defendant would be guilty of attempted bribery, but in setting forth the facts the indictment alleges that the offer was made to induce the deputy sheriff to allow liquors to be shipped into Lewiston and not to seize or libel the liquors.

The word "liquors" includes both intoxicating and non-intoxicating liquors. Webster's Dictionary. Standard Dictionary. The statute only authorizes the seizure, libeling and forfeiture of intoxicating liquors intended for sale in this State in violation of law. A warrant to seize intoxicating liquors must allege that they are intoxicating and intended for sale in this State in violation of law. *State* v. *Robinson,* 33 Maine, 564; *State* v. *Gurney,* 33 Maine, 527.

A prosecution for the sale of intoxicating liquors must allege that they are intoxicating liquors. Form provided by chapter 29, R. S. The case of *State* v. *Beasley,* 21 W. V., 777, relied upon by the State, is not applicable to the case at bar; that was a prosecu-

tion under a statute making it a crime to sell *spirituous liquors,* and the complaint and warrant allege the sale in the words of the statute as *spirituous liquors.* The only question discussed was the sufficiency of the proof. In this case the question is the sufficiency of the pleadings, which were sufficient in *State* v. *Beasley,* supra.

The allegations in this case do not describe the acts of the defendant in words that portray a crime or, in the words of the statute describing the crime which it is claimed he was attempting to bribe the deputy sheriff to allow him to commit; for the liquors may have been non-intoxicating.

That the indictment fails to state a crime is too plain for argument, as said by the court in *Ward* v. *State,* 44 Ind., 293, which was a case where the defendant was indicted for selling one pint of liquor, and the question for the court was the sufficiency of the indictment, "it contains no averment that the liquor was intoxicating. The statute prohibits the sale of 'intoxicating liquors' only. We scarcely need to remark that there are many kinds of liquors which are not intoxicating. The indictment should have been quashed."

There being no sufficient allegation in the indictment to show that the liquors mentioned were *intoxicating liquors,* or that they were intended for sale in this State in violation of law, the offer, if made as set forth, was not an attempt to bribe the officer to allow the defendant to perform the unlawful act of having intoxicating liquors brought into the State and sold in violation of law.

Indictment quashed.

ISAAC A. WING *vs.* L. A. BRADSTREET & SONS COMPANY.

Cumberland. Opinion March 10, 1916.

Fellow Servant. Incompetent Fellow Servants. Master providing Necessary and Proper Appliances. When Vice-Principal may become a Fellow Servant.

1. In an action for injuries received by a servant when an elevator fell, evidence held insufficient to show that the one in charge of the engine and foot brake controlling the elevator was incompetent because he had lost one of his feet.
2. A construction company which operated an elevator inside of a building it was erecting some distance from the engine which supplied the motive power, having established a system of bells to regulate operation, and printed the directions in plain hand, was not negligent in providing that method of operation.
3. Where plaintiff's fellow servant, who rang the bell to notify the engineer that they desired the elevator to descend, failed to give the proper signal for a loaded cage, and plaintiff was injured by the falling of the cage, there can be no recovery, the negligence being that of a fellow servant.
4. Where the vice principal of the defendant master temporarily took the place of the engineer who operated the engine running an elevator, such vice principal under the circumstances became a fellow servant of the other employes for whose negligence in operating the elevator there can be no recovery, it not appearing that he was an incompetent person.

Action on the case to recover damages for personal injuries sustained by the plaintiff while riding in the elevator of the defendant company. Defendant pleaded general issue. Verdict for plaintiff. Motion for new trial filed by defendant. Motion sustained. New trial granted.

Case stated in opinion.

Thomas A. Sanders, and Charles E. Gurney, for plaintiff.

Newell & Woodside, for defendant.

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

HALEY, J. This is an action on the case to recover damages for personal injuries received by the plaintiff in December, 1913, while at work as a carpenter in the employ of the defendant on the construction of an addition to a shoe factory in the city of Auburn. The verdict was for the plaintiff, and the case is before this court on defendant's motion to set aside the verdict.

The accident happened December 5, 1913, at which time the plaintiff had been working as a carpenter upon the building about three weeks. The building was of brick construction, and three stories above the basement. At the time the plaintiff was injured the workmen were working on the third floor and above it; the material and stock used were carried from the first floor and basement by means of a freight or construction elevator. The elevator was operated by a hoisting engine located in a temporary building, partly on the sidewalk and partly in the street. The engine was attached to a drum, upon which was a wire cable which extended horizontally into the building where it went under a sheave or wheel, thence perpendicularly to the third floor going over a sheave, thence horizontally over another sheave and down to connect with the crosshead timber of the elevator. The elevator ran up and down through openings in the floor, and was kept in place by upright timbers or planks. The end of the cable opposite the drum, after going over the sheaves, was attached to the crosshead of the elevator, and the sheaves were attached to the cross timbers, forming the top of a horse; and as the work of construction progressed the horse was moved up from story to story and put in position. The elevator could not be seen by the engineer, except when in the basement or on the ground floor, and was operated by signals given by means of a push button connected by wire with a bell in the engine room. The push button was placed on a cross piece and nailed to the legs of the horse. On one of the legs of the horse, toward the rear of the building, directions were written regulating the number of bells, the defendant claims one bell to go up, two bells to lower when empty, and three bells to lower when loaded. These directions were written with a carpenter's pencil, large enough to be seen and read by people using the elevator, and were a short distance from the button. The elevator was so balanced that the friction of the cable on the drum would retard the motion of the elevator when empty,

so that it would descend slowly to the basement. When the elevator was descending unloaded it was disconnected from the engine, and when loaded was controlled by a friction clutch and foot brake, the clutch being operated by the right hand, and the brake by the left foot.

Pearl Bradstreet was a director of the defendant company and the superintendent of construction of this building, having charge of the laborers, carpenters and bricklayers. There were other bosses who had charge of the different crews.

At the time of the accident the engineer, who had charge of the engine which operated the elevator, was in the engine room, it being his time off for dinner, and Pearl Bradstreet, above named, took the engineer's place and was operating the engine at the time of the accident. There was stone to be unloaded from a jigger, and to unload it they required a dolly, an appliance in common use in the handling of stone and heavy timbers. The dolly was on the third floor, where it had been used in handling stone. Mr. Rankin, the boss of the laborers, went from the ground floor with the elevator to the third floor for this dolly. While loading it on to the elevator he asked some of the carpenters, among whom was the plaintiff, to go down and assist in unloading the stone. The plaintiff and two other carpenters boarded the elevator where Rankin was, and as they did so Brown, one of the carpenters, pushed the button twice, thereby giving two bells in the engine room, which the defendant claims meant to the engineer for the elevator to come down empty. Bradstreet released the clutch and brake and the elevator started down immediately with the four men and dolly upon it. As the drum was loose it descended with great speed. Mr. Bradstreet saw by the marks on the cable that it was coming down more rapidly than usual, and attempted to apply the friction clutch and foot brake, but not in time to decrease the speed. The elevator struck the basement floor with great force, and the plaintiff received the injuries complained of.

The negligence alleged in the writ is that "the said defendant corporation, wholly unmindful of its duty and obligation to the plaintiff in this regard and totally disregarding the same, carelessly, negligently and wantonly, and without proper regard to its duties and obligations to the plaintiff, employed and permitted one Pearl

Bradstreet, a director and officer of the defendant corporation to operate, manage and run the said engine used for the hoisting and lowering of the elevator herein complained of, which said Pearl Bradstreet, as aforesaid, was physically incapable and incompetent by reason of physical infirmity, misfortune and inexperience, to operate, run and manage the aforesaid engine, and the said Pearl Bradstreet at the time of the injuries herein complained of, by reason of his physical infirmity, misfortune, weakness and defects, lost control of said engine, its brakes and other essential component parts with the result that the said elevator, upon which the said plaintiff was standing, as hereinbefore set out, dropped quickly, suddenly and with great force to the basement of said building."

And in the second count it is averred that when the plaintiff "stepped upon the elevator in company with other fellow workmen, expecting and intending to be lowered and carried down by said elevator to the place where said stone was to be moved, to wit, the basement of said building, when said elevator was negligently, carelessly and without proper supervision by the said defendant corporation through its servants and agents, dropped quickly and with great force to the basement of said building, and said plaintiff, who was then (still) upon said elevator in its said descent, was thrown down with great force," and the plaintiff received the injuries set forth.

It is admitted that the engine, elevator and appliances were of the approved type, and all in perfect order, and there is no intimation that any defect in them contributed in any way to the accident. Was Pearl Bradstreet, who, at the time of the accident was in charge of the engine which raised and lowered the elevator, an incompetent person to manage the elevator and its appliances? Several years prior to this accident Mr. Bradstreet had lost his right foot and a portion of his leg extending to a few inches above the knee, which had been replaced by an artificial limb. He had been in charge of the construction of buildings for eight or nine years, and had operated this and other engines for elevator purposes, going up and down ladders, over roofs, into cellars and all over the buildings under construction, without difficulty. He was operating the elevator and its connections at the time of the accident. The clutch and brake controlled the operations of the elevator, and there was a

seat which the engineer occupied when handling the engine and elevator. Mr. Bradstreet was seated on this seat with his hand on the clutch and his left foot on the brake. It is urged that he was incompent on account of the loss of his right leg; but all that he had to do with his feet was to use his left foot on the brake, and he surely was as competent to use his left foot on the brake as he would have been if he had had a right foot. And the fact that for many years he had had charge of the building of large buildings and had had no difficulty in going to all parts of them, and during the same period had had experience in operating and hoisting engines and elevators, and no evidence in the record tending to show his incompetency, except as argued by the plaintiff from the fact that he had lost his right foot and part of his right leg, falls far short of proof that he was incompetent to operate the engine and elevator.

It is claimed by the plaintiff that two bells, as given by the man Brown, was the signal to lower the elevator, and that there was no difference in the signals to lower the elevator when loaded and when light, and that Mr. Bradstreet should have had control of the elevator with the clutch and brake the same as he would have had control if loaded, so that it could not have dropped as it did. It was the duty of Mr. Bradstreet, acting as engineer, to have control of the engine and elevator, and it was also his duty to obey the signals given him by the electric bell in the raising and lowering of the elevator. The elevator had to be operated by signals, because the engine was in another building where the engineer could not see what was wanted of him, and the electric bell was a proper appliance to notify him, and if he obeyed the signals it would not be neglect upon his part.

The evidence very clearly shows that there was printed in letters large enough for any one to see who was using the elevator the three signals, one, up; two, to go down light; three, to go down loaded. It is true that some of the witnesses who had worked upon the building from its beginning said they did not so understand it, some that they did not see the notice printed near the bell; but there had to be some signals that were used in building this large building, three stories high, and the workmen must necessarily have known of those signals, and it is incredible that the workmen could use that elevator in carrying up the bricks, mortar, stone, iron and lumber

to construct so large a building and know nothing of them, and if the signals were as testified to by the defense, and as shown by the man who printed them to be as claimed by the defense, then the witness Brown, who gave the signal of two bells when he should have given the signal of three bells, was the negligent party, and for his negligence the defendant is not liable, because it was the negligence of a fellow servant, and it was not negligence of the man acting as engineer to operate the elevator according to the signals received by him. Mr. Brown testified that the elevator started when he gave two bells and before he could give the third bell. If his testimony was true, he would have tried to push the button for the third bell, and the electric bells could have been rung three times in a fraction of a second. Having given two bells, if he had wanted to give three, he could have given the third by raising his finger from the button a mere trifle and replace it, all of which could have been done while the elevator was moving a few inches.

But if it was the duty of the engineer to have control of the elevator, and to have controlled its speed with the clutch and brake while lowering it, if the signal of two bells was a signal for him to lower it that way, it was negligence upon his part not to control it, but as a director and superintendent of the defendant company having charge of the construction of the building, he was a vice-principal of the defendant in performing the duties that the principal should perform, and for any negligence by him of the duties that the principal should perform the defendant is liable; but when he did the work of the engineer, whose duty it was to run the engine and raise and lower the elevator, he ceased to be vice-principal, and in performing those duties he was a fellow servant of the plaintiff, the same as the engineer would have been if he had been performing the services, and for the negligence of a fellow servant, when not performing the duties of the principal, the defendant is not liable, unless the fellow servant was incompetent, and that fact was known to the defendant, or the defendant, by the exercise of due care, should have known he was incompetent. As the evidence conclusively shows that the defendant had provided all necessary and proper appliances, viz., engine and elevator, and there being no evidence that authorized the jury to find that Pearl Bradstreet was incompetent to operate the engine and elevator, and as in performing

the duties of engineer said Bradstreet was a fellow servant of the plaintiff, for whose negligence, if any, while acting as a fellow servant, the defendant was not liable, *Small* v. *Manufacturing Co.*, 94 Maine, pp. 554-555, there was not evidence which authorized the verdict for the plaintiff.

Motion sustained.
New trial granted.

FRANK B. CURTIS, Collector, *vs.* PAUL POTTER.

Piscataquis. Opinion March 11, 1916.

Execution and delivery of mortgage of personal property as evidence of title. Oath of Assessors. Service of Tax Notice. Tax of Non-resident.

Action of debt brought by a collector to recover a tax assessed in 1914 by the town of Wellington upon certain lumber alleged to be the property of the defendant, a resident of Worcester, Massachusetts.

Upon defendant's motion for a new trial, and upon exceptions it is held;

1. That under the evidence the jury were warranted in finding that the defendant was the owner of the property for which he was taxed.
2. That under the circumstances of this case, a personal demand by the collector upon the defendant prior to bringing the suit was unnecessary. That after sending two tax bills in the ordinary form, a written demand informing the defendant that the tax must be paid at once and if a favorable reply was not received within twelve days the collector would proceed to collect it, was a sufficient compliance with R. S. ch. 10, sec. 27.
3. That the assessors were legally sworn. When the record states that the assessors personally appeared before the town clerk and "took oath necessary for them to discharge their duties as assessors for the ensuing year," it is not necessary that the record set forth in exact words the form of oath which was in fact administered.
4. The warrant to the collector was not invalidated by the mere fact that the words "Actual expense of brown tail moths" were interlined above the total amount of the assessment.

Action of debt brought by collector of taxes to recover tax of personal property of a non-resident. Plea, general issue. Verdict for plaintiff. Exceptions to rulings and instructions of presiding Justice and motion for new trial filed by defendant. Motion and exceptions overruled.

Case stated in opinion.

C. W. Hayes, for plaintiff.

J. H. Haley, and J. S. Williams, for defendant.

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

CORNISH, J. Action of debt brought by the collector to recover a tax assessed in 1914 by the town of Wellington upon certain lumber alleged to be the property of the defendant, a resident of Worcester, Massachusetts.

The case is before this court on motion and exceptions by the defendant.

1. MOTION.

The motion raises the question of ownership, the defendant contending that the verdict of the jury on this point was clearly wrong.

It appears from the evidence that the defendant, the then owner of the Lawrence lot, so called, in Brighton, on January 1, 1914, conveyed the same to his father, Burton W. Potter. Immediately following this conveyance a logging operation was begun and it continued during the winter season. The timber cut was sawn by portable mills on the premises and hauled to the Ward field, so called, in the town of Wellington as long as the snow permitted. The balance near the end of the season was delivered at the Decker field in the plantation of Brighton. The hauling to Wellington began early in January and continued to the last of March, and the hauling to the Decker lot was a matter of only a week or ten days. It was all a part of one and the same operation, and in round numbers about nine-tenths of the lumber was delivered in Wellington where it remained on April 1.

To prove title to the lumber in the defendant the plaintiff relied upon a certain mortgage given by the defendant on May 20, 1914, to Everett and Stanhope covering seven hundred thousand feet more or less of hard and soft wood lumber, "being the same lumber

that was cut by the grantees on the Lawrence lot in the plantation of Brighton and now located in the field of Charles Decker in Brighton." This designation of the location was evidently an error, because the portion of the lumber in the Decker field was very small. The quantity called for in the mortgage, seven hundred thousand feet, could only be satisfied by including the Wellington lumber. There is no evidence of any lumber in the Decker field belonging to the defendant other than that which came from this winter's operation, and, as it was a single operation, if the defendant owned the portion in Brighton he also owned the portion in Wellington. Moreover in that mortgage the defendant avouches himself to be the true and lawful owner of the mortgaged property and covenants to warrant and defend the title against the lawful claims and demands of all persons. This mortgage with its declarations and covenants on the part of the defendant stands for its full bigness, and it is significant that the defendant did not take the stand to explain it. This instrument of itself, unexplained, was sufficient warrant for the verdict, it being admitted that there was no change of ownership between April 1, the date of the assessment, and May 20, the date of the mortgage. Obviously the owner of the mortgaged property was the party liable for its taxation.

The defendant relies upon the deed from himself to his father, dated January 1, 1914, conveying the title to this lot. But it is common knowledge that land owners frequently permit, even verbally, lumber to be cut from their land, and the title to such lumber when cut vests in the permittee. It is reasonable to suppose, in view of the mortgage, that such an arrangement was made here between father and son. If not, then it would have been natural and quite necessary for either the defendant to deny such an arrangement and to explain the mortgage, or for the father to also deny it and claim the lumber as his. Neither testified in the case and their silence is significant. Nor did Everett and Stanhope testify, the parties who carried on the operation and received the mortgage from the defendant as security for a debt of $2500. It is safe to assume that they must have satisfied themselves on the point of ownership before they consented to take this security.

The verdict on the evidence was clearly right.

EXCEPTIONS.

Three exceptions were urged in argument and involve certain points which were raised by the defendant in requests for instructions refused by the presiding Justice.

1. Insufficient demand prior to suit.

This tax was assessed under R. S., ch. 9, sec. 13, par. I, as amended by chapter 30 of the Public Laws of 1913. This amendment provides that "Portable mills, logs in any town to be manufactured therein, and all manufactured lumber, excepting lumber in the possession of a transportation company and in transit, shall be taxed in the town where situated on the first day of April in each year."

Prior to 1909 there was no provision for taxing personal property of this class to an owner residing outside the State. It was taxed "to the person having the same in possession" etc. R. S., ch. 9, sec. 13, par. II. But chapter 80 of the Public Laws of 1909 amended paragraph II, so that now "Personal property which . . . on the first day of April is within the State, and owned by persons residing out of the State or by persons unknown, . . . shall be taxed either to the owner, if known, or to the person having the same in possession." . . .

This tax was assessed against the defendant as the owner under this act of 1909.

The authority under which this suit was brought by the collector is found in R. S., ch. 10, sec. 27, viz: "Any collector of taxes . . . may, after demand for payment, sue in his own name for any tax, in an action of debt." . . .

The defendant construes this to mean a personal demand by the collector upon the tax payer, and contends that no other notice will under any circumstances meet the requirements. This court has held that in case of a resident taxpayer a special demand was intended by the Legislature, a demand so formal and explicit that a taxpayer should realize that a suit would follow his noncompliance with the demand. "A written request mailed to the person taxed is not sufficient. It should be a personal demand made by the collector or some authorized agent, unless such a demand be excused by the absence of the debtor from home or by some other good reason." *Parks* v. *Cressey*, 77 Maine, 54. The gist of the court's construction of the statutory requirement is plain. The demand

should be commensurate with the object to be attained and should be of such a character as to fully inform the delinquent of the collector's purpose. It is on this principle that in *Clark V. Gray,* 113 Maine, 443, the court held that the demand preliminary to an arrest, under another section, R. S., ch. 10, sec. 20, should be a personal demand, and that the sending of a mere tax bill in the ordinary form, such as is sent to every taxpayer immediately after the commitment was insufficient. The drastic nature of the remedy proposed required it.

The facts and circumstances of each case must be taken into consideration, and what might be deemed an adequate demand under one state of facts as upon a nonresident might not be under another, as upon a resident. Thus in *Parks* v. *Cressey,* supra, the court expressly said that a personal demand by a collector or his authorized agent "might be excused by the absence of the debtor from home or by some other good reason." Such ground for excuse is proven here. The defendant is a resident of another State. A personal demand upon him by the collector, as collector, would be well nigh impossible. If made, it would contain no official element. The collector's jurisdiction ceases at the line of the State. Under these circumstances to require a personal demand upon the deliquent is in effect to nullify the statute of 1913, authorizing the taxing of personal property to nonresident owners. The Legislature did not change the language of the statute giving the collector authority to bring suits for such taxes in his own name, when it enlarged the realm for which such suit could be brought. It therefore brought the collection of such taxes within the terms of the saving clause in *Parks* v. *Cressey.* Thus applied, the rule is reasonable and workable. The demand made by the collector in this case was ample under the circumstances. He did not rest upon the ordinary tax bill sent in June, 1914, nor upon a second bill sent in August accompanied by a letter requesting payment; but on October 3, he sent the defendant a third tax bill accompanied by a registered letter in which he wrote: "This tax must be paid at once and if I do not get a favorable reply within twelve days shall proceed to collect it." The registry receipt proves that this demand reached the defendant in due course of mail, but he made no reply. Under the statute

and the rule established in this State this was a sufficient preliminary demand on which to base this action of debt. The defendant was seasonably and fully apprised of the action which his neglect or refusal would lead to. To require more than this would prevent the collection of taxes on personal property from nonresidents by suit, and would effectually thwart the legislative intent.

2. Assessors not legally sworn.

The record of the oath is as follows: "Personally appeared John H. Frye, F. C. Pease and Arthur Cross and took oath necessary for them to discharge their duties as assessors for the ensuing year, before me, Max V. Libby, Town Clerk."

The defendant urges that it was the duty of the clerk to set out in totidem verbis the oath which he administered and leave it to the court to say whether or not it was the one required. This position is untenable.

R. S., 1821, chapter 118, sec. 1, to which our attention is called by the defendant, prescribed a form of oath to be administered to each assessor, but no form has been prescribed in any revision since that time. In like manner that first revision recited at length the oath to be administered to a constable, and also that to a collector, R. S., 1821, ch. 116, sec. 25. But those forms have never been repeated in any subsequent revision. The reason perhaps is that the revision of 1841 contained for the first time certain Rules of Construction among them one for the construction of the words "duly sworn" or "sworn according to law," which rule in the present revision is as follows: "The words 'sworn,' 'duly sworn' or 'sworn according to law' used in a statute, record or certificate of the administration of an oath, refer to the oath required by the constitution or laws in the case specified and include every necessary subscription to such oath." R. S., ch. 1, sec. 6, par. XXII. This obviates the necessity of lumbering up records with the full language of all the oaths administered. The word "sworn" implies all the necessary terms. In the case at bar the language was even more specific. The record states that the assessors took the "oath necessary for them to discharge their duties as assessors for the ensuing year." This was obviously all that was required of them or that the record need state. *Green* v. *Lunt,* 58 Maine, 518; *Bowler* v.

Brown, 84 Maine, 376; *Mason* v. *Belfast Hotel Co.,* 89 Maine, 384. The cases cited by the defendant are not in conflict with these decisions.

3. Illegal warrant.

The warrant is in the form prescribed by law and authorizes and requires the collector to levy and collect the whole assessment for State and county taxes, municipal purposes and overlay, amounting to $5593.19, and to pay the same to the town treasurer. The words "actual expense of brown-tail moths" are interlined above the total. No sum is carried out. Towns are authorized to destroy brown-tail moths at the expense of the owners of real estate if such owners fail to take the necessary steps. Laws of 1905, ch. 29; 1907, ch. 15; 1909, ch. 34; 1911, ch. 84 and ch. 111. A tax therefor may be levied upon the real estate of such delinquent land owners and may be committed to the collector and collected.

The interlineation of this clause in the warrant was evidently intended to meet this condition. Whether or not it did meet it as a matter of law is immaterial here. That question could in no way affect this defendant nor relieve him from paying his just and legal tax upon personal property. In this form of action, technicalities, which affect neither the substantial rights of the taxpayer, nor the jurisdiction of the assessors, nor essential prerequisites to the bringing of this action, are viewed by the court with scant favor. *Greenville* v. *Blair,* 104 Maine, 444; *Rockland* v. *Farnsworth,* 111 Maine, 315.

Motion and exceptions overruled.

WILLIAM O. LITTLEFIELD *vs.* EDWIN I. LITTLEFIELD.

York. Opinion March 15, 1916.

Assault and Battery. Damages. Mitigating Circumstances. Taking advantage of Rulings of Court. Title.

1. It is the established doctrine and rule of practice in this State that erroneous rulings of the presiding Justice during the trial and in his charge to the jury can be taken advantage of only by exceptions seasonably noted and allowed.
2. It has been held, however, that where it clearly appears that a verdict is the result solely of the application to the facts proved of a manifest error in law, and except for such error in law the verdict must have been otherwise, such verdict may be set aside as against law under a general motion.
3. The rulings here complained of are not of that class. They were not statements of law that necessarily controlled the determination of the case, for it cannot be held that the verdict would have been otherwise if the rulings complained of had not been made. They clearly fall within the established rule. If the defendant deemed them erroneous he should have taken exceptions to them at the time they were made. Had he done so they might have been changed or modified. Not having done so he is not now entitled to have them considered under his general motion for a new trial.
4. After a study of all the testimony in case, court does not conclude that the amount of the verdict is so manifestly excessive that it should not be permitted to stand.

Action of trespass for alleged assault and battery. Plea, general issue and brief statement. Verdict for plaintiff. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

Allen & Willard, for plaintiff.

Emery & Waterhouse, for defendant.

SITTINGS SAVAGE, C. J., CORNISH, KING, HALEY, HANSON, PHILBROOK, JJ.

KING, J. Action of trespass to recover damages for an alleged assault and battery. A verdict for $579.25 was returned for the plaintiff and the case comes up on defendant's motion for a new trial on the usual grounds. The defendant also asks that certain rulings made during the trial (to which no exceptions were taken) may be examined under the motion and, if they are found to be erroneous, that the verdict be set aside as against law.

It appears from the evidence that the parties claimed to own adjoining properties bordering on the shore at Kennebunk Beach; that there was some dispute between them as to their dividing line; and that prior to the time of the alleged assault the plaintiff built a wharf a portion of which the defendant tore down claiming that it encroached upon his lot, whereupon the plaintiff hauled rocks and piled them againt the remaining part of the wharf and in the breach made by the defendant's tearing down. On the morning of the day of the alleged assault the defendant notified the plaintiff that he was "going down to the Beach and tear away those rocks." When he arrived at the rocks the plaintiff was there and forbade him moving them, claiming that they were his rocks and on his property, and he placed himself upon them, thus trying to prevent the defendant moving them. It was not in controversy that the defendant took the plaintiff by the shoulders and removed him from the rocks, and that is the particular assault and battery complained of. The plaintiff testified that the defendant violently threw him down whereby he was bruised and severely injured. On the other hand the defendant testified that he did the plaintiff no injury but merely turned him about away from the rocks so he would not get hurt as they were being moved and left him standing on his feet in a position of safety. Each party was corroborated by his witnesses, and there was a sharp conflict of testimony as to the force used by the defendant upon the plaintiff.

The defendant did not plead title to the locus where the alleged assault occurred, but during the trial in answer to an inquiry by the court the defendant's counsel said: "We claim that the affray took place on the land of the defendant, that he is in possession of, . . . But we do not consider it makes a mite of difference, if the assault was committed as alleged, where it took place. We simply ask these questions to show a mitigation, aggravation, if

there were any damages." And to that statement the court replied "You may proceed on that line." But the defendant did not offer any evidence of title even in mitigation of damages as suggested. He proceeded apparently on the theory that he could establish the fact that what he did to the plaintiff was necessary and lawful for him to do under the circumstances to remove him from a place of danger to a place of safety, and, moreover, that in doing it he caused him no harm.

During the trial the court stated that he should rule "as the case stands upon the evidence, that the plaintiff had a right to sit upon that rock, and that the defendant committed an assault, in accordance with the definition of assault under the Revised Statutes." In his charge to the jury however the court did not rule directly that the defendant committed an assault but he did explicitly instruct the jury that "in view of the manner in which the case has been tried," the plaintiff had the right to the possession of the place, and to the possession of the rocks on the place where the alleged assault occurred, and had the right to do what he did do in trying to prevent the defendant removing the rocks. The defendant took no exceptions to the rulings and instructions, but he now claims that they were erroneous and prejudicial to him, and asks under his motion that the verdict against him be set aside for that reason. We think the defendant's motion must be overruled.

I. If it had been shown that the defendant owned the land where the affray occurred, and had the right to remove the rocks, even then it could not be held under the evidence that a verdict against the defendant was not justified, for if the jury believed the plaintiff and his witnesses they were warranted we think in finding that the defendant used excessive force upon the plaintiff, and for that he is liable to some extent at least.

2. Notwithstanding that the title to the land where the affray occurred was not put in issue under the pleadings, yet the defendant was not precluded from presenting evidence in mitigation tending to show that he owned the land where the rocks were and had the right to remove them. The court told him to proceed on that line, but he did not. As to the ownership of the rocks, the defendant admits in his brief that they belonged to the plaintiff, and there was evidence to that effect, for he hauled them and placed them where

they were. In view therefor of that fact, and that the defendant did not plead title to the land where the rocks had been placed by the plaintiff, and that he did not, when permitted to do so, present evidence of his right to the possession of the land in mitigation of damages, it may not have been error for the court to instruct the jury as he did concerning the plaintiff's right to be upon the rocks and to do what he did to prevent the defendant taking them away. But we have no occasion to pass upon that question, for we think it is not open to the defendant under his motion.

It is the established doctrine and rule of practice in this State that erroneous rulings of the presiding Justice during the trial and in his charge to the jury can be taken advantage of only by exceptions seasonably noted and allowed. But it has been held, that where it clearly appears that a verdict is the result solely of the application to the facts proved, of a manifest error in law, and except for such error in law the verdict must have been otherwise, such a verdict may be set aside as against law under a general motion for a new trial. But we think this case is not of that class. The rulings here complained of clearly fall within the established rule. They were not statements of law which necessarily controlled the determination of the case, for it cannot be held that the verdict would have been otherwise if the rulings complained of had not been made. They were statements of the court's understanding, based upon a consideration of the issues raised by the defendant's pleadings, and the fact that he had offered no evidence of title even in mitigation of damages, that the plaintiff's claim of the right to the possession of the place where the rocks were was not in fact controverted, and was to be regarded as conceded. If the defendant deemed the rulings erroneous and desired to preserve his right to have them reviewed by the Law Court he should have taken exceptions to them at the time they were made. Had he done so they might have been changed or modified. Not having taken any exceptions to them we think he is not now entitled to have them considered under his motion.

3. The damages. There was a flat contradiction in the testimony relating to the plaintiff's alleged injuries. He testified that the defendant threw him down violently upon the sharp rocks whereby his hands and leg were bruised and lacerated, and he was made sore

and lame, and from which he had not fully recovered at the time of the trial. On the other hand the defendant testified that he caused the plaintiff no bodily harm whatever. Full and explicit instructions were given to the jury as to the assessment of damages if they found the defendant liable. If they believed the plaintiff and his witnesses they were undoubtedly warranted in awarding substantial damages against the defendant. They may have erred in their judgment as to the amount, but after a study of all the testimony the court does not conclude that the amount of the verdict is so manifestly excessive that it should not be permitted to stand.

Motion overruled.

AUGUST BOUCHER *vs.* CUSHNOC PAPER COMPANY.

Kennebec. Opinion March 18, 1916.

Assumption of Risk. Duty of Master to Furnish Reasonably Safe and Suitable Place for Servants in which to Work.

The plaintiff was injured in the wood room of the defendant's mill on the evening of December 11, 1912. He was engaged at the time in carrying on his shoulder heavy logs of wood about four feet in length, from a small car outside the basement door to a saw situated in the basement. While thus engaged he claims that the forward end of a log came in contact with an iron truss rod supporting a beam in the ceiling, and hanging above the path of his work, and that he was thrown upon the floor and injured. The negligence complained of is the existence of this low truss, combined with the inadequate lighting of the room.

Held:

1. That so far as the truss was concerned, it was a matter of mill construction and had existed for a long time. The lowest point of the truss rod was five feet, ten and one-half inches above the floor. If its maintenance could be deemed negligence on the part of the defendant, a question not free from doubt, the plaintiff had assumed the risk connected with it and cannot now be heard to complain of it. The risk, if any, was open, visible and fully appreciated by the plaintiff, who from his prior service in the same room was entirely familiar with the construction.
2. That as to the inadequate lighting the evidence weighs heavily against the plaintiff.

3. That if the plaintiff's contention as to darkness is not true, then the defendant cannot be charged with negligence, and the case fails. If his contention as to darkness is true, then his own want of due care is apparent, and the case likewise fails. For a man of mature years, in the full possession of his faculties, entirely familiar with the situation and surroundings, to attempt to transport logs of wood weighing about two hundred pounds each, on his shoulder, a distance of forty feet, over an uneven, wet and slippery floor, across a log chain and beneath a low lying beam, all this in darkness, must be regarded such contributory negligence on his part as precludes recovery.

Action on the case to recover damages for personal injuries sustained by plaintiff through the alleged negligence of the defendant company. Plea, general issue. Verdict for plaintiff. Motion for new trial filed by defendant. Motion sustained. New trial granted.

Case stated in opinion.

Benedict F. Maher, and J. L. Boyle, for plaintiff.

Andrews & Nelson, for defendant.

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

CORNISH, J. The plaintiff, a man then twenty-eight years of age, was injured in the wood room of the defendant's mill on the evening of December 11, 1913. He was engaged at the time in carrying on his shoulder a heavy log of wood about four feet in length, from a small car outside the basement door to a saw situated in the basement. While thus engaged he claims that the forward end of the log came in contact with an iron truss rod supporting a beam in the ceiling and hanging above the path of his work, and that he was thrown upon the floor and injured. The negligence complained of is the existence of this low truss, combined with the inadequate lighting of the room; that is, the plaintiff contends that the defendant failed to use that due diligence in furnishing him a reasonably safe place in which to do his work which the law requires.

A word as to the premises. The wood room, in which this accident happened, was situated in the basement of the defendant's pulp and paper mill on the east bank of the Kennebec River in Augusta. The logs, wet from the river, were drawn into this room by an endless chain, transferred to live rolls and carried along to the saw, toward the inner end. Beyond the saw were the barkers. The

chain which drags in the logs crossed the floor at an angle between the door and the truss. About midway of the room and nineteen feet from the outer door a large wooden beam, strengthened by an iron truss, extended across the ceiling between two supporting posts, to strengthen the floor above. This beam was seven feet, and the lowest point of the truss rod five feet ten and one-half inches above the floor. The floor of that portion of the room where the logs came in was rough, uneven, wet and slippery either from water or ice. The room was lighted by means of electric lights suspended from the ceiling.

On the night of the accident no logs were being brought into the room but instead, four foot wood or short wood as it was called, was brought to the outer door on a car, and the plaintiff with a fellow worker named Dostie was engaged in transporting this short wood from the car to the saw. The usual method was to move the sticks along the floor by means of a pickaroon, but as there was no usable pickaroon available that night, these two men carried the short logs one at a time on their shoulder. We think the evidence fairly shows that the absence of proper tools was called to the foreman's attention and he directed them to do the best they could. The plaintiff was working extra time. He had worked during the day, returned at 7 P. M., commenced this work and was injured about 8.15, after he and his companion had unloaded two cords from the cars. This briefly states the general situation. Let us now consider the issues.

1. Negligence of the defendant.

The two points relied upon by the plaintiff are the low truss, and the darkness. So far as the truss is concerned, it was a matter of mill construction, and had existed many years, the evidence does not show how many. If its maintenance could be deemed negligence on the part of the defendant, a question not free from doubt, the plaintiff had assumed the risk connected with it and cannot now be heard to complain of it. He was perfectly familiar with the construction. He had worked for this defendant for two months immediately prior to the accident, and at a former period for seven months, and practically all of that time in this wood room, a part of the time rolling logs on to the carrier, and his work carried him back and forth beneath this truss. If it was a menace, the risk was

open and visible, and fully appreciated by Boucher. It remained unchanged and uncomplained of by this plaintiff during all the time that he was employed. This element of negligence cannot be considered. *Dempsey* v. *Sawyer,* 95 Maine, 295; *Babb* v. *Paper Co.,* 99 Maine, 298.

As to the inadequate lighting the evidence is overwhelmingly against the plaintiff. There were places for two or three lamps between the beam and the door, beside a lamp over the saw, beyond the beam, and others over the barkers and in the more distant parts of the room. The controversy was over the condition between the beam and the door. The plaintiff says that no light was burning there, that the nearest was the one over the saw and that where he worked it was dark. In this he is corroborated by Dostie, and to some extent by a workman in the adjoining grinder room.

On the other hand the foreman, the watchman, the sawyer, and the two men who worked on the barkers, emphatically state that two or three lights were burning between the beam and the door, and that that portion of the room was well lighted. It was of course the province of the jury to compare, weigh and pass upon the conflicting evidence, but when we consider the vital interest which the plaintiff has in the result of this litigation, and the want of interest on the part of the defendant's witnesses, many of whom are no longer in its employ, the improbability, if not impossibility, of two men working in that dark room, stepping over the log chain and going back and forth beneath this truss for over an hour, making seventy-five trips as they say, without meeting with any accident, and that want of lights was not given by them as the cause of the accident immediately after it occurred, we are forced to the belief that the sympathy of the jury outweighed their judgment.

After studying and analyzing the evidence with great care we are of the opinion that the room was adequately lighted, and that the injury was caused, not by the plaintiff's log hitting the truss, in the darkness, but by his tripping on the log chain and falling down, as the one eye witness, outside the plaintiff's companion, said he did. This was the man who brought the wood to the door in the car, and who was looking directly at the plaintiff at the time of the accident. He says that Boucher stepped on the log chain about eight or ten feet from the door and fell.

The record shows that both Boucher and Dostie gave the same account of the accident that evening after it happened, not mentioning truss or darkness but assigning it to slipping on the chain, a statement however which the plaintiff denies. The location of the log on the floor after the accident tends further to bear out the truth of this theory.

In view of all the facts and circumstances it is the opinion of the court that the verdict of the jury was palpably wrong on the question of the defendant's negligence. *Moulton* v. *Railway Co.*, 99 Maine, 508.

2. Contributory negligence.

It is unnecessary to dwell upon this point at length. If the plaintiff's contention as to darkness is not true, then the defendant cannot be charged with negligence and the case fails. If the plaintiff's contention as to darkness is true, then his own want of due care is apparent, and the case likewise fails. For a man of mature years, in the full possession of his faculties, entirely familiar with the situation and surroundings, to attempt to transport logs of wood weighing about two hundred pounds each, on his shoulder, a distance of forty feet, over an uneven, wet and slippery floor, across a log chain, and beneath a low-lying beam and truss, all this in darkness, fills full the measure of contributory negligence.

The plaintiff claims that he went into an adjoining room and procured two lamps, but they would not work, and after that he asked the foreman for lights and he promised to get some at the office. The foreman denies this and says that Boucher made no request, and that Dostie simply remarked that it was a little dark. But assuming Boucher's statement to be true, it does not relieve him from that measure of due care which as a reasonably prudent man he was bound to exercise. No lights were brought, and yet the plaintiff continued his perilous work for an hour. There was no obligation on his part to do so. It was purely voluntary. Its continuation led to what might have been naturally expected under those circumstances, an accident, and one towards which his own lack of reasonable prudence contributed.

Under the principles of law which have become firmly fixed, the entry must be,

Motion sustained.

E. BENSON STANLEY *vs.* JABEZ TRUE.

Cumberland. Opinion March 18, 1916.

Action of Trover. Belief of Parties as Bearing on Legal Construction of Instrument. Discharging of First Mortgage as Affecting Second Mortgage. Intervening Incumbrances.

Action of trover for the wrongful conversion of a certain building known as Glen Cottage, which had been moved by the plaintiff from the lot on which it was built and was on its way across the adjoining land of the defendant when the alleged conversion took place. The premises in question are a part of Ottawa Park in South Portland, which was surveyed and plotted in the summer of 1899.

Held:

1. That the ownership of Glen Cottage, which is the point at issue, depends upon the ownership of the lot from which it was removed.
2. That Glen Cottage was built in the Spring of 1900 upon that part of the hotel lot as delineated on the recorded plan, which adjoined lot number forty, the rear veranda possibly extending over and upon lot forty.
3. That on October 10, 1900, the Ottawa Park Company, the then owner, mortgaged to the Mechanics Loan and Building Association lot forty and the portion of the hotel lot on which Glen Cottage stood, which for convenience is called the addition. This constituted a first mortgage on the addition.
4. That on July 20, 1901, the Ottawa Park Company mortgaged to Reuben and Henry B. Higgins the original hotel lot including the portion adjoining lot forty on which Glen Cottage stood. This constituted a second mortgage on the addition.
5. That on July 19, 1905, the Mechanics Loan and Building Association mortgage was assigned to Isaac W. Hanson, who thereby held the first mortgage on the addition, the Higgins mortgage still outstanding being a second mortgage thereon.
6. That on December 27, 1905, Isaac W. Hanson discharged his mortgage and on the same day took a new mortgage on the same property.
7. That by such discharge on the part of Hanson the Higgins mortgage was ipso facto promoted from a second to a first mortgage on the addition, and the new mortgage taken by Hanson became a second mortgage thereon. When the prior mortgage was discharged no rights could be predicated upon it nor deduced from it even though a new mortgage was given at the same time. Intervening incumbrances were thereby let in.

8. That on March 30, 1910, the defendant became the assignee of the Higgins mortgage, foreclosed the same, the final decree of foreclosure being entered on February 13, 1913, and thereby secured title to the hotel lot including the addition and Glen Cottage standing thereon.
9. That the legal rights of the parties must be determined by the recorded conveyances and those conveyances place the legal title to Glen Cottage in the defendant.

Action of trover for conversion of a certain wooden building or cottage. Plea, general issue. Case reported to Law Court upon such evidence as competent and legally admissible; Law Court to render final judgment. Judgment for defendant.

Case stated in opinion.

Hinckley & Hinckley, for plaintiff.

Frank H. Haskell, and Charles J. Nichols, for defendant.

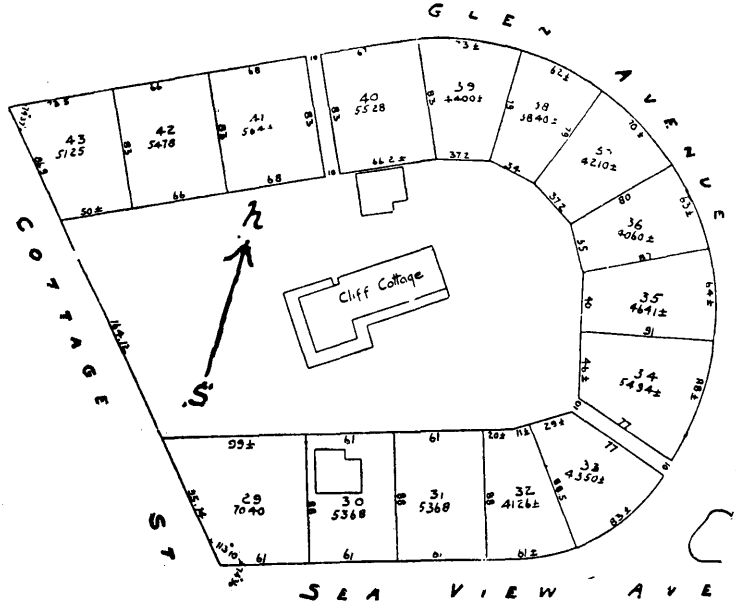
SITTING: SAVAGE, C. J., CORNISH, KING, HALEY, HANSON, PHILBROOK, JJ.

CORNISH, J. This is an action of trover to recover the value of a certain building known as Glen Cottage which the plaintiff alleges the defendant wrongfully appropriated and converted to his own use on June 3, 1914. This cottage had been moved by the plaintiff from the lot on which it was built and was on its way across the adjoining land of the defendant when the alleged conversion took place. The ownership of the building is the point at issue, and that depends upon the ownership of the lot from which it was removed. Both parties claim title to this lot, the plaintiff by warranty deed from Charles B. Dalton, dated January 23, 1906, and by quit claim from the Ottawa Park Company of the same date; and the defendant under a foreclosed mortgage dated July 20, 1901. The storm centre is whether this mortgage covered and held the lot on which Glen Cottage stood.

The premises in question are a part of the Ottawa Park development at Cape Elizabeth which was promoted in 1899. An elaborate plan of streets and projected lots was made by a civil engineer, dated August 16, 1899, filed on November 22, 1899, and recorded in Cumberland Registry of Deeds, Plan Book 9, page 29. We are concerned with only a portion of this Park property, namely lot

forty and the large central lot known as the Cliff Cottage lot or hotel lot, which contained 56,553 square feet, and which was bounded by Cottage street on the southwest, and on all other sides by surrounding lots numbered from twenty-nine to forty-three inclusive. On this hotel lot stood Cliff Cottage, afterwards known as the Cliff House, a summer hotel. This was the only building that then existed and was the only one delineated on the plan filed November 22, 1899, except a cottage known as Sunnybank Cottage which stood on lot thirty and is not involved here.

It appears that because of certain changes made in Cottage Road in the spring of 1900, a second plan of the entire tract was made, dated May 28, 1900, filed on July 24, 1900, and recorded in plan book No. 9, page 39. In the early spring of 1900, after the filing of the first plan and before the filing of the second, Glen Cottage was built upon that portion of the hotel lot which adjoined lot forty. The rear veranda overhung lot forty. At that time Josephine L. Dalton was the owner of both lot forty and the hotel lot. The outlines of this cottage appear on the second plan, and a reduced copy of so much of that plan as is necessary to picture the locus and to aid in understanding the case follows:



Glen Cottage contained eleven numbered rooms, was connected with Cliff Cottage or the Cliff House by a flight of steps and also by electric light wires, water pipes, call bells, etc., and was used for guests as a sort of annex to the hotel.

So much for the general situation. Let us now examine the title. Many deeds were introduced in evidence, but on careful analysis, few of them are found to affect the issue.

HOTEL LOT.

On August 21, 1899, Alpheus Hyatt, the then owner of the entire tract, by warranty deed conveyed the hotel lot as delineated on the first plan, to Charles B. Dalton, and on November 23, 1899, Dalton conveyed the same to Elmer P. Sargent. Sargent mortgaged it on the same day to the Deering Loan and Building Association for $3,000, and conveyed the equity by quitclaim deed to Josephine L. Dalton, the wife of Charles B. Dalton. Mrs. Dalton took up the Sargent mortgage of November 23, 1899, to the Deering Loan and Building Association on May 7, 1900, and on the same day gave a new mortgage to the same association for the sum of $5,000, which was discharged on January 22, 1902. The description in this mortgage refers to plan one and covers the entire hotel lot. Evidently at about this time Glen Cottage was erected, not on lot forty but on that portion of the hotel lot next to lot forty. Lot forty was then unencumbered and Mrs. Dalton was anxious to have the lot on which Glen Cottage had been built also free from encumbrance. She therefore procured on May 23, 1900, from the Deering Loan and Building Association, the mortgagee, a release of that portion of the hotel lot on which the cottage stood, the release reading: "a certain lot of land at Ottawa Park . . . adjoining the southeasterly side line of lot forty, meaning and intending to release so much of a certain lot that is now held by a certain mortgage for $5,000, held by the Deering Loan and Building Association as is occupied by a certain cottage and verandahs attached thereto, said cottage being situated on lot forty and premises hereby released." This release left Mrs. Dalton with the title to lot forty and the adjoining portion of the hotel lot, which we will call for the sake of brevity the addition, free from encumbrance, and with the title to the balance of the hotel lot subject to the Deering Loan and Build-

ing Association mortgage. The equity continued to be held not by several parties but by a single party.

On July 9, 1900, Mrs. Dalton conveyed all her equity in the entire Ottawa Park property to the Ottawa Park Company, and that company on July 20, 1901, executed a mortgage to Reuben and Henry B. Higgins, which covered the original hotel lot, including the addition, and under which the defendant claims title here. The description is as follows: "A certain lot or parcel of land . . . being a part of what has been called the Cliff Cottage property, now Ottawa Park, and is more fully described on the plan of said property . . . recorded in Cumberland Registry of Deeds, Plan Book 9, page 29, to which reference may be had for a more full and perfect description. Said lot is outlined on said plan as containing the building formerly called Cliff Cottage and has a frontage of one hundred and seventy (170) feet on said Cottage Road and is bounded on the northwest by lots indicated on said plan as numbers 39, 40, 41, 42 and 43, on the north and east by lots 34, 35, 36, 37 and 38, on the southeast by lots 29, 30, 31, 32 and 33; and having an area of fifty-six thousand five hundred and fifty-three (56,553) feet. Said property hereby conveyed is subject to a mortgage to the Deering Loan and Building Association dated May 7, 1900, and recorded in Cumberland Registry, etc." This Higgins mortgage was assigned to the defendant, Jabez True, on March 30, 1910, and was foreclosed by him, the final decree of foreclosure being entered on February 13, 1913.

There can be no doubt that this Higgins mortgage in clear and unambiguous terms covers the entire hotel lot including the addition on which Glen Cottage stood. True, it does not mention Glen Cottage, and does mention Cliff Cottage; but the bounds are clearly defined, and its boundary on the northwest at the crucial point, is the lot line of forty. No exception is made of the addition, and the special reference is to the first plan, which was made before Glen Cottage was built.

At this point it is best to pause for a moment in the consideration of the chain of title to the hotel lot and take up the chain in LOT FORTY.

On May 10, 1900, Alpheus Hyatt conveyed by warranty deed to Josephine L. Dalton, lot forty as delineated on plan number one. As we have already seen, Mrs. Dalton owned at this time the hotel lot, subject to the mortgage to the Deering Loan and Building Association of May 7, 1900, and after the erection of Glen Cottage, that Association had released to her from the mortgage so much of the hotel lot as Glen Cottage occupied. This was on May 22, 1900. On the same day Mrs. Dalton, then owning lot forty and the addition free of encumbrance, mortgaged both lots with the cottage thereon to Elmer P. Sargent for the sum of $500. This mortgage was discharged on October 6, 1900.

In the meantime, on July 9, 1900, Mrs. Dalton, as we have before stated, had conveyed all her equity in the entire Ottawa tract to the Ottawa Park Company, and on October 9, 1900, she again conveyed to the Ottawa Park Company by quitclaim deed with metes and bounds this addition, which was described in the deed as a tract of the same width as lot forty, namely, about sixty-six and two-tenths feet, and projecting southeasterly into the hotel lot a distance of forty feet, "Meaning and intending hereby to convey all the rights released to me by deed of the Deering Loan and Building Association dated September 29, 1900 . . ." This last date is evidently erroneous. It should be May 22, 1900. This quitclaim deed was merely confirmatory of Mrs. Dalton's deed of July 9, 1900, to the same grantee, because under the prior deed she had conveyed all her right, title and interest in the entire tract.

The Ottawa Park Company on October 10, 1900, mortgaged to the Mechanic's Loan and Building Association for the sum of $1500 the same property embraced in the Sargent mortgage, that is, lot forty, the addition and Glen Cottage, the Sargent mortgage having been discharged four days before, on October 6, 1900.

The situation therefore on July 20, 1901, after the Ottawa Park Company executed the $10,000 mortgage to R. and H. B. Higgins on the hotel lot was this. The Ottawa Park Company owned lot forty, the addition, and Glen Cottage subject to the Mechanic's Loan and Building Association mortgage of October 10, 1900; and with the addition also covered by the Higgins mortgage of July 20, 1901, which as to that portion was therefore a second mort-

gage. It owned the remainder of the hotel lot subject, first, to the Deering Loan and Building Association mortgage of May 7, 1900, and, second, to the Higgins mortgage of July 20, 1901. The Deering Loan and Building Association mortgage was discharged a few months later, on January 22, 1902, and that left the Higgins mortgage a first mortgage on the hotel lot, exclusive of the addition, and a second mortgage on the addition, the Mechanic's Loan and Building Association mortgage being the first.

The next steps that were taken are important as they constitute the key to the legal rights of the parties in this action. The Mechanic's mortgage was assigned to Isaac W. Hanson on July 19, 1905, and by him discharged on December 27, 1905, he taking a new mortgage on the same day and on the same property from Charles B. Dalton, who at that time claimed to be the owner of the equity, although the conveyance of title from the Ottawa Company to him is not clear. The evidence contains a deed from the Ottawa Park Company to Davis and Wilson dated October 18, 1902, but none from them to Dalton. Assuming, however, Dalton's title to the equity to be perfect, the pivotal fact is that when the Mechanic's mortgage on lot forty and the addition and Glen Cottage was discharged, the Higgins mortgage, which was a second mortgage on the addition and Glen Cottage, was ipso facto promoted to a first mortgage on that portion. It became at once the underlying mortgage, and from that time forward continued as such. It was never discharged. The mortgage which Hanson took in place of the old and prior security could hold as an encumbrance only from its date, December 27, 1905, because when a prior mortgage is discharged no rights can be predicated upon it, nor deduced from it, even though a new mortgage is given at the same time. Intervening encumbrances are thereby let in. *Stearns* v. *Godfrey,* 16 Maine, 158, 162. In other words, by the discharge of the old mortgage and the taking of a new, the situation of the parties was reversed, and instead of Hanson holding the first mortgage on the addition and Higgins the second, the Higgins mortgage became the first, and the Hanson new mortgage became the second. This addition, therefore, with its cottage, because of the discharge of the prior Hanson mortgage, took its place under the Higgins mortgage alongside of the rest of the hotel lot. When the Higgins mortgage

was assigned to the defendant, Jabez True, and was foreclosed by him, the title to the addition and to Glen Cottage became as perfect in True as did the title to the rest of the hotel lot and to the Cliff House, which title the plaintiff does not question.

The deeds of the equity under which the plaintiff claims are two, a warranty from Charles B. Dalton and a quitclaim from the Ottawa Park Company, both dated January 23, 1906. The Dalton deed conveys subject to the Higgins mortgage of July 20, 1901, on the hotel lot, and to the Hanson mortgage of January 1, 1906, an error for December 27, 1905, on lot forty. The grant describes the buildings as "the Cliff House proper on what is known as the hotel lot" and "Glen Cottage on lot forty and the hotel lot." It may be that the parties to this deed supposed that the addition was free from the Higgins mortgage, but it was not, and their mistake could not affect the legal rights of the holder of the Higgins mortgage.

The plaintiff urges that the mortgagees of the respective parcels had the same belief. There is evidence tending to support that view, as for instance the fact that the insurance taken out on the Cliff House was made payable, in case of loss, to the Higgins as mortgagees or their assignee, and on Glen Cottage was made payable to Hanson as mortgagee. Other facts tend in the same direction. On the other hand Mr. Higgins testifies that Mr. Dalton came to him and asked him to release from his mortgage the lot that Glen Cottage stood on and he declined to do so. But the acts of the parties are of little weight here. The practical construction given to an instrument by the parties, is sometimes helpful in cases of doubt, but it cannot be permitted to throw down language which is in itself definite and certain, nor to violate well settled rules of construction. *Oakland Woolen Co.* v. *Union Gas & Electric Co.*, 101 Maine, 198.

No ambiguity exists here. The skein is somewhat tangled, but when unraveled the separate threads are distinct and each is definite and precise. The recorded conveyances must determine the legal rights of the parties, and those conveyances place the legal title to Glen Cottage and the land on which it stood in the defendant.

The entry must therefore be,

Judgment for defendant.

OSCAR W. POLAND *vs.* HARRIET MCDOWELL.

Knox. Opinion March 22, 1916.

Power of Presiding Justice after Adjournment of Court. Rule of Court as to Making and Filing Exceptions.

1. The presiding Justice having instructed the jury, as requested, "to give due consideration to all testimony that has been deemed admissible by the court," it was not error for him to add, "that due consideration means that you are to consider it as far as it has any bearing as proving the issue in this case, and not as proving anything else."
2. By rule of court, exceptions to any opinion, direction or omission of the presiding justice in his charge to the jury must be noted before the jury retire, or all objections thereto will be regarded as waived. If exceptions not noted are afterwards allowed, it is a matter of grace, and not of right.
3. When a term of court is adjourned, the power of the presiding Justice over the business of the term ceases.
4. After the adjournment of a term of court, the presiding Justice has no power to allow a bill of exceptions, as of the term, unless the privilege of presenting them for allowance after the term, has been reserved, with the consent and waiver of the opposing party.
5. Chapter 305 of the Laws of 1915, which prescribes certain things which may be done by the justices in vacation, does not include the allowance of exceptions to rulings made in term time.
6. The certificate of the presiding Justice that an exception was allowed is conclusive in the law court of the regularity of the filing and allowance of the bill of exceptions.

Action of asumpsit to recover for alleged services rendered by plaintiff to defendant. Plea, general issue. Verdict for defendant. Plaintiff filed exceptions to one instruction of court in his charge to the jury, and after court had adjourned, counsel for plaintiff, without consent of Justice presiding, made up bill of exceptions and asked that the same be heard. Exception allowed must be overruled; others dismissed.

Case stated in opinion.

Rodney I. Thompson, for plaintiff.

Edward C. Payson, for defendant.

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

SAVAGE, C. J. This case comes up on the plaintiff's bill of exceptions. One exception was formally allowed by the presiding Justice, though it appears to have been done after the adjournment of the term. But as to that, the certificate of the presiding Justice that the exception was allowed is conclusive in this court of the regularity of the filing and allowance of the exceptions. *Dunn* v. *Auburn Motor Co.*, 92 Maine, 165. The exception allowed is thus stated in the bill. At the conclusion of the charge plaintiff's counsel requested the following instruction. "You are to give due consideration to all testimony that has been deemed admissible by the court." This was given in the language requested, and the presiding Justice added, "I give you that requested instruction with this qualification: That due consideration means that you are to consider it as far as it has any bearing as proving the issue in this case, and not as proving anything else." We perceive no error in the qualification.

As to the other exceptions alleged, the presiding Justice certified as follows: "None of the extracts from the Judge's charge, as set forth in this bill of exceptions, were excepted to at the time of the trial, nor was the attention of the court called to any error in the charge, other than the requested instruction above referred to, until weeks after the court had adjourned finally, and then the attention of the court was called to them by receiving from the clerk of the court the bill of exceptions as filed with him on October 21, 1915. And I rule that the plainiff is not entitled to exceptions as to such matters as to which the attention of the court was not seasonably called. But if, under the circumstances, the plaintiff is entitled to exceptions, and the Law Court so decides, they are to be considered as allowed."

We think the plaintiff is not entitled of right to have the exceptions allowed. Rule of Court XVIII prescribes that "exceptions to any opinion, direction or omission of the presiding Justice in his charge to the jury must be noted before the jury retire, or all objections thereto will be regarded as waived." This rule was declared in *McKown* v. *Powers*, 86 Maine, 291, to be merely an affirmance of a long pre-existing rule of practice. It is true that this rule is

not always enforced. Exceptions not reserved before the jury retires are sometimes allowed as a matter of grace, but not as a matter of right. The excepting party is not entitled to them as of right. The presiding Justice is not required to allow them.

The plaintiff contends that this rule of practice, though applicable to exceptions taken under the general statute regulating the taking of exceptions, R. S., ch. 79, sect. 55, does not apply to exceptions under R. S., ch. 84, sect. 97, under which these exceptions are claimed. This contention is not tenable. The rule is unlimited. It makes no exceptions. And the procedure in reserving exceptions under chapter 84, section 97, is governed by the provisions of chapter 79, section 55.

There is another reason why these exceptions should not be allowed. They were not presented to the presiding Justice until after the term adjourned, and it does not appear that any privilege was reserved during term time to present them later. It happens sometimes, especially in cases tried near the end of a term, that it is difficult or even impossible to put a bill of exceptions in shape for allowance without unduly delaying the adjournment of the term. And in such cases, it is not improper for the Justice, with the consent of the parties, to grant the privilege of presenting the exceptions for allowance at a later time. This may be done by consent, not otherwise. And when a bill of exceptions is allowed, it is conclusively presumed that it is properly allowed in this respect. *Dunn* v. *Auburn Motor Co.,* supra.

When a term of court is adjourned the power of the presiding Justice over the business of the term ceases. He is no longer the "court" for that term. He cannot hold the term, or any part of it, or do any of the work of the term, in vacation. What he may do in vacation concerning pending cases at law is prescribed by chapter 305 of the laws of 1915, which does not include the allowance of exceptions to rulings made in term time. The presiding Justice is not only not required to allow exceptions after the term is adjourned, but without waiver and consent he has no power to do it.

The conclusion is that the exception allowed must be overruled, and the others dismissed.

So ordered.

MANUFACTURERS NATIONAL BANK

vs.

CHABOT & RICHARD COMPANY, et als.

Androscoggin. Opinion March 27, 1915.

Accommodation Maker. Extension of credit between holder of note and principal debtor as effecting surety. Promissory notes.

1. In the absence of any exceptions to the instructions given, it must be presumed that they were unobjectionable and presented clearly all the issues involved.
2. An agreement for extension of credit between the holder of a note and the principal debtor, which will discharge a surety, must be a valid one, founded on sufficient consideration, and the effect of which is to give further definite time to the principal, without the consent of the surety.
3. The acceptance by the holder of a note of interest for a stipulated time in advance from the principal debtor, while evidence properly to be considered in determining whether an agreement for an extension which will discharge the surety had been made, and is a sufficient consideration for such an agreement, is nevertheless not in itself such controlling proof that there was such an agreement as to require a verdict against the surety to be set aside, especially where there is positive testimony on behalf of the holder that no such agreement was made.
4. A receipt given to the receiver of the principal debtor for dividends, and which recited that the payment received was in full for dividends on its claim against the principal under the decree of the court, does not discharge the surety on the note.
5. Where the principal debtor assigned its property to a trustee for the benefit of its creditors, but the trustee did not take actual possession thereof, and a receiver was appointed at the suit of the surety who did take possession and distributed the assets, and it did not appear that the holder of a note had any part in the assignment or assented thereto, the surety cannot claim discharge on the ground that the property assigned was sufficient in value to pay all of the principal's debts.

6. While a bank has the privilege of charging overdue notes against the checking account of the maker, it is not required to do so, and its failure to do it does not discharge a surety.
7. Money deposited in a bank subject to check becomes the absolute property of the bank, and the latter becomes a debtor to the depositor in an equal amount.

Action upon three promissory notes. Plea, general issue and brief statement. Verdict for plaintiff. Exceptions and motion for new trial filed by defendant. Motion and exceptions overruled.

Case stated in opinion.

Newell & Woodside, for plaintiff.

McGillicuddy & Morey, for L. T. Chabot.

J. G. Chabot, for Chabot and Richard Co. and E. P. Langley.

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

KING, J. Action upon three promissory notes, each payable to the plaintiff bank and signed by the Chabot & Richards Co., and indorsed on the back by the other defendants. One note was dated February 10, 1910 on three months for $4000, another dated February 17, 1910 on three months for $2000, and the other dated March 21, 1910 on one month for $10,000. Some payments were made on the principal of each note. A general verdict for $4,932.75 was returned against all the defendants, and the case comes up on a motion for a new trial and exceptions by the defendant L. T. Chabot.

THE MOTION.

At the time the notes were given Langley and Chabot were the principal stockholders in the defendant corporation, the Chabot & Richards Co., and Mr. Chabot was then its president, treasurer and business manager, and continued as such until January 13, 1911, when he was succeeded in those offices by Mr. Langley who thereafter managed the affairs of the corporation until it ceased to do business in the latter part of 1913. The notes in question were issued to obtain a substantial part of the working capital of the Chabot & Richards Co. Prior loans had been obtained for the corporation from the plaintiff bank on similar notes signed by

it and indorsed by Chabot and Langley, such loans, in some instances, having been paid, The notes in suit were not paid at maturity, but remained in the bank overdue, the interest thereon being paid, and usually in advance monthly. This practice of paying the interest on the notes while they remained overdue continued for more than two years.

There was more or less friction between Chabot and Langley concerning the control and management of the affairs of the corporation resulting in litigation, and finally the business of the corporation was closed up under a bill in equity brought by Mr. Chabot, in which proceeding a receiver was appointed who distributed the assets of the corporation among its creditors under decree of the court. Thereafter this action was brought to collect the balance due on these notes.

It was claimed by Mr. Chabot at the trial, among other alleged defenses, that he was an accommodation indorser or surety on the notes and that the plaintiff, without his knowledge or assent, had extended the times of payment therein provided for, whereby he became released from all liability thereon. The plaintiff contended that there was no agreement on its part for an extension of credit to the maker of the notes and further, that Chabot and Langley, owning practically the whole capital stock of the corporation, and being the beneficiaries of substantially all the profits of its business, ought not to be considered as accommodation indorsers of the notes, but, if such was their status as between them and their corporation, that the bank had no knowledge of that fact.

In the absence of any exceptions to the instructions given to the jury it must be presumed that they were unexceptionable and presented clearly all the issues involved in the case. A general verdict for the plaintiff having been returned, this court has no means of knowing whether the jury found all or only a part of those issues against the defendant. It may be that the jury found as a fact that the defendant was an original promisor and not a mere surety on the notes, or if he was in fact a surety only that the bank took the notes without any knowledge of that fact. If such was their finding, and a decision of the defendant's motion depended upon the determination of the question whether such a finding is justified

by the evidence, the matter would not, we think, be free from doubt. But, assuming that the defendant was in fact a surety on the notes, and that the bank took them with knowledge of that fact, then the question presented under the motion is whether the finding of the jury, that there was no agreement by the bank to extend the times of payment which would release Mr. Chabot from his liability on the notes, is so manifestly against the evidence that it should be set aside.

It is well settled that an agreement for an extension of credit between the holder of a note and the principal debtor which will discharge a surety must be a valid enforceable one, founded on a sufficient consideration, and the effect of which is to give further definite time to the principal, without the consent of the surety, such an agreement as would present a legal obstacle to the prosecution of an action upon the note during the time. *Berry* v. *Pullen,* 69 Maine, 101; *Bank of Boothbay Harbor* v. *Blake,* 113 Maine, 313.

The only evidence relied upon in the case at bar to establish such an agreement on the part of the plaintiff bank is the fact that it received from the maker of the notes, after they became due, payments of interest thereon in advance. That circumstance was properly submitted for the consideration of the jury upon the question whether such an agreement was in fact made. The receipt of interest in advance is a good consideration *for* an agreement to extend the time of payment of a debt, but there must also be sufficient proof that an agreement to extend was in fact made. It has been decided in this State, in *Freeman's Bank* v. *Rollins,* 13 Maine, 202, that the receipt of interest for a stipulated time in advance from the principal by the payee, after the note has become payable, is not sufficient evidence of an agreement to give further credit, and does not discharge the surety. In that case interest in advance for sixty days was indorsed on the note without the surety's knowledge or consent. This decision was commented on with approval in *Mariner's Bank* v. *Abbott,* 28 Maine, 280, and also in *Williams* v. *Smith,* 48 Maine, 135, 138.

And such is the doctrine of the Massachusetts cases, the court there holding that the mere payment and receipt of interest in advance on an overdue note is not sufficient proof to establish an enforceable contract to extend the time of the payment of the note,

and does not tie the hands of the bank so that it cannot sue on the note before the expiration of the period for which the interest was advanced. If in such case the bank may sue the note regardless of the receipt of advance interest, likewise may the surety pay the note and proceed against the maker before the end of the advance interest period. *Oxford Bank* v. *Lewis,* 8 Pick., 458; *Blackstone Bank* v. *Hill,* 10 Pick., 129; *Bank* v. *Bishop,* 6 Gray, 317.

The defendant cites *Stewart* v. *Oliver,* 110 Maine, 208. In that case exceptions to a ruling directing a verdict for the plaintiff were sustained. The issues of fact there involved were similar to those in the case at bar, and it was held that there was evidence in support of the defendant's contentions which ought to have been passed upon by the jury. The court in its opinion said: "But there is evidence that the bank without the knowledge or assent of the defendant, on payment of interest in advance, extended the time of payment to Torrey, the principal, nineteen times for a period of four months each time. The payment of interest in advance was a sufficient consideration for the agreement to extend the time of payment." That statement would seem to justify the inference that there was evidence to prove the agreement to extend in addition to the fact of the payment and receipt of interest in advance. But, be that as it may, we do not think that statement implies a decision by the court that the mere payment and receipt of interest in advance is sufficient proof of an agreement to extend credit to the principal which would release the surety. Such a decision would have been in conflict with the long established contrary doctrine laid down in *Bank* v. *Rollins,* supra and the subsequent cases approving it. So far as concerns the point now being considered, the decision in *Stewart* v. *Oliver* only decides, we think, that the fact of the payment and receipt of interest in advance on an overdue note is evidence tending to prove an agreement to extend the time of payment proper for the consideration of the jury. In the case at bar the fact of the payment and receipt of the interest in advance was submitted to the jury. And, moreover, there was the testimony of the cashier of the plaintiff bank that nowithstanding the receipt of the advance interest the bank made no agreement with the principal to extend the time of payment of the notes, and the jury so

found. To reverse that finding of the jury as erroneous, would be to hold that the fact that the notes in suit remained in the plaintiff bank overdue for more than two years, and that the bank permitted the maker of the notes to pay the interest thereon in advance monthly, is controlling proof that there was an agreement between the bank and the maker of the notes for an extension of the time of their payment which would release the surety, notwithstanding the testimony of the cashier of the bank that there was no such agreement. We think it cannot be so held, and that the finding of the jury on that issue must stand.

There is no merit in the defendant's claim that he was discharged from his liability on the notes by reason of the fact that on May 16, 1914, the plaintiff accepted from the receiver of the Chabot & Richards Company $2655.38 and receipted for the same as "being in full for dividend on my claim against said company as per decree of court." That was not a release of the maker of the notes from liability for the unpaid balances due thereon. It was only the acknowledgment of the receipt from the receiver of the plaintiff's dividend on its claim against the maker of the notes "as per decree of court." It had no effect to release a surety on the notes from his liability for the unpaid balance. *Boston Penny Savings Bank* v. *Bradford,* 181 Mass., 199.

The defendant, Chabot, also alleged in defense that the Chabot & Richards Company on the 15th of January, 1913, made an assignment of its property to John L. Reade in trust to convert the same into cash and pay the proceeds thereof on account of its indebtedness to the plaintiff, that the property so assigned was more than sufficient in value to satisfy that indebtedness, including the notes in suit, and that thereafter the plaintiff wrongfully and negligently allowed said property to be diverted from the purposes of said trust, by reason whereof, as he contends, the plaintiff became estopped to collect from him any part of said notes. And he now urges under his motion, a consideration of that alleged defense. But that defense, too, has been decided adversely to Mr. Chabot by the jury, and, as it must be presumed, under appropriate instructions as to the law applicable thereto. We find, however, no reason to question that decision. It does not appear that the plaintiff bank

assented to that assignment, or had any part in its making, or that it became responsible in any way for the doings of the assignee thereunder. It appears that Mr. Reade did not take actual possession of the property as such assignee, but soon after the assignment was made took possession of the property as the temporary receiver appointed in the equity proceedings against the Chabot & Richards Company brought by Mr. Chabot, and thereafter the property passed into the control of the permanent receiver, by whom it was distributed under order of the court.

Mr. Chabot further alleged in defense and now contends that it was the duty of the plaintiff bank to charge these overdue notes against the ordinary banking account, subject to check, which the Chabot & Richards Company had with the plaintiff bank. That contention is not sustainable. Money deposited in a bank, subject to check, does not remain the property of the depositor, subject only to a lien in favor of the bank. It becomes the absolute property of the bank, and the bank thereby becomes a debtor to the depositor in an equal amount. The bank is bound to honor the depositor's checks so long as there is a sufficient balance due the depositor. And it has the right to charge against the depositor's general account any independent debts then due and payable from him to the bank. It is not obliged to do so. It owes no duty to a surety to do so. "The right of the bank to apply the balance of the account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety." *National Bank* v. *Peck*, 127 Mass., 298, 301 and cases cited.

THE EXCEPTIONS.

1. There is no merit in the exceptions to the rulings excluding the inquiries concerning the general banking account of the Chabot & Richards Company with the plaintiff bank during the time the notes remained overdue. As herein before stated, under the motion, a bank owes no duty to a surety on a note of its customer, due and payable to the bank, to charge that note off against the balance of the customer's general banking account with the bank. It may do

that at its option, but the law does not require it to do so even at the surety's request.

2. The remaining exceptions are to rulings excluding inquiries as to the value of the property described in the assignment from the Chabot & Richards Company to Reade hereinbefore mentioned and considered under the motion. As there stated, the evidence fails to show that the plaintiff assented to that assignment; and we find nothing in the case to justify the contention that the plaintiff became responsible to Mr. Chabot to see that the property described in the assignment was applied to the payment of these notes.

We find therefore no error in the exclusion of the inquiries as to the value of the property.

Motion and exceptions overruled.

Justices Bird and Haley do not concur.

ST. CROIX COMPANY *vs.* SEACOAST CANNING COMPANY.

Washington. Opinion March 31 1916.

Discretionary Rights of Presiding Justice. Method of Proving Missing Contract or Writing.

1. When secondary evidence of the contents of a document is offered, its admissibility depends upon proof of the former existence of the document, and that it has been lost or destroyed or has become inaccessible, and as well upon proof that the requisite diligence has been used and efforts made to find it. These preliminary questions of fact are all for the court.
2. When secondary evidence of the contents of a document is offered, its former existence, if denied, must be proved to the satisfaction of the court. But this rule means only that the court must be satisfied that there is sufficient evidence on the issue to go to the jury.
3. When the issue is whether there is sufficient evidence of the former existence of a document, the contents of which it is sought to prove by secondary evidence, to what extent the court will hear evidence on the

preliminary question is discretionary. It may permit cross-examination. It may hear the evidence on both sides pertaining to this issue, or not, as it deems necessary or expedient.

4. A ruling to admit secondary evidence of the contents of a document involves necessarily a finding that the preliminary questions of facts have been sufficient to make the evidence admissible for the consideration of the jury. No special finding is necessary.
5. The court is of opinion that the verdict based as it necessarily must be upon a finding that the contract relied upon by the plaintiff existed and continued in force after May 6, 1907 is unmistakably wrong.

Action of assumpsit to recover price of certain goods sold and certain profits claimed to be due under an alleged contract. Plea, general issue. Verdict for plaintiff. Motion for new trial and exceptions filed. Motion for new trial sustained.

Case stated in opinion.

Hinckley & Hinckley, for plaintiff.

R. J. McGarrigle, and Curran & Curran, for defendant.

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

SAVAGE, C. J. In this action of assumpsit the plaintiff seeks to recover the price of goods sold, and profits, as per contract, on goods manufactured, and damages for breach of contract to manufacture other goods and divide the profits. The verdict was for the plaintiff, and the amount of the verdict shows that the jury awarded a substantial amount on each of the several classes of claims. The case comes before this court on defendant's exceptions and motion for a new trial.

The plaintiff bases its right to recover for the first two classes upon a written contract. The defendant denies that such a contract as claimed by the plaintiff ever existed. The first exception relates to the admissibility of oral testimony for the consideration of the jury of the existence and contents of the alleged contract. Such testimony was admitted. And the correctness of the ruling should be decided at the outset, because if the admission was wrong, the foundation for the larger part of the plaintiff's claim is swept away, and it will be unnecessary to examine the evidence on this branch of the case under the motion.

Both parties to this action were in 1907 canning companies, canners of fish. They both had been using plants in Robbinston. The precise relation of the plaintiff to the plant it had been using will be discussed later. The plaintiff's president and general manager, Mr. Holmes, was permitted, against objection, to testify in substance that during the last of March or first of April, 1907, he acting for the plaintiff, made a contract with the defendant, then represented by its vice president and general manager, Mr. McCall, that the contract was made at the defendant's office in Eastport, that it was reduced to writing by George A. Curran, Esq., who was at that time interested in the plaintiff's affairs, and was also general counsel in this State for the defendant, that the contract was in duplicate, that it was signed by himself for the plaintiff and by Mr. McCall for the defendant, and that Mr. McCall kept one copy and Mr. Curran the other. Mr. Holmes testified that he had never had nor seen the contract since, and that he had not been able to get a copy. It appeared that notice had been given to the defendant to produce the contract; likewise to Mr. Curran, who was attorney of record of the defendant. No such contract was produced, and counsel for the defendant told the court that no such contract ever existed. The issue then was not so much, and perhaps not at all, whether the plaintiff had taken the necessary steps to find and produce the contract, as it was whether such a contract had ever existed. After the evidence which we have summarized, the plaintiff offered the testimony of Mr. Holmes to show the contents of the contract. The evidence was admitted and the defendant excepted.

Mr. Holmes testified as follows: "It was an agreement entered into between the St. Croix Company and the Seacoast Canning Company, whereby the St. Croix Company was to sell what fittings and furnishings were in their factory, the manufactured and unmanufactured stock that was in that factory, for which the Seacoast Company was to pay market prices and invoice price for the fittings and furnishings; that these fittings and furnishings were to be taken to the plant of the Seacoast Canning Company that was to be refitted and operated during the season of 1907, that they were to pack 10,000 cases of the St. Croix Company's brands; that L. E. Holmes was to be superintendent and manager of the plant at a salary

of $1,000 per year, for doing the business; that the Seacoast Company was to finance the proposition and make the collections, and at the end of the season, they were to divide the portions of the net proceeds accruing from the packing of that amount of goods."

The defendant contends in argument that "before the contents of a lost instrument can be introduced in evidence, provided its existence is denied, sufficient evidence must be first produced to satisfy the presiding Justice that such an instrument did at one time exist," that in this case it "had a right to have the question of the existence or non-existence of the document passed upon by the court preliminary to the court's receiving secondary evidence of its contents."

The admissibility of a given piece of evidence is for the Judge to determine. When its admissibility in law depends on some incidental question of fact, this also is for the Judge to determine. 4 Wigmore on Ev. 3590. When secondary evidence of the contents of a document is offered, its admissibility depends upon proof of the former existence of the document, and that it has been lost or destroyed or has become inaccessible, and as well upon proof that the requisite diligence has been used and efforts made to find and produce the document. These preliminary questions are all for the court. Whether it is sufficiently shown that the document has been lost or destroyed, and whether proper efforts have been made to find and produce it, are questions addressed to the discretionary power of the court, and if there be no apparent abuse of his authority, his determination, as in all cases of discretionary authority, is final and conclusive. *Camden* v. *Belgrade,* 78 Maine, 204. This is a rule of practice in matters of evidence to be administered according to the discretion of the court. It is not concerned with the final determination of any fundamental issue of fact between the parties. It relates only to the manner of proof,—how, when, and under what conditions the issue may be proved.

It is also true that before secondary evidence of the contents of a document can be received, it must be proved to the satisfaction of the court that such a document once existed. But that does not mean that the court's preliminary determination is final and conclusive. It merely means that the court must be satisfied that there is sufficient evidence on the issue to go to the jury. To determine

whether an alleged contract which is the basis of a suit exists in fact might be, and often would be, to determine the only fundamental issue of fact in the suit; in other words, determine the suit. It would invade the constitutional province of the jury. To determine whether there is sufficient evidence of its existence to go to the jury is an exercise of discretion which is within the province of the court. In *State* v. *Robinson,* 146 Mass., 571, the court said: "A consideration of the nature of the question which is presented to the court when it is called upon to decide upon a preliminary question of fact, in order to determine whether offered evidence shall be received, will show that its determination reaches no further than merely to decide whether the evidence may or may not go to the jury. . . . It is only necessary that there should be so much evidence as to make it proper to submit the whole evidence to the jury." That was a criminal case, but the principle is the same in civil cases.

The court is to be satisfied that there is sufficient relevant evidence to go to the jury. To what extent the court will hear evidence on the preliminary question is discretionary. It may permit cross-examination. It may hear the evidence on both sides, or not. But in the end, in a case like this, it determines only whether the evidence of the existence of the document is sufficient to go to the jury. The final determination is for the jury. It is not necessary that the court make and announce its determination in so many words. A ruling to admit the secondary evidence involves necessarily a finding that the preliminary question of fact is sufficiently proved to make the evidence admissible. The defendant can take nothing by the exception.

To understand the merits of the case under the motion for a new trial it is necessary to state some preliminary history. Prior to 1905, the Robbinston Packing Company, in which Mr. Holmes and his family were interested, became insolvent, and assigned for the benefit of its creditors. Mr. Holmes likewise assigned. The International Trust Company, of which Mr. Curran was president, was a large creditor. Evidently with a view to protect the interests of the Trust Company, Mr. Curran became interested in the settlement of the estates under the assignments. In the end, a settle-

ment was reached under which the assignees conveyed the estates in their hands to Mr. Curran, and Mr. Curran on his part assumed certain obligations to the creditors. Thereupon the plaintiff corporation was organized in 1905 to carry on the canning business with the old plant of which Mr. Curran had the title. No property was conveyed to the plaintiff. Apparently it had no assets. The funds necessary to fulfil Mr. Curran's obligations to the creditors of the Robbinston Packing Company under the arrangement with the assignees were for the larger part, if not wholly, obtained from the Trust Company on notes of the plaintiff, endorsed by Mr. Curran. Mr. Curran appears to have been the only responsible party on the notes. The plaintiff operated the plant in 1905 and 1906, the latter year, nominally under a contract to operate it for Mr. Curran. From time to time Mr. Curran took bills of sale from the plaintiff to cover such property as the plaintiff had added to the plant and stock, in substitution for such property as the plaintiff had used or sold in its operations. So that in April 1907, Mr. Curran had the legal title to all the property in and about the plant. But Mr. Curran admits that the original conveyance to him was made to secure him for his liability on the obligations assumed by him on the notes or otherwise, and that the subsequent conveyances and contracts with the plaintiff were made for the purpose of securing him more completely. And he says that by virtue of the original arrangement between him and Mr. Holmes, if the property should be ultimately sold for more than enough to cover his, Curran's, obligations and advancements, if any, any balance remaining would equitably belong to Mr Holmes. And he denies that the plaintiff corporation, which was not in existence at the time he settled with the assignees and took title to the property, was in any way a party to this equitable agreement, and that it was not entitled to the benefits thereof. As to essentials thus far, there is litttle or no dispute. It was while matters were in the situation thus stated that the plaintiff claims that the contract was made, about which Mr. Holmes testified, and which is the basis for most of the plaintiff's claims embraced in this suit.

The defendant denies that any such contract was ever made. Mr. Holmes testifies that Mr. Curran and Mr. McCall were both present

when it was made, that Mr. Curran drafted it and Mr. McCall signed it. Mr. Curran and Mr. McCall both testify that no such contract was ever made or signed. On the contrary, they both say that on May 6, 1907, a contract in writing was executed between Mr. Curran, as owner of the factory at Robbinston, and the defendant by its vice-president, Mr. McCall, whereby it was agreed that the defendant should take possession of the Robbinston plant and supplies and use them in packing sardines during that season, that the defendant should pay Curran for shooks and supplies taken by it at the market rates, that the defendant should have the right to pack and sell goods under the brands used by the plaintiff, or otherwise as it saw fit, and that at the end of the season the profits of the season were to be divided equally between Curran and the defendant.

Such a contract as the one described was introduced in evidence. Though Mr. Curran and Mr. McCall both testify that Mr. Holmes was present when it was executed, Mr. Holmes denies it. He says he never heard of this contract until the case came on for trial. But the defendant introduced in evidence a writing, admittedly signed by Mr. Holmes, for the plaintiff, in which the contract between Mr. Curran and the defendant is distinctly referred to, and in which "the St. Croix Company agrees that the brands heretofore packed by it may be packed under said contract [of Curran] with the Seacoast Canning Company and assents to all the conditions of said contract so far as the same in any way affects the St. Croix Company." And it may be said here that except in the particular of the sale of the fittings, furnishings and stock manufactured and unmanufactured, which Mr. Holmes testified was embraced in the contract he signed, and of which some items were embraced in the Curran contract, the two contracts would work out essentially the same result. For the profits of the Curran contract, under Mr. Curran's version of his understanding with Mr. Holmes, would in equity have belonged to Mr. Holmes, and Mr. Curran would have been accountable to him for them. And except in name and legal entity, Mr. Holmes seems to have been the St. Croix Company. Mr. Holmes attempts to explain how he came to sign the writing of assent, dated May 6, quoted above. He says that paper "was given

simply as security to protect Mr. Curran on his endorsements." But the explanation does not explain. Whatever the purpose may have been, the point of this evidence is that it shows that Mr. Holmes when he signed the writing, whether on May 6 or some other time, had knowledge of the Curran contract, and assented to it.

Upon the whole evidence, the fact that Mr. Curran was the legal owner of the property, the contract itself, the testimony of Mr. McCall and Mr. Curran, supported and emphasized by Mr. Holmes' written assent, we can entertain no doubt that the Curran contract was made and executed on or about its date. To conclude otherwise would be absolutely to disregard the effect of evidence, which the court will not do, and the jury have no right to do.

As already shown the two alleged contracts embrace for the most part the same subject matter, and as to matters embraced, they are inconsistent. It could not have been intended that both should be in force at the same time. Starting then with the premise which we find established, that the Curran contract of May 6 was made and signed by the parties to it, we are forced to take one of two alternatives, either that there was no prior existing contract, or if there was, that the Curran contract was intended to be substituted for it. Either conclusion is fatal to the plaintiff's contention. It is true that the Curran contract was afterwards repudiated by the management of the Seacoast Canning Company, and was thereupon cancelled by Mr. Curran. But that did not revive the prior contract, if any such there was.

We have not overlooked the fact that in April, 1907, there were various conferences and negotiations among the parties interested looking to the taking over and the operation of the St. Croix plant by the defendant, nor that Mr. Holmes testifies that prior to May 6 he had begun to move, or to prepare to move material and stock from the St. Croix factory to the defendant's. It may well be that the parties confidently expected that a satisfactory arrangement would be made, and, in the interest of time, anticipated the execution of the formal contract. The plaintiff claims that the conduct and correspondence of the parties are strong confirmatory evidence of the contract which Mr. Holmes says was made. But however that may be, we must find that all prior understandings and negotiations

were merged in the contract of May 6. That this was so strong corroborative proof is found in that fact that Mr. Holmes, writing to Mr. Curran, October 24, 1908, and urging him to get a settlement with the Seacoast Company, and to collect what was due from it for goods for which it was accountable, and thus "get rid of an interest account that is slowly eating the property up," makes no mention of any claim for profits under his alleged contract.

Our conclusion then is that the jury were not warranted in finding that any contract was in existence after May 6, except the Curran contract. But for reasons already stated, that contract was never performed. It was abandoned. It follows that the basis of the plaintiff's claim for the price of goods sold and delivered, as under the alleged April contract, and for a share of the profits for the season of 1907 is shattered. And the case discloses no evidence to support the claim in the third and fourth counts of the writ, based on a subsequent contract by the defendant to can 10,000 additional cases of sardines.

But the defendant did receive several thousand dollars' worth of goods and stock from the St. Croix plant which it was bound to pay for to somebody. Since the April contract, if made, was no longer in force, we look further for the evidence of a sale. And we think it clearly appears that after the Curran contract was cancelled, the parties made new arrangements. The defendant purchased of Mr. Curran a large amount of material and stock, at prices agreed upon between them. And Mr. Holmes went to work for the defendant as foreman at $18 a week, instead of as superintendent at $1000 a year, as he says the original contract stipulated. Mr. Curran, holding the legal title, had the right to sell, and to agree upon a price, and his sale was valid as to the purchaser, without notice of any equitable infirmity in his title. Besides Mr. Holmes testifies that Mr. Curran was acting for the plaintiff in all this matter. So that whether he sold as owner, or sold as agent, his acts were valid as to third parties, in the absence of any proof of fraud. If Mr. Curran exceeded his authority, the plaintiff must look to him. It appears that the defendant paid Mr. Curran the agreed price, and that Mr. Curran applied it in reduction of the obligations he was under as endorser for the plaintiff. Later the

balance of the obligations of Mr. Curran was paid by Mr. Holmes, or for him, and Mr. Curran released the property he had held as security. In January, 1909, a full settlement was had between Mr. Curran and Mr. Holmes. Finally, in May, 1912, five years after the original transaction, and nearly five years after any possible breaches of any contract, this suit was brought.

The jury found for the plaintiff for every one of its claims, proved or unproved. We think the verdict was unmistakably wrong. Whether it was due to misunderstanding of the facts, or of the law, or due to prejudice, we have no occasion to inquire.

It is unnecessary to consider the remaining exceptions.

Motion for a new trial sustained.

ROBERT H. GRAY *vs.* MAINE CENTRAL RAILROAD COMPANY.

Penobscot. Opinion April 1, 1916.

Contributory Negligence. Damages. Evidence.

Action brought to recover damages for injuries sustained by reason of the alleged negligence of the defendant. Heard on defendant's motion for new trial and on exceptions.

Held:

1. Evidence is incompetent if not fit for the purpose for which it is offered. For evidence to be fit, it must conform to proper standards. Irrelevant evidence indicates that kind of incompetence which results from having no just bearing on the issue. If not barred by these rules the evidence is not to be excluded on the ground of incompetence or irrelevancy.
2. As to intrusion upon the special field of the jury by conclusions of witnesses, no hard and fast rule can well be applied. As to receiving conclusions of the witness, it is a sane and salutory proposition that the fact that a given mental act assumes the phraseology appropriate to a conclusion is by no means sufficient to insure its rejection. Administration looks not only at the appearance, but penetrates through that into the reality, the essential nature of that which it is proposed to submit to the

tribunal. It will scrutinize, not the form of language, but the nature of the subject matter with which the reasoning deals, in what ways these are related to the province of the jury or of the court, and how largely a matter of speculation or guess work the so-called opinion quoted is. Should the facts involved, the observations made, be comparatively few and simple and lead, in the judgment of all reasonable men, to but one necessary inference, the conclusion will be received, whatever may be the language in which it is couched. It is, in main, a matter of fact, and will be so treated.

3. Testimony of acts offered, not for the purpose of showing custom among men, but to show knowledge, or opportunity for knowledge, on the part of defendant, and the corresponding care necessary, is admissible.

Action by Robert H. Gray, an infant under the age of twenty-one years, who sues this action by Belle A. Gray, his next friend, to recover damages on account of the injuries received by plaintiff, through the alleged negligence of defendant. Plea, general issue. Verdict for plaintiff. Exceptions and motion for new trial filed by defendant. Motion and exceptions overruled.

Case stated in opinion.

Morse & Cook, for plaintiff.

Fellows & Fellows, for defendant.

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

PHILBROOK, J. This is an action brought to recover damages for injuries sustained by reason of the alleged negligence of the defendant. The plaintiff recovered a verdict of three thousand two hundred sixty-six dollars and sixty-seven cents. The defendant comes to this court upon the customary motion for a new trial, and also upon exceptions to the admission of certain evidence.

The defendant operated its cars upon a side track leading by the doorway of a mill in which the plaintiff was employed. On the day of the accident a box car had been placed opposite this doorway and the plaintiff, with fellow workmen, was engaged in taking shooks from the mill and loading them in the car. The shooks were being piled in both ends of the car and when the loading was partially completed the defendant, by its yard crew, attached a locomotive and other cars to the car in which the loading was being done, for the purpose of placing another car upon another side

track. The plaintiff and his fellows entered the car which they were loading in order to hold up the shook piles and thus prevent them from falling when this car was coupled to another car in being moved from and returned to its place opposite the doorway. The testimony appears to establish the fact that this car was wider than those ordinarily used by the defendant. It also appears that the defendant had permitted a coal shed to be erected by another corporation with beams projecting so near the side track that this wider car, in passing those beams was struck by one of them. Just before the collision the plaintiff looked out of the moving car, as he says, "to see when we got to the other car so I could hold my boxes so they wouldn't knock them over." The car door was on the outside of the car and the contact between the car and the beam was upon the edge of the car door, closing it with sudden violence, catching plaintiff's head between the door and door jamb, and inflicting serious injuries.

EXCEPTIONS.

1. Subject to objection by the defendant, the foreman of the crew in which the plaintiff worked was asked whether the men were in the performance of their duty in the car when the accident happened, and what would have happened to the shooks if the crew had left the car when the engine was coupled and the shifting took place. The objection was based upon the ground that the questions were incompetent and irrelevant, and as calling for conclusions within the province of the jury. Evidence is incompetent if not fit for the purpose for which it is offered. Irrelevant evidence indicates that kind of incompetence which results from having no just bearing on the issue. But for evidence to be fit it must conform to proper standards, and so, when the objection is made that the questions called for conclusions within the province of the jury, then, if this be true, the objector has only specified under a generic term. Were these questions relevant? Did they bear upon the subject or issue? Clearly yes, for the defendant raised the issue, as part of its defense, whether the plaintiff was properly and lawfully in the car, and if so whether he was there as a mere licensee or otherwise. Were the questions incompetent, not conforming to proper standards, because they called for conclusions within the province of the jury? As to intrusion upon the special field of the

jury by conclusions of witnesses there has been much discussion but, as one writer has said, "No hard and fast rule, so dear to the heart of formal or technical procedure, can well be applied." As to receiving conclusions of the witness, this sane and salutory proposition seems to be applicable to the case at bar. "As is abundantly illustrated by the decisions, the fact that a given mental act assumes the phraseology appropriate to a conclusion is by no means sufficient to insure its rejection. Administration looks not only at the appearance but penetrates through that into the reality, the essential nature of that which it is proposed to submit to the tribunal. It will scrutinize, not the form of language, but the nature of the subject matter with which the reasoning deals, in what ways these are related to the province of the jury or of the court, and how largely a matter of speculation or guess work the so-called opinion quoted is. Should the facts involved, the observations made, be comparatively few and simple and lead, in the judgment of all reasonable men, to but one necessary inference, the conclusion will be received, whatever may be the language in which it is couched. It is, in main, a matter of fact, and will be so treated." *Chamberlayne on Evidence,* Vol. III, sec. 2301 and cases there cited. Applying this rule to the objection under discussion it would seem plain that the evidence was properly admitted.

2. Objection was also made to the admission in cross examination of certain questions addressed to and answered by a witness called by defendant, upon the claim that those questions related to customary acts of others, and in support of this objection the defendant cities *Swasey* v. *M. C. R. R. Co.,* 112 Maine, 399. The testimony was not offered for the purpose of showing custom but to show knowledge that men were in the cars, or opportunity for knowledge, on the part of the conductor of the train, and the necessity of corresponding care. This objection fails for the evidence was properly admitted upon the latter grounds.

MOTION.

The defendant urges not only that its negligence was not established but that the evidence shows contributory negligence on the part of the plaintiff. The charge of the presiding Justice is not made part of the case and we must therefore assume that appro-

priate instructions were given upon those elements. Under those instructions the jury has found its verdict in favor of the plaintiff. That the damages are excessive is also urged. While the court might have assessed those damages in a smaller sum, if the decision was primarily addressed to that tribunal, yet the questions of negligence and amount of damages are facts properly within the forum of the jury and we are not convinced of such manifest error on the part of the jury findings as to require us to disturb them.

Motion and exceptions overruled.

R. A. L. COLBY *vs.* J. W. WHITE COMPANY.

Androscoggin. Opinion April 1, 1916.

Negligently Leaving Property in Unsafe and Dangerous Condition for Travelers.

The superintendent of a factory directed a crate to be placed against the building in such a position that it could be blown over by the wind. It was blown over in the morning, and an employee lifted it up against the building again, leaving it to get nails and a hammer to secure it. The superintendent about that time came to the factory, and, though the wind was blowing heavily, he took no precautions to secure the crate and protect passers-by. Held, that he was guilty of negligence chargeable to the owner of the factory.

Action on the case to recover damages for personal injuries sustained by plaintiff through the alleged negligence of the defendant. Plea, general issue. Verdict for plaintiff. Motion for new trial filed by defendant. Motion overruled.

Case stated in opinion.

McGillicuddy & Morey, for plaintiff.

John A. Morrill, for defendant.

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

HALEY, J. This is an action on the case to recover damages for personal injuries. The verdict was for the plaintiff for $1504.16, and the case is before this court on a motion for a new trial. The defendant corporation is a manufacturer of windows, doors, blinds, etc., and its building where the accident described in the writ took place is situated on Main street, at the end of the North Bridge, so called, and on the right hand side of Main street going from Auburn into Lewiston. There is a platform about six feet wide, measured from the inside of the sidewalk to the building. The sidewalk extends from the bridge along the right hand side of Main street to Lisbon street, over which sidewalk there is a large amount of travel. The defendant was in the habit of receiving large plates of glass, crated, and standing the crates on the platform near to the building until the glass had been removed, and some time afterwards removed the empty crates to some place for storage. On the night of May 26th, 1915, and on the night before, the defendant left standing, leaning against the building two crates of glass, and leaning against them an empty crate from which the glass had been removed. The empty crate was sixty inches wide by eighty-three inches long and weighed between one hundred and forty and one hundred and fifty pounds. It was so placed that if it fell over it would fall upon the sidewalk for a distance of about three or four feet. The plaintiff was a man thirty-four years of age and resided in Auburn, and at the time of the accident, (May 27th), was working for the New England Telephone and Telegraph Company, and had been so employed for three and a half years prior thereto. At about 6.30 o'clock on the morning of the accident there was a strong wind, blowing with sufficient force to throw the empty crate down on the sidewalk, and just before seven o'clock one of the employees of the defendant, who was a glazier on his way to work, discovered the crate across the sidewalk, and, with the assistance of another man who was passing, placed the crate in the same place and position that it was before it fell, and went into the shop to get a hammer, nails and a piece of wood to fasten the crate so that it would not again blow over. While Mr. Goss, the employee who set up the crate from the sidewalk as above, was in the shop, Mr. Gammon, the superintendent of the defendant company, who, in the absence of Mr. White, had full authority in and around the

premises and who the night before, with the assistance of some of the men, placed the empty crate on the platform in the same position that it was before it had blown over, came to work, and, passing the crate standing as he left it the night before, went into the shop and took off his coat when he heard a noise and looking out of the window saw the box down on the sidewalk, during which time the plaintiff passed along on the sidewalk on his way to work and the box fell, by reason of the strong wind, off the platform on to the plaintiff and crushed him to the ground and he received the injuries for which this action is brought.

The testimony of the witnesses as to the occurrence of the accident, and as to the facts which caused the accident, are uncontroverted. It is claimed by the defendant that Mr. Goss, the employee of the defendant, when he removed the crate from the sidewalk and set it on the platform where Mr. Gammon, the superintendent, had left it the night before, was not acting within the scope of his employment, that he was a mere volunteer, and for his negligence in leaving the crate in the dangerous position in which it was, the defendant is not liable. It is not necessary in ruling upon the motion, to determine whether the employee Goss was a servant of the defendant or a volunteer, as the evidence clearly shows the liability of the defendant, even if he was a volunteer.

That the empty crate was placed in an unsafe position and was liable to fall upon the sidewalk and injure travelers passing along the sidewalk is too plain for argument. The plaintiff was lawfully passing along the sidewalk and was injured by the crate falling from the platform to the sidewalk. It is true that the crate had fallen a short time before this accident and had been replaced in the same place and in the same position that it was left by Mr. Gammon, the superintendent, the night before. A few minues before it fell upon the plaintiff Mr. Gammon passed it and went into the office of the company. It was then in the same dangerous position that he had left it. The wind had increased, and it was blowing so hard that it could and did blow it over; seeing it there in that high wind and unsafe position he left it there and went to the office to remove his rain coat. He should have known that there was danger of its falling. It was his duty, representing the defendant and exercising the care of an ordinary prudent person, to have removed it or

placed it in a position that it would not fall upon innocent passersby. He thought it was in the same situation that he had created when he placed it there not securely fastened. Even the employee Goss went for a hammer, nails and a board to nail it so that it would be safe. The situation was such that Goss knew that it was not safe, and the jury were justified, from the admitted facts, in finding that the defendant's superintendent, in the exercise of due care, should have known that the crate was not securely placed upon the platform, was in such position with the wind blowing as it was, that there was danger of its falling upon people using the sidewalk, and that it was his duty to have placed it in a safe position by laying it flat upon the platform until it could have been securely fastened, or removed from the platform, and when he went to the office of the company leaving it in that position, with no one to guard it, or to warn the passersby, he did not exercise due care, and if he had done so, the accident would not have happened.

Motion overruled.

BRUCE KITTREDGE, By Pro Ami, *vs.* WILLIAM O. FROTHINGHAM.

Franklin. Opinion April 1, 1916.

Arrest and Detention. Declaration or Statement of Deputies as Binding upon Sheriff. Duties of Officers having Reasonable Grounds to believe that a Felony has been committed.

A man closely resembling the plaintiff had committed a felony by raising or forging a check given to him in payment of his labor. Warrant was issued for the man's arrest and the plaintiff, while riding on a train, was noticed by the man whose check was forged, he calling the deputy sheriff's attention to the similarity of description. This deputy telephoned to another deputy, in an adjoining town, to arrest the plaintiff when he arrived there and hold him for identification.

It was admitted in evidence that the description given to the officer of the man who had committed the felony fitted the plaintiff very closely in minute detail.

Plaintiff was detained by deputy sheriff at about noon of that day. In the afternoon of the same day, he was locked in a cell and as soon as the parties could reasonably reach the place of detention, the plaintiff was found not to be the man wanted and was released. Evidence showed that the plaintiff was confined less than twenty-four hours.

In suit brought against sheriff for the alleged wrongful detention and arrest by his deputy, held:

1. That the officer, acting in a reasonable manner and having reasonable grounds for suspecting the plaintiff to be the person wanted, and having used all necessary and reasonable means to obtain the identification of the plaintiff within a reasonable time, was not liable for his detention and arrest.
2. That the sheriff and his deputies, so far as the performing of lawful acts are concerned, are considered one and the same and the sheriff is liable for the misconduct and wrongful acts of his deputy, while the deputy is performing his official duties, but they are not agents of each other, only so far as they are authorized and required by law to aid and assist each other in the performance of their official duties.
3. The declaration of an agent, to be binding upon his principal, must be made by the agent when he himself is engaged in transacting the business of his principal and is acting within the scope of his authority.

Action on the case to recover damages for alleged false arrest and imprisonment. Plea, general issue and brief statement. Verdict for plaintiff. Defendant filed exceptions and motion for new trial. Certain exceptions allowed. Motion sustained. New trial granted.

Case stated in opinion.

Elmer E. Richards and Kenneth A. Rollins, for plaintiff.

Albert Beliveau, for defendant.

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

HALEY, J. An action against the sheriff of Oxford county for the alleged unlawful arrest and imprisonment of the plaintiff by his deputy, Everett M. Bessey. The verdict was for the plaintiff, and the defendant brings the case to this court upon exceptions and a motion for a new trial.

The record shows that the last of July, 1914, a laborer known as Barbrick worked in the woods for Mr. Hastings of Auburn, and the foreman gave an order for Mr. Hastings to pay him for his

labor. Mr. Hastings made a check and gave it to his clerk, and the clerk turned it over to Barbrick. When the check was returned as paid the first of August it was discovered that it had been raised from $7 to $17. Immediately Mr. Hastings obtained a warrant from a trial justice at Gilead for forgery, and a description of the man Barbrick was given by the foreman under whom he worked in the woods, and the warrant was placed in the hands of a deputy sheriff for service. On the 8th day of August Mr. Hastings was on the train from Gilead to Auburn, and observed the plaintiff leave the train at Bryant's Pond, and called the attention of Mr. Atketts (Arkett), a deputy sheriff, to him, and stated that he believed he was the man that he wanted apprehended, and related the circumstances of the alleged forgery. As the train pulled out from Bryant's Pond they both saw the plaintiff take the public conveyance plying between Bryant's Pond and Rumford. They both thought that the man answered the description of Barbrick which had been given to Mr. Hastings, and Mr. Hastings asked the deputy sheriff to telephone, or have the sheriff telephone, to Rumford to detain the plaintiff until it could be determined if he was the man wanted by the name of Barbrick. Upon the arrival of the plaintiff at Rumford, Mr. Bessey, from an examination, concluded that the plaintiff answered the description that had been telephoned him, and asked him to go to the police station, stating that he had instructions from the sheriff at Bryant's Pond that he wanted a man of his description. The arrest, or detention, was at about noon on Saturday. The plaintiff was not imprisoned until the latter part of that afternoon. As soon as the plaintiff and the deputy Bessey had taken dinner at a restaurant, Mr. Bessey communicated with Mr. Atketts and also Mr. Hastings, but before he could reach Mr. Hastings he was obliged to telephone to several dfferent places, and when Mr. Hastings was finally located he was at Auburn, and he said he would be there with some one to identify the plaintiff, if he was the man Barbrick, as soon as possible. The next day, between twelve and one o'clock, Mr. Bessey was called away on business, and having ascertained that Mr. Hastings was coming, told the chief of police that he had been in communication with Mr. Hastings, who would be there shortly, and if he did not come before he, Bessey, left, to take charge of the case and if the

man was not identified as Barbrick, to allow him to go. Mr. Hastings, when informed by telephone that a man was arrested and requested to come to identify him, stated that he could not personally identify him, but that he would get his foreman who hired him, and the clerk in the store, and come to Rumford as soon as he could. He took the 2.30 train from Auburn, went to Gilead, and thence by team to Hastings, and took an auto and found out that the foreman who had hired Mr. Barbrick was on a farm in Masontown some ten miles away. He took the clerk in the store and started for Masontown. On the way he met with an accident to his machine, so that after having obtained the foreman they could not reach Rumford until two or three o'clock in the morning, and so they put up that night and went to Rumford the next forenoon, arriving there between twelve and one o'clock, and immediately they went to the police station and the foreman and clerk declared that the plaintiff was not the man Barbrick, and he was released. The testimony is that the plaintiff answered the description given of the man Barbrick, even to the color of his shoes.

The first exception was to allowing the plaintiff to testify to a conversation made by Thomas W. Penley, a deputy sheriff, after listening to the plaintiff's story while he was in the police station, not in the presence of the sheriff, the nominal defendant, or in the presence of Everett M. Bessey, the real defendant. The plaintiff seeks to justify the admission of the testimony by the claim that a sheriff's deputies are his agents, that the law regards the sheriff and his deputies as the same officer. They are the same officer as far as the performing of lawful acts are concerned, and the sheriff is liable for the misconduct or wrongful acts of his deputy while the deputy is performing official business, but they are not agents of each other only as they are authorized and required by law to aid and assist each other in the performance of their official duties. The question at issue was whether or not Mr. Bessey was guilty of any wrongful act in detaining the plaintiff as he did? That was a question to be settled by the jury from the evidence in the case and the opinion or statement of another deputy sheriff, however, strongly expressed, if not in the presence of Mr. Bessey, was not admissible as tending to prove Mr. Bessey

guilty of the alleged wrongful acts. Even if Penley had been an agent of the sheriff, he would not have been an agent of Bessey with authority to bind Bessey by his statements. The arrest was made by Bessey, and it was for the arrest and detention of the plaintiff that this action is brought, and by no process of reasoning can it be made to appear that Penley's statements were admissible, even as claimed by the plaintiff, as an agent of the sheriff, or the defendant, because the declarations of the agent to bind the principal must be made by the agent when he himself is engaged as the agent in the transaction of his principal being investigated. Penley was not so engaged, but was a mere spectator. The testimony admitted was not in the presence of the sheriff or Mr. Bessey, so that they might reply or deny or explain the circumstances or conclusions expressed in that conversation. It was the statement by a witness who knew nothing as to the circumstances of the crime or the arrest, except as he had been informed by others than the sheriff or deputy sheriff Bessey. It was not even hearsay evidence, which would not be admissible, but was the opinion of a witness as to the guilt or innocence of the deputy Bessey upon hearsay evidence, and no legal reason can be given for its admission. Exception sustained.

Exceptions 2, 3, 7, 8, 9, 10 and 11 all relate to conversations between the plaintiff, his brother Glen Stevens and Thomas W. Penley, the deputy sheriff above referred to, all of which tends to show efforts to have the plaintiff released from arrest before Mr. Hastings could arrive with witnesses to determine whether the plaintiff was the man Barbrick, and to their conversation with said Penley, all of which was in the absence of the sheriff and his deputy Bessey. Some of the evidence being merely to the fact that they were present and heard the conversation of the deputy sheriff and other conversations would be immaterial as they did not state the conversation, if it did not tend to support the inadmissible testimony of the deputy Penley, but as it tended to prove the truth of the inadmissible testimony it is, as frankly stated by counsel in their brief, governed by the same rules that apply to the first exception and must be sustained.

Exception 4 was to the excluding of the question asked deputy sheriff Atketts, "That description, as far as you saw Mr. Kittredge,

did it fit him in any way?" There was no error in excluding the question. The witness could have been asked what description was given him of Mr. Kittredge, and what he observed about Mr. Kittredge, that corresponded with the description, and the jury might then have determined for themselves whether the description fitted him or not. The question called for the opinion of a witness, which was not proper under the circumstances disclosed. Exception overruled.

Exception 5 was to the exclusion of the question asked deputy Bessey by his counsel, "Did you do everything in your power to ascertain the identity of Bruce Kittredge?" The question was properly excluded. It called for the opinion of a witness as to his own acts, which was something the jury were to pass upon. It would have been proper for him to have stated all that he did to ascertain the identity of Mr. Kittredge, and the jury could have determined, under the instructions of the court, if he did all the law required of him. Exception overruled.

Exception 6 was to admitting the following question and answer: "Did you have any conversation with Mr. Cobb while you were there? Answer. Yes." This was in the absence of the defendant and deputy sheriff Bessey, but the fact that he did have conversation with Mr. Cobb, the conversation not being testified to rendered the testimony immaterial, and it was harmless error. Exception overruled.

The next two exceptions are to the refusal by the presiding Justice to give two requested instructions, the first of which being as to the right of an officer to arrest a person when he has reasonable grounds for suspicion that a felony has been committed. The court fully instructed the jury upon that branch of the case and the defendant was not prejudiced by the refusal of the Justice to repeat instructions which he had already given, in different words it is true, but the same in meaning.

The court also refused to instruct the jury: "I instruct you that in this case you are not to consider the question of exemplary damages." It was a question for the jury to say whether the arrest and detention of the plainiff, if illegal, had been committed so unreasonably, recklessly, wantonly or maliciously that the plaintiff was entitled to exemplary damages. Exceptions overruled.

Motion. The evidence clearly shows that a felony had been committed by the raising of a check of Mr. Hastings. The check was payable to and delivered to one Barbrick. A warrant had been issued by the court having authority to issue it, ordering the arrest of said Barbrick. It was the duty of the defendant and his deputies to be vigilant in their search for the man Barbrick named in the warrant. The officer necessarily, under such circumstances as disclosed in this case, must exercise his judgment in the arrest of a person for the crime charged in the warrant, for, as said by the court in *Rohan* v. *Sawin,* 59 Mass., 281, "The public safety and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrest should be made without warrant by officers of the law. . . . It is only necessary (for the defendant) to show that upon representations made to him of the commission of a felony, and other circumstances coming to his knowledge, he has reasonable grounds to suspect the plaintiff of having committed the crime of receiving stolen goods, knowing them to be stolen." See *Burke* v. *Bell,* 36 Maine, 317; *Palmer* v. *M. C. R. R. Co.,* 92 Maine, 399.

Did Everett M. Bessey have reasonable grounds to suspect the plaintiff of having raised a bank check? He was informed by a telephone message from another officer, whose duty it was to arrest the person who was alleged to have committed the felony, of the circumstances of the crime, of the warrant being issued and a description of the man Barbrick, and that the plaintiff was on the conveyance which would arrive at Rumford at about noon, that the man answered the description which he gave to Bessey of the person wanted for the crime, and requested that Bessey detain him, if he answered the description, that it might be determined if he was the man wanted. The description of the man's wearing apparel, as well as his personal appearance, answered in every detail the description received by Bessey. The information was given deputy Bessey by one who was in charge of the case, and, coming from a reasonable prudent man, an officer whose duty it was to arrest the person named in the warrant, it was not only the right of Bessey but his duty to arrest the plaintiff and hold him for the purpose of identification. An officer receiving the communication received by Bessey should apprehend the person

answering the description and hold him a sufficient length of time to properly investigate and ascertain whether the person arrested was the person named in the warrant. Were it otherwise persons who commit felonies and escape from the place where the crime was committed, could keep moving from town to town, and an officer would have no right to arrest and hold them for the proper person to come and identify them as the felons. Everything was done by deputy Bessey that he could do to ascertain whether the plaintiff was the man named in the warrant. He telephoned to Mr. Hastings, whose check had been raised, and was informed that Mr. Hastings, as soon as he could do so, would go to Gilead or Hastings and obtain the clerk and the foreman who could identify the plaintiff, if he was the man Barbrick, and the plaintiff was only detained a sufficient time for that to be done, and as soon as it was determined by the clerk and the foreman that the plaintiff was not the man Barbrick, he was immediately discharged from arrest.

There is nothing in the case which authorizes an inference that the deputy Bessey omitted to do anything that he could reasonably have done to ascertain whether the plaintiff was the man named in the warrant or not, or that he detained him longer than necessary to determine that he was not the person named in the warrant. Complaint is made that the plaintiff was confined in jail; but officers when they arrest men for felonies must confine them somewhere, and it appears that as long as the deputy Bessey could avoid doing so he did not lock the plaintiff up, but allowed him to remain with him, but when obliged to attend to other business he placed him in a place provided by the authorities for the detention of persons suspected of crime, and, although it was humiliating to the plaintiff to be so detained, it is necessary that an officer should have that right when they have reasonable grounds to believe that a felony has been committed and that the person detained is guilty of the felony. Being authorized by the law to do so, they are not liable in damages, when they only do the acts althorized by law.

Exceptions 1, 2, 3, 7, 8, 9 10 and 11 sustained. Motion sustained. New trial granted.

MEMORANDA DECISIONS

CASES WITHOUT OPINIONS

GEORGE C. NICHOLS *vs.* JOHN SONIA.

Sagadahoc County. Decided October 9, 1915. Action of slander in which the principal averment of the declaration is: "You (meaning the plaintiff) are certainly a damned fool. You (meaning the plaintiff) lied under oath in your case against me (meaning the defendant) in the lower court." A general demurrer to the declaration was sustained and the case comes up on exceptions to that ruling.

The exceptions must be overruled. The declaration is clearly defective for want of a sufficient averment of the particular court wherein, and of the specific proceeding in relation to which, the alleged false swearing occurred.

In *Small* v. *Clewley,* 60 Maine, 262, which was an action for slander based on an alleged accusation of false swearing, Walton, J., speaking for the court, said: "The averment must be specific, naming the particular court, or tribunal, or officer, or matter or thing in relation to which the alleged false swearing is said to have taken place, or it will not be sufficient." Exceptions overruled. *F. P. Sprague,* for plaintiff. *E. W. Bridgham,* for defendant.

GEORGE B. ROGERS *vs.* THOMAS KELLEY & COMPANY.

Androscoggin County. Decided October 21, 1915. This is an action to recover damages for injuries alleged to have been received through the negligence of the defendant while working in defendants' mill at Lewiston, on March 9, 1914. The defendant pleaded the general issue. The jury returned a verdict for the plaintiff for $2250.00, and the defendant filed a motion for a new trial. Motion sustained. *McGillicuddy & Morey,* for plaintiff. *Newell & Skelton,* for defendant.

MORRIS SACKNOFF *vs.* ALBERT DINGLEY.

Cumberland County. Decided November 8, 1915. Action to recover for rent. A verdict of $32.50 was returned. The case comes to this court on a bill of exceptions by the defendant presenting nineteen separate excerpts from the charge of the presiding Justice as erroneous instructions. The evidence and the charge to the jury are made a part of the exceptions. It will serve no useful purpose to make here an extended comment on each of the numerous instructions complained of. We have examined them with care and find no merit in any of them. And it is further to be said that the evidence amply justifies the verdict. Exceptions overruled. *M. L. Pinansky,* for plaintiff. *D. A. Meaher,* for defendant.

ALDEN J. VARNEY *vs.* STEPHEN E. AMES.

Aroostook County. Decided November 27, 1915. An action of assumpsit to recover damages for breach of a written contract

wherein defendant agreed to raise and sell to plaintiff certain merchantable potatoes to the value of $250. Plea, general issue. At the conclusion of the evidence, the case was reported to the Law Court for determination of rights of parties, upon so much of the evidence as is legally admissible. Judgment for defendant. *Ransford W. Shaw,* for plaintiff. *Powers & Guild,* for defendant.

ALMEDA MAXIM, Pro Ami, *vs.* W. A. FRANCIS.

Androscoggin County. Decided November 27, 1915. This is an action on the case to recover damages for the alleged slander of the plaintiff. The verdict was for the plaintiff, and the case is before this court on a motion to set aside the verdict as against law and evidence. Motion denied. *L. T. Carleton,* for plaintiff. *Newell & Woodside, and Clary,* for defendant.

THOMAS P. EMERY

vs.

WATERVILLE, FAIRFIELD AND OAKLAND RAILWAY CO.

Kennebec County. Decided December 10, 1915. This is an action on the case by which plaintiff seeks the recovery of damages from defendant corporation for injuries alleged to have been sustained through negligence of defendant in permitting one of its cars, while proceeding along and upon one of the streets of Waterville, coming in contact with plaintiff. A verdict was rendered in favor of plaintiff for $873.08. Plea, general issue. The

defendant filed a motion for a new trial. Verdict set aside. New trial granted. *Beane & Beane,* for plaintiff. *Johnson & Perkins,* for defendant.

WILLIAM H. GULLIVER, Special Administrator, in Equity,

vs.

WILLARD STROUT, et al.

Cumberland County. Decided December 18, 1915. This is a bill in equity involving the title to certain real estate and an accounting for certain personal property. The determination of these questions depended upon the inquiry whether the defendant, Willard W. Strout, was acting as agent for Mary J. Frazir, the plaintiff's decedent, in the acquisition of the real estate and the management thereof, or in his own behalf.

These questions were fully heard by Charles A. Strout, as special master, who found in favor of the plaintiff.

The defendant, Strout, excepted to the finding of fact, marked in the report, "Finding I" and "Finding II," because they were not warranted by the evidence and were contrary to law; and to Finding V because it was predicated on I and II as to Strout's agency and was not authorized by the evidence and the law applicable thereto.

The cause was then heard on the exceptions by the Chief Justice, who after an exhaustive examination of the evidence sustained the findings of the special master, in regard to the Strout matters and ordered that his report be accepted, and decreed accordingly. From this decree, the defendant Strout appealed. The special master also in his report allowed the defendant Kerr, upon certain promissory notes, which were due him, interest upon interest, or compound interest, to which finding the plaintiff excepted, and the

sitting Justice sustained this exceptions, to which an appeal was taken but not prosecuted.

Accordingly, the only question now before the Law Court is whether Strout's appeal shall be sustained or denied.

A careful examination of the whole matter leads us to the ready conclusion that the decree of the sitting Justice is well founded upon both the law and the evidence and must be sustained. Appeal denied with costs. *Woodman & Whitehouse,* for plaintiff. *Augustus F. Moulton, and Charles E. Gurney,* for respondent Strout. *John C. Warren,* for respondent Kerr.

Memorandum. The sitting Justices at the Portland Law Term, 1915, were disqualified to sit upon this case, except Justices Spear, King and Hanson; and by agreement of counsel, the case was argued before and submitted to the decision of the above three parties.

STEPHEN D. BRIDGES *vs.* GEORGE E. PATTERSON.

Hancock County. Decided December 28, 1915. Action of assumpsit to recover balance alleged to be due on sale of a certain quantity of fish. The verdict was for the plaintiff and the case is before this court on the usual motion for a new trial. There is no controversy concerning the law involved in the case. The issue was solely one of fact and it is the opinion of the court that the verdict of the jury was not so manifestly wrong as to warrant us in disturbing it. Accordingly the entry must be motion overruled. *Fellows & Fellows,* for plaintiff. *W. C. Conary,* for defendant.

In Re Application of JAMES L. TRYON for Admission to the Bar.

Cumberland County. Decided January 3, 1916. It is the opinion of a majority of the court that an applicant for admission to the

bar may be admitted under the provisions of Revised Statutes, chapter 81, section 24, although he is not a resident of this State, provided he possesses the other statutory qualifications. And it is held that the applicant, so far as the question of residence is concerned, is entitled to be admitted to the bar of this State. So ordered. *George E. Fogg,* for applicant. *Clarence W. Peabody, and Philip G. Clifford,* for bar examiners.

ALLAN W. TIBBETTS

vs.

RAFFAELE MURRAY, otherwise known as RALPH MURRAY.

Penobscot County. Decided February 4, 1915. The plaintiff purchased a horse of the defendant in September, 1911, which animal, plaintiff says, was expressly warranted to be free from disease. This horse was brought to plaintiff's stable where it was kept during the subsequent fall, winter, and spring, with other horses owned by the plaintiff. In January, 1912, plaintiff also took to his stable, and kept with his other horses, two horses referred to in the record as the Cyr horses. After the advent of the Cyr horses a disease known as glanders became prevalent among plaintiff's drove which resulted in the death of some, among which was one of the Cyr horses, and by order of the authorities the killing of others, among which was the horse purchased of defendant, this animal being killed after the death of the Cyr horse. Plaintiff thereby sustained loss, to recover which he brought suit, claiming that the horse purchased of the defendant had the disease when purchased and communicated it to his other animals. Among other elements of defense it was strenuously urged that the Cyr horse, and not the one purchased of the defendant, infected the drove and so did the damage sustained. The verdict was for plaintiff, and upon the usual grounds the defendant asks that the

verdict be set aside and a new trial granted. A motion was also filed asking for a new trial on the ground of newly discovered evidence.

We have devoted much time to a careful study of the new evidence, as well as to that offered at the trial. As a result of that study, we are convinced that justice requires the entry to be, Motion sustained. New trial granted.

Justice Spear does not concur.

F. E. Doyle, for plaintiff. *Ira G. Hersey and Charles P. Barnes,* for defendant.

HOMER F. TASKER *vs.* ROSCOE W. AREY.

Penobscot County. Decided February 16, 1916. Action of trespass brought under section 10, chapter 222, Public Laws, 1909, to recover for damages done to property of plaintiff by dog belonging to defendant. The plaintiff, in substance, claimed that while he was driving along the public highway, the dog of defendant jumped in front of the plaintiff's car, striking the wheel and causing it to be overturned. Verdict for plaintiff. General motion for new trial filed. Motion overruled. *U. G. Mudgett,* for plaintiff. *B. W. Blanchard,* for defendant.

NEVA M. STEWART *vs.* W. N. GILBERT AND ANNA D. GILBERT.

Androscoggin County. Decided March 5, 1916. Action of assumpsit to recover the sum of three hundred dollars and interest upon a promissory note signed by plaintiff and other defendants. Plaintiff alleged that she was an accommodation maker, and having paid the note seeks to recover from defendant. Plaintiff discon-

tinued as to one of defendants. Defendant claimed that she was also an accommodation maker. That issue was presented to jury. Verdict for plaintiff in sum of $154.38. General motion filed for new trial. Testimony conflicting, sufficient evidence to support verdict. Motion overruled. *McGillicuddy & Morey,* for plaintiff. *Newell & Woodside,* for defendants.

BYRON GILES *vs.* CARRIE E. ROBINSON AND MYRON W. ROBINSON.

CARRIE E. ROBINSON AND MYRON W. ROBINSON *vs.* BYRON GILES.

Lincoln County. Decided March 8, 1916. These cases grew out of the same transaction and were tried at nisi and argued before the Law Court together. Byron Giles, of Boothbay, brought suit against Carrie E. Robinson and Myron W. Robinson, summer residents of Boothbay Harbor, to recover a balance claimed to be due from constructing a concrete wall across the mouth of the cove, the design of the wall being to make the cove a swimming pool. Carrie E. Robinson brought action against Byron Giles to recover back money paid on account of the work and for other damages. In the discussion of the case Giles will be alluded to as plaintiff, and Robinson as defendant. The questions presented involved issues of fact. The jury found a verdict for the plaintiff, Giles, in each case, and the only question before us is, whether there was sufficient evidence to warrant the jury, if they believed the plaintiff's testimony, to render a verdict in favor of his contention.

But since the argument of these cases at the Law Court, a motion for a new trial has been filed, on the ground of newly discovered evidence, and the testimony taken and presented to the court for consideration in connection with the evidence in the general motion. The plaintiff urges that this evidence is not newly discovered on the defendants' own statement, that "it did not exist at the time of the trial." But the testimony shows that it did exist at the time

of the trial. The quality of the work and material was there in the wall, but could not at that time be seen, nor ascertained by physical examination nor proved by any testimony available to the defendants, as, at that time, the plaintiff, the one knowing the facts, denied any deficiency in the workmanship and material, which time and tide have since revealed.

We are accordingly of the opinion that the motion upon the newly discovered evidence should be sustained and a new trial granted. Motion for new trial on newly discovered evidence sustained. New trial granted. *Hon. Cyrus Tupper, and James B. Perkins,* for Giles. *Hon. A. S. Littlefield,* for Robinson.

I. P. BUTLER *vs.* L. P. HAWKINS.

Cumberland County. Decided March 8, 1916. Action of assumpsit on a promissory note, tried in Superior Court, Cumberland county.

The defendant, if liable at all, was liable as an accommodation maker. The defense was that the note declared upon was not the defendant's note, and that he never signed it. Verdict for defendant. Plaintiff filed exceptions to admission of certain testimony. Exceptions overruled. *E. H. Wilson, and Anthoine & Anthoine,* for plaintiff. *Cleaves, Waterhouse & Emery,* for defendant.

ARTHUR L. GORE *vs.* BERTRAM L. GORE.

Androscoggin County. Decided March 10, 1916. Action of assumpsit upon an account annexed to recover for labor of plaintiff and the use of horses, and also a count for money had and received.

Plaintiff and defendant are brothers. It was admitted that certain plans had been talked over in regard to plaintiff and defendant forming a copartnership. Plaintiff claims that their plans were all abandoned; defendant admits that they were in part, but that the labor performed by plaintiff and his horses, and the money loaned was in furtherance of the partnership plans. Plaintiff claimed that he was working for daily wages although no price was agreed upon, no books or account showing number of days worked. Defendant claimed that the labor of plaintiff, and the use of plaintiff's horses, was offset by defendant's work and use of horses supplied by him. Verdict for plaintiff. Defendant filed motion for new trial. Motion sustained. New trial granted.

Chief Justice Savage and Justice Bird do not concur.

R. W. Crockett, for plaintiff. *Tascus Atwood,* for defendant.

WILLIAM H. MITCHELL *vs.* JOHN H. COTREAU and Trustee.

Sagadahoc County. Decided March 25, 1916. This was an action of tort to recover damages alleged to have been caused the plaintiff's horse by the defendant's dog. The verdict was in favor of the plaintiff in the sum of $200.30. The case is before this court on motion. The issues were simply of fact.

A careful study of the evidence fails to convince the court that the verdict was manifestly wrong. The entry must therefore be, Motion overruled. *Arthur J. Dunton,* for plaintiff. *Edward W. Bridgham,* for defendant.

LILLIAN T. DENSMORE *vs.* GUY L. THURSTON.

Cumberland County. Decided April 1, 1916. Action to recover damages because of defendant's breach of promise to marry plain-

tiff. Engagement continued for twenty-eight or twenty-nine days, when the defendant broke it and notified the plaintiff he could not marry her.

Verdict for plaintiff and damages assessed at $7500. Motion filed by defendant to set aside verdict, and is urged because damages awarded are excessive. Plaintiff was entitled to recover just compensation for her loss and damages by reason of the breaking of the engagement, not damages as a punishment for the defendant's breach of his contract.

A careful reading of the evidence clearly shows that the jury, in the assessment of damages, either misapprehended or disregarded the rule of damages as stated to them by the presiding Justice, as a careful reading of the evidence shows it is impossible to believe that $7500 was not excessive damages. How much the jury were authorized to award it is hard to determine, but it is the opinion of the court that the extreme amount should not have exceeded $3000. If the plaintiff files a remittitur of all above $3000, the mandate will be, "Motion overruled;" otherwise, "Motion sustained and new trial granted." *William H. Gulliver,* for plaintiff. *H. H. Hastings, and McGillicuddy & Morey,* for defendant.

ALEXANDER BILODEAU *vs.* MAINE CENTRAL RAILROAD COMPANY.

Kennebec County. Decided April 3, 1916. In this case the plaintiff seeks to recover damages for the burning of property by a fire communicated by one of the defendant's engines.

There was evidence that, if believed by the jury, and it was sufficiently clear that they were authorized to believe it, that justified the verdict returned. Although the damages awarded are large, yet we cannot say that they are sufficiently large to authorize the court to set aside the verdict. Motion overruled. *Andrews & Nelson,* for plaintiff. *Johnson & Perkins,* for defendant.

GEORGE C. NICHOLS *vs.* GEORGE E. LEGARD.

Sagadahoc County. Decided April 16, 1916. At the December Law Term, 1915, the following entry was made in the above cause: "In writing 40 – 30 – 10 – or overruled."

The time specified in said stipulation for the argument of said cause having elapsed, and neither the printed case nor briefs having been received by the court, the entry must be that the motion and exceptions are overruled for want of prosecution. So ordered. *F. P. Sprague,* for plaintiff. *E. W. Bridgham,* for defendant.

QUESTIONS AND ANSWERS

QUESTIONS SUBMITTED BY THE GOVERNOR OF MAINE TO THE JUSTICES OF THE SUPREME JUDICIAL COURT OF MAINE, AUGUST 12, 1915, WITH THE ANSWERS OF THE JUSTICES THEREON.

STATE OF MAINE

EXECUTIVE DEPARTMENT.

AUGUSTA, MAINE, Aug. 12, 1915.

To the Honorable Justices of the Supreme Judicial Court:

Under and by virtue of the authority conferred upon the Governor by the Constitution of Maine, Article six, Section three, and being advised and believing, that the questions of law are important and that it is upon a solemn occasion, I, Oakley C. Curtis, Governor of Maine, respectfully submit the following statement of facts and questions and ask the opinion of the Justices of the Supreme Judicial Court thereon.

STATEMENT.

The Legislature of 1915 passed an act, entitled, "An Act to Divide the Town of Bristol and to Incorporate the Town of South Bristol," which act appears in the Acts and Resolves of 1915 as chapter one hundred thirty-three of the Private and Special

Laws of Maine. This act was approved by the Governor on the twenty-sixth day of March 1915.

The Legislature adjourned on April third, 1915. Within ninety days of the date of said adjournment, certain petitions intended to come within the provisions of Article four of the Constitution of Maine as amended by the amendment adopted September 14, 1908, known as the Initiative and Referendum Amendment, were filed in the office of the Secretary of State, addressed to the Governor, requesting that the act hereinbefore referred to, be referred to the people of Maine to be voted on.

These petitions bore the names of more than ten thousand petitioners, to wit: 10,496.

A copy of each sheet, composing said petitions as filed in the Secretary of State's office, bearing the names of signing petitioners, is attached hereto and made a part thereof.

The form of said petition including the verification and jurat is not specifically prescribed by law.

Certain objections have been made to the sufficiency of certain of said petitions and in order that I may determine whether or not to count certain of said signatures to said petitions, so filed in the Secretary of State's office and to refer to the people of Maine, to be voted on, the act in question, I desire your opinion as to the sufficiency of certain of said petitions and whether or not the names thereon should be counted in determining that ten thousand electors have petitioned in accordance with the Constitution.

QUESTION I.

(A) Should names be counted if attached to petitions where the town clerk has certified that the names of the petitioners appear on the voting list of his city, town or plantation, as qualified to vote for governor, but the signatures to which petitions are not verified as to authenticity by the oath of any petitioner certified thereon?

(B) Such petitions being so filed in the Secretary of State's office within the ninety days, can they, after the ninety days prescribed in the Constitution has expired, be verified as to authenticity by one of the petitioners, so as to entitle them to be counted as a part of the required ten thousand signatures?

QUESTION 2.

(A) Certain petitions consisted of two or more sheets, pasted together, others with two or more sheets, pinned together, others with two or more sheets fastened together by eyelets; on the first sheet, the forms mentioned in the Statement of Fact, are properly filled out; on the other sheets said forms are blank. Shall the names on the sheets on which the forms are blank be counted?

(B) In certain cases the whole number of names upon the sheets so fastened together are certified by the town clerk but only the first sheet bears the verification of a petitioner. In such cases should the names on all the sheets be counted?

(C) If the failure on the part of the town clerk or verifying petitioner to sign the sheets above mentioned, other than the first sheet, would prevent the names on said sheets, other than the first sheet, being counted, can such defect be cured by permitting the town clerk or verifying petitioner to sign said sheets after the expiration of the ninety days heretofore mentioned and may the Governor receive evidence of the intention of said petitioner and said clerk to sign said sheets or that in signing the first sheet they regarded the several sheets as constituting one petition, and on receipt of such evidence is the Governor authorized to count said names?

QUESTION 3.

(A) If the verifying petitioner signs the verification on each of the several pages of the petition but the jurat is executed only on the first page should names on all of the several sheets be counted?

(B) If the fact that the jurat is filled out on the first sheet of the several sheets attached together and not filled out on the subsequent sheets would prevent the names on the subsequent sheets being counted, may such omission to fill out said jurat be remedied after the filing of the petitions and the expiration of the ninety days aforesaid and may the Governor receive evidence as to the intention of the verifying petitioner and the magistrate executing the jurat that said jurat was to apply to the several sheets and that they were to be taken as one petition?

QUESTION 4.

(A) In certain cases where sheets are pasted together as heretofore described and verified on the first sheet only, the name of the verifying petitioner appears on the subsequent page but does not appear on the first page as a petitioner. Is such verification sufficient so that the names upon the first page shall be counted?

QUESTION 5.

(A) Should several sheets similar to the copy hereto attached, pinned together, pasted together or fastened together by eyelets, each bearing signatures but only one sheet being verified by a petitioner or one sheet being certified by a clerk or the jurat filled out on one sheet alone be deemed one petition; and one verification, one certification and one jurat be deemed sufficient so that the names on all of the sheets so fastened together should be counted?

(B) Would it affect the counting of names on petitions just described if the certification, verification and jurat were filled out on the first page or some subsequent page other than the last page?

QUESTION 6.

(A) In certain cases it appears that the verifying petitioner did not sign the petition, as a petitioner, which he verifies but did sign some other petition. In such case shall the names on the petition verified by him be counted?

(B) Would it affect the counting of names on petitions just described if the verifying petitioner, although failing to sign the petition as a petitioner, which he verified, sign a similar petition as a petitioner in the same town or city; such latter petition being properly certified by the town clerk?

QUESTION 7.

(A) In a certain case a petition composed of four sheets pasted together, wherein the names of the petitioners were numbered from 1 to 253 inclusive, the first three sheets of which are properly certified by the city clerk, he designating the numbers on those

sheets of those names which he refused to certify, the verifying petitioner signed the fourth sheet only and his name appears as a petitioner on the fourth sheet only, being No. 192. On all four sheets a jurat is filled out by a magistrate. On the fourth sheet the certificates of the clerk is filled out, excepting that it is left unsigned. This certificate contains the statement that certain names numbered as follows: 191, 197, 206, 202 and 241 are excepted. The clerk's certificate on the first three pages did not purport to relate to any names on the fourth page.

Is the verifying petitioner in this case competent to verify the signatures and should the names on this petition be counted?

(B) If this petition is defective can the defect be cured by permitting the clerk to sign the certificate on the fourth page thereto, after the filing of the petition and the expiration of said ninety days heretofore mentioned, (or can the Governor, after said ninety days, receive evidence from the said clerk that the omission to sign on the fourth page was through inadvertence and on such testimony can the certificate be cured and the petitioners be counted?)

QUESTION 8.

(A) A verifying petitioner appears as a petitioner upon the petition verified but is specifically excepted as not being upon the voting list in clerk's certificate to the petition. His name does not appear on any other petition. Is he competent as a verifying petitioner and should the names upon that petition be counted?

(B) If the petitioner excepted by the clerk, described in the foregoing question gave his voting residence in the petition as from a different town can the names on the petitions be counted, provided that said verifying petitioner is certified to as a qualified voter by the clerk of the town where he resides, after said ninety days have expired?

QUESTION 9.

(A) From a certain city there were seven petitions each verified by a different verifying petitioner. The names on one sheet were numbered by themselves and all certified to by the city clerk

on June 26th, 1915, as being upon the voting list. The names upon the other six petitions were numbered consecutively from 1 to 399. The city clerk on June 18th made his certificate on each of these six petitions certifying by number the names in the first column only, as for instance: Upon the first of these sheets the names from 1 to 32 inclusive, there being in the second column, names numbered from 33 to 61. In the certificate the excepted names are said to be marked by a red star. On some of the sheets the only red stars there are appear in the second column.

At the end of the second column in the sixth petition is the following: "399 on sheet No. 5" and a name appears in the first column of sheet No. 5 between numbers 266 and 267. This name is No. 399.

Should the names in the second columns on these sheets be counted?

(B) The second of the foregoing petitions is verified by a verifying petitioner whose name appears only in the second column of the petition. Is he competent to verify the signatures and should any of the names upon that petition be counted?

(C) If the failure of the city clerk to certify by number the names in the second column, renders these petitions defective, may the city clerk correct his certificate after the ninety days in which the petitions are to be filed has expired, by including the names in the second column of the several petitions? Or, may the Governor, after said ninety days, receive evidence from the city clerk that the omission of the names in the second column was through inadvertence and can the defect be cured by such evidence and the petitioners in the second column be counted?

QUESTION 10.

(A) Can the names on the petition be counted where the name of the verifying petitioner does not appear on any petition?

(B) Can a petition not properly verified within the ninety days aforesaid be afterwards verified by a petitioner competent to make such verification?

(C) Can a verifying petitioner who failed to sign the petition by inadvertence, but did sign as verifying petitioner and his verifica-

tion was duly taken by the magistrate, (both verification and jurat being according to the forms of blanks hereto annexed), be regarded as a petitioner as to entitle the names of the petitioners to be counted?

QUESTION 11.

(A) Can names be counted as petitioners that are certified as being upon the voting list by a clerk or stenographer of the town or city clerk, who is not a deputy, signing the city clerk's name with her initials under the same, but not verified within ninety days, by the city or town clerk?

(B) In such a case as stated in the foregoing question could the names be counted if after the expiration of the ninety days, this city clerk personally verified to the names on the petition, thus ratifying the former action of his stenographer?

QUESTION 12.

(A) Are the names of petitioners verified so that they are entitled to be counted if the verifying petitioner does not sign the certificate?

(B) Can the verifying petitioner who has properly appeared before the magistrate and certified to the petition and whose name is entered in the jurat by the magistrate, but inadvertently failed to sign the name as a verifying petitioner, after the expiration of the ninety days in which the petitions are to be filed, correct the error by signing the petition and thus enable the names to be counted?

QUESTION 13.

(A) Are the names upon a petition entitled to be counted in a case where the blank in the jurat left for the insertion of the name of the verifying petitioner is not inserted but instead thereof, the words "town clerk" are inserted? Can names on a petition be counted where no name of a verifying petitioner is inserted in the jurat although the verifying petitioner has signed the certificate and appeared before the magistrate when the jurat was executed?

(B) Can the magistrate who inadvertently enters in the jurat, after the words, "by the said," the words, "town clerk" when he intended to insert the name of the verifying petitioner, correct the mistake by inserting the name of the verifying petitioner and can he also correct the jurat by entering the name of the verifying petitioner, although no name appears in said jurat on the petition as now filed, after the words "Subscribed and sworn to by the said," provided, that as a matter of fact, said petitioner made oath to the petition before him?

Very respectfully,

OAKLEY C. CURTIS,
Governor.

To the Honorable Oakley C. Curtis, Governor:

The undersigned, Justices of the Supreme Judicial Court, have the honor to submit their answers to questions propounded by you touching the sufficiency of petitions addressed to the Governor under Article four of the Constitution of Maine, as amended by the amendment adopted September 14, 1908, known as the Initiative and Referendum Amendment.

The request for our opinion is accompanied with the following statement:

STATEMENT.

"The Legislature of 1915 passed an act, entitled, 'An Act to Divide the Town of Bristol and to Incorporate the Town of South Bristol,' which act appears in the Acts and Resolves of 1915 as chapter one hundred thirty-three of the Private and Special Laws of Maine. This act was approved by the Governor on the twenty-sixth day of March, 1915.

The Legislature adjourned on April third, 1915. Within ninety days of the date of said adjournment, certain petitions intended to come within the provisions of Article four of the Constitution of Maine as amended by the amendment adopted September 14, 1908, known as the Initiative and Referendum Amendment, were filed in the office of the Secretary of State, addressed to the Gov-

ernor, requesting that the act hereinbefore referred to, be referred to the people of Maine to be voted on.

These petitions bore the names of more than ten thousand petitioners, to wit: 10,496.

A copy of each sheet, composing said petitions as filed in the Secretary of State's office, bearing the names of signing petitioners, is attached hereto and made a part thereof.

The form of said petition including the verification and jurat is not specifically prescribed by law.

Certain objections have been made to the sufficiency of certain of said petitions and in order that I may determine whether or not to count certain of said signatures to said petitions, so filed in the Secretary of State's office and to refer to the people of Maine, to be voted on, the act in question, I desire your opinion as to the sufficiency of certain of said petitions and whether or not the names thereon should be counted in determining that ten thousand electors have petitioned in accordance with the Constitution."

The petitions were in the following form:

"To His Excellency

THE GOVERNOR OF MAINE.

The undersigned electors of the State of Maine qualified to vote for Governor, residing in the town ..... of ..... in said State, and whose names appear on the voting list of said town as qualified to vote for Governor hereby respectfully request that the whole of a certain act entitled '.....' which said act was passed at the session of the Maine Legislature which convened January ...., 191.., and which said act was approved by you....., be referred to the people of Maine, to be voted on in the manner described in section seventeen of part third of article four of the Constitution of Maine. The full text of said act is printed on reverse side of this sheet.

SIGNATURES RESIDENCE SIGNATURES RESIDENCE

STATE OF MAINE

.....ss .....191..

I hereby certify that I am the clerk of the town ..... of .....duly elected and qualified, and that the names of all the foregoing petitioners numbered from .... to...., except the following ..... appear on the voting list of said town ..... as qualified to vote for Governor.

.....

Clerk of .....

STATE OF MAINE.

I ....., one of the foregoing petitioners, hereby make oath that the signatures of all the petitioners upon the foregoing petition are the original and authentic signatures of the same persons whose names the clerk has certified thereon appear on the voting lists of said town ..... as qualified to vote for governor therein.

.....

..... ss .....191..

Subscribed and sworn to by the said .....before me,

.....Notary Public."

To the end that we may be able to answer the questions concisely and clearly, it is expedient to refer first to the language of so much of the referendum amendment as is material to the discussion, and to express our views of its significance with respect to the subject matter.

Section 17 of the amendment reads as follows: "Upon written petition of not less than ten thousand electors addressed to the governor, and filed in the office of the secretary of state within ninety days after the recess of the Legislature, requesting that one or more acts, bills, resolves or resolutions, or part or parts thereof passed by the Legislature, but not then in effect by reason of the provisions of the preceding section, be referred to the people, such acts, bills, resolves or resolutions, or part or parts thereof as are specified in such petition shall not take effect until thirty days after the governor shall have announced by public proclamation

that the same have been ratified by a majority of the electors voting thereon at a general or special election. As soon as it appears that the effect of any act, bill, resolve or resolution, or part or parts thereof, has been suspened by petition in manner aforesaid, the governor by public proclamation shall give notice thereof and of the time when such measure is to be voted on by the people." The rest of the section is not material.

What shall be regarded as a petition within the meaning of section 17 is defined in section 20, in these words: "'Written petition' means one or more petitions written or printed or partly written and partly printed, with the original signatures of the petitioners attached, verified as to authenticity of the signatures by the oath of one of the petitioners certified thereon, and accompanied by the certificate of the clerk of the city, town or plantation in which the petitioners reside that their names appear on the voting list of his city, town or plantation as qualified to vote for governor."

Taking both sections together it is clear, we think, that in order to warrant the counting of the names on a petition, it must not only be filed in the office of the secretary of state within ninety days after the recess of the Legislature, but when filed, it must contain the verification of the authenticity of the signatures by the oath of one of the petitioners, and be accompanied by the certificate of the city, town or plantation clerk that the names appear on the voting list as qualified to vote for governor. A petition wanting either of these constitutional requirements is not a petition within the meaning of section 17 of the amendment. A paper that is not a constitutional petition within the ninety days cannot be made so afterward by adding affidavit or certificate. To do so would be in effect to extend the constitutional limitation of ninety days. The provision of the constitution is explicit and mandatory. In our opinion, the governor is authorized to count the names only on such petitions as comply with the requirements of the constitution, and of those, only such as were filed within ninety days after the recess of the Legislature.

In the light of this general statement, we now make particular answer to the questions as follows:

QUESTION 1.

(A) Should names be counted if attached to petitions where town clerk has certified that the names of the petitioners appear on the voting list of his city, town or plantation, as qualified to vote for governor, but the signatures to which petitions are not verified as to authenticity by the oath of any petitioner certified thereon?

Answer. We answer in the negative.

(B) Such petitions being so filed in the Secretary of State's office within the ninety days, can they, after the ninety days prescribed in the Constitution has expired, be verified as to authenticity by one of the petitioners, so as to entitle them to be counted as a part of the required ten thousand signatures?

Answer. We answer in the negative.

QUESTION 2.

(A) Certain petitions consisted of two or more sheets, pasted together, others with two or more sheets, pinned together, others with two or more sheets fastened together by eyelets; on the first sheet, the forms mentioned in the Statement of Fact, are properly filled out; on the other sheets said forms are blank. Shall the names on the sheets on which the forms are blank be counted?

Answer. The fact that two or more sheets are pasted or fastened together affords some presumptive evidence that they were filed as one petition. But the certificate and affidavit on the first sheet refer only to "the foregoing petitions," that is, to those whose names precede them. Strictly speaking it is not evidence as to the names on the following sheets. The names after the certificate and affidavit we think should not be counted.

(B) In certain cases the whole number of names upon the sheets so fastened together are certified by the town clerk but only the first sheet bears the verification of a petitioner. In such cases should the names on all the sheets be counted?

Answer. Only those preceding the verification should be counted.

(C) If the failure on the part of the town clerk or verifying petitioner to sign the sheets above mentioned, other than the first sheet, would prevent the names on said sheets, other than the first

sheet, being counted, can such defect be cured by permitting the town clerk or verifying petitioner to sign said sheets after the expiration of the ninety days heretofore mentioned, and may the Governor receive evidence of the intention of said petitioner and said clerk to sign said sheets or that in signing the first sheet they regarded the several sheets as constituting one petition, and on receipt of such evidence is the Governor authorized to count said names?

Answer. We answer in the negative.

QUESTION 3.

(A) If the verifying petitioner signs the verification on each of the several pages of the petition but the jurat is executed only on the first page should names on all of the several sheets be counted?

Answer. Only those on the first page.

(B) If the fact that the jurat is filled out on the first sheet of the several sheets attached together and not filled out on the subsequent sheets would prevent the names on the subsequent sheets being counted, may such omission to fill out said jurat be remedied after the filing of the petitions and the expiration of the ninety days aforesaid, and may the Governor receive evidence as to the intention of the verifying petitioner and the magistrate executing the jurat that said jurat was to apply to the several sheets and that they were to be taken as one petition?

Answer. We answer in the negative.

QUESTION 4.

(A) In certain cases where sheets are pasted together as heretofore described and verified on the first sheet only the name of the verifying petitioner appears on the subsequent page but does not appear on the first page as a petitioner. Is such verification sufficient so that the names upon the first page shall be counted?

Answer. The verification extends only to the names on the first page. The verifying petitioner must be one of the petitioners on that page. Persons whose names appear on the other unverified

sheets are not petitioners within the meaning of the constitution. We answer the question in the negative.

QUESTION 5.

(A) Should several sheets similar to the copy hereto attached, pinned together, pasted together or fastened together by eyelets, each bearing signatures but only one sheet being verified by a petitioner or one sheet being certified by a clerk or the jurat filled out on one sheet alone be deemed one petition; and one verification, one certification and one jurat be deemed sufficient so that the names on all of the sheets so fastened together should be counted?

Answer. As already stated, in answer to Question 2, paragraph A, the fact that the sheets are fastened together affords some presumptive evidence that they were filed as one petition. The verification and certification, wherever they appear, are good only as to names preceding them, when phrased as appears in the form submitted.

(B) Would it affect the counting of names on petitions just described if the certification, verification and jurat were filled out on the first page or some subsequent page other than the last page?

Answer. The preceding answer answers this question.

QUESTION 6.

(A) In certain cases it appears that the verifying petitioner did not sign the petition, as a petitioner, which he verifies but did sign some other petition. In such case shall the names on the petition verified by him be counted?

Answer. We answer in the negative.

(B) Would it affect the counting of names on petitions just described if the verifying petitioner, although failing to sign the petition as a petitioner, which he verified, sign a similar petition as a petitioner in the same town or city; such latter petition being properly certified by the town clerk?

Answer. We think the verification of a petition must be by a petitioner whose name is upon the petition verified.

QUESTION 7.

(A) In a certain case a petition composed of four sheets pasted together, wherein the names of the petitioners were numbered from 1 to 253 inclusive, the first three sheets of which are properly certified by the city clerk, he designating the numbers on those sheets of those names which he refused to certify, the verifying petitioner signed the fourth sheet only and his name appears as a petitioner on the fourth sheet only, being No. 192. On all four sheets a jurat is filled out by a magistrate. On the fourth sheet the certificate of the clerk is filled out, excepting that it is left unsigned. This certificate contains the statement that certain names numbered as follows: 191, 197, 206, 202 and 241 are excepted. The clerk's certificate on the first three pages did not purport to relate to any names on the fourth page.

Is the verifying petitioner in this case competent to verify the signatures and should the names on this petition be counted?

Answer. The fourth sheet not having been certified, persons whose names appear thereon were not constitutional petitioners, and no one of them was competent to verify the signatures on the other sheets. We answer both questions in the negative.

(B) If this petition is defective can the defect be cured by permitting the clerk to sign the certificate on the fourth page thereto, after the filing of the petition and the expiration of said ninety days heretofore mentioned, (or can the Governor, after said ninety days, receive evidence from the said clerk that the omission to sign on the fourth page was through inadvertence and on such testimony can the certificate be cured and the petitioners be counted?)

Answer. We answer in the negative.

QUESTION 8.

(A) A verifying petitioner appears as a petitioner upon the petition verified but is specifically excepted as not being upon the voting list in clerk's certificate to the petition. His name does not appear on any other petition. Is he competent as a verifying petitioner and should the names upon that petition be counted?

Answer. We answer in the negative. No one is a constitutional petitioner whose name is not on the voting list.

(B) If the petitioner excepted by the clerk, described in the foregoing question, gave his voting residence in the petition as from a different town can the names on the petitions be counted, provided that said verifying petitioner is certified to as a qualified voter by the clerk of the town where he resided, after said ninety days have expired?

Answer. We answer in the negative.

QUESTION 9.

(A) From a certain city there were seven petitions each verified by a different verifying petitioner. The names on one sheet were numbered by themselves and all certified to by the city clerk on June 26, 1915, as being upon the voting list. The names upon the other six petitions were numbered consecutively from 1 to 399. The city clerk on June 18th made his certificate on each of these six petitions certifying by number the names in the first column only, as for instance: Upon the first of these sheets the names from 1 to 32 inclusive, there being in the second column, names numbered from 33 to 61. In the certificate the excepted names are said to be marked by a red star. On some of the sheets the only red stars there are appear in the second column.

At the end of the second column in the sixth petition is the following: "399 on sheet No. 5" and a name appears in the first column of sheet No. 5 between numbers 266 and 267. This name is No. 399.

Should the names in the second columns on these sheets be counted?

Answer. As we understand the question, the clerk certifying the names in the six petitions by number has certified only the names in the first column of each. The other names remain uncertified, and we think should not be counted.

(B) The second of the foregoing petitions is verified by a verifying petitioner whose name appears only in the second column of the petition. Is he competent to verify the signatures and should any of the names upon that petition be counted?

Answer. We answer both questions in the negative.

(C) If the failure of the city clerk to certify by number the names in the second column, renders these petitions defective, may the city clerk correct his certificate after the ninety days in which the petitions are to be filed has expired, by including the names in the second column of the several petitions? Or, may the Governor, after said ninety days, receive evidence from the city clerk that the omission of the names in the second column was through inadvertence and can the defect be cured by such evidence and the petitioners in the second column be counted?

Answer. We answer in the negative.

QUESTION 10.

(A) Can the names on the petition be counted where the name of the verifying petitioner does not appear on any petition?

Answer. We answer in the negative.

(B) Can a petition not properly verified within the ninety days aforesaid be afterwards verified by a petitioner competent to make such verification?

Answer. We answer in the negative.

(C) Can a verifying petitioner who failed to sign the petition by inadvertence but did sign as verifying petitioner and his verification was duly taken by the magistrate, (both verification and jurat being according to the forms of blanks hereto annexed) be regarded as a petitioner as to entitle the names of the petitioners to be counted?

Answer. We answer in the negative.

QUESTION 11.

(A) Can names be counted as petitioners that are certified as being upon the voting list by a clerk or stenographer of the town or city clerk, who is not a deputy, signing the city clerk's name with her initials under the same, but not verified within the ninety days, by the city or town clerk?

Answer. We answer in the negative. Official signatures required by law must be made by the officer himself. The signing of the town clerk's name by the hand of another is not official.

(B) In such a case as stated in the foregoing question could the names be counted if after the expiration of the ninety days, this city clerk personally verified to the names on the petition, thus ratifying the former action of his stenographer?

Answer. We answer in the negative.

QUESTION 12.

(A) Are the names of petitioners verified so that they are entitled to be counted if the verifying petitioner does not sign the certificate?

Answer. The constitution does not require a signed certificate from a verifying petitioner. It requires that the authenticity of signatures be verified by the oath of a petitioner. We think this may be done in either of two ways. The petitioner may make and sign a certificate and swear to the truth of his statements. That is what the petitions in the present matter contemplated. Or he may make oath before a magistrate, as to the authenticity of the signatures, and the magistrate's jurat or certificate thereof is sufficient evidence of the facts stated in it. The signature of the verifying petitioner, therefore, is not constitutionally essential. If it appears by the jurat that the authenticity of the names was sworn to by one of the petitioners on the petition, we think the names should be counted.

(B) Can the verifying petitioner who has properly appeared before the magistrate and certified to the petition and whose name is entered in the jurat by the magistrate, but inadvertently failed to sign the name as a verifying petitioner, after the expiration of the ninety days in which the petitions are to be filed, correct the error by signing the petition and thus enable the names to be counted?

Answer. We answer in the negative.

QUESTION 13.

(A) Are the names upon a petition entitled to be counted in a case where the blank in the jurat left for the insertion of the name of the verifying petitioner is not inserted but instead thereof the words "town clerk" are inserted? Can names on a petition be counted where no name of a verifying petitioner is inserted in the jurat although the verifying petitioner has signed the certificate and appeared before the magistrate when the jurat was executed?

Answer. The error referred to is manifestly a clerical one. The constitution does not prescribe the form of the jurat. The error is not material, if it appears that the verification was actually signed and sworn to by a petitioner. Immaterial errors may be disregarded.

(B) Can the magistrate who inadvertently enters in the jurat, after the words, "by the said," the words "town clerk" when he intended to insert the name of the verifying petitioner, correct the mistake by inserting the name of the verifying petitioner and can he also correct the jurat by entering the name of the verifying petitioner, although no name appears in said jurat on the petition as now filed, after the words "Subscribed and sworn to by the said," provided, that as a matter of fact, said petitioner made oath to the petition before him?

Answer. Neither certificates nor jurats can be corrected after the expiration of ninety days from the recess of the Legislature. We think no amendments of any kind are permissible, after the time fixed in the constitution has expired. The petition must be in conformity with the constitutional requirements within that period, or it never can be made so.

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

STATE OF MAINE.

SUPREME JUDICIAL COURT. IN LAW TERM AT AUGUSTA, 1915.
December 30, 1915.

It is ORDERED that the following Rule of Court be adopted: namely,

All libels for divorce shall stand continued at the first term of court as a matter of course. This Rule shall be effective on and after March 1, 1916.

By the Court,
A. R. SAVAGE, *Chief Justice.*

RULES OF THE PROBATE COURT.

I.

Any party may appear in the Probate Court, in person or by an attorney authorized to practice in the courts of this State, or by a person authorized by writing, filed in said court for that purpose. A person, other than an attorney, so appearing for another, or a person appearing for himself, shall file with the Register a writing giving his name, residence, the matter in which, and the name of the person or persons for whom he appears. Such writing shall be placed on file, a corresponding entry shall be made on the docket, and such person shall endorse his name on the back of the petition or other paper in the matter in which he appears.

II.

If a party shall change his attorney pending any proceeding, the name of the new attorney shall be substituted on the docket for that of the former attorney and said party shall give notice thereof to the adverse party; and until such notice or change, all notices given to or by the attorney first appointed shall be considered in all

respects as notice to or from his client, except in cases in which by law a notice is required to be given to the party personally; provided, however, that nothing in these rules shall be construed to prevent any party interested from appearing for himself, in the manner provided by law, and in such case the party so appearing shall be subject to the same rules that are or may be provided for attorneys in like cases, so far as the same are applicable.

III.

When the authority of an attorney at law to appear for any party shall be demanded, if the attorney shall declare that he has been duly authorized to appear by an application made directly to him by such party or by some person whom he believes to have been authorized to employ him, such declaration shall be deemed and taken to be evidence of authority to appear, and prosecute or defend in any proceeding in said court.

IV.

Petitions and other matters upon which notice has been ordered will not be acted upon until after the return hour, and any attorney or other duly authorized person who desires to appear to contest, or object to any matter in order for hearing, shall give notice to that effect on or before the opening hour of the session of the court at which such hearing is to be had.

V.

Approved blanks will be furnished by the Register, and must be used in all proceedings to which they are applicable.

VI.

Notice will not be ordered on any petition, report, account or other instrument until the same has been actually filed in court.

VII.

The names of attorneys presenting petitions and other instruments in court to be acted upon should be endorsed thereon to secure the prompt issuing of notices and for other purposes.

VIII.

Petitions to sell real estate or personal property, or for allowances to widows or minor children will not be acted upon until the inventory in that estate has been duly filed in court and approved.

IX.

Petitions to sell real estate for the payment of debts, or legacies, except where the amount has been ascertained by the settlement of an account or the report of commissioners of insolvency must be accompanied with a list, under oath, of the debts (and legacies, if any) due from the estate, and the amount of the expenses of administration up to the time of the application.

X.

No letter of appointment of a non-resident administrator, executor, trustee, guardian or conservator shall be issued until such officer has filed with the Register a written appointment of a resident agent or attorney.

XI.

All petitions for assessment of inheritance taxes shall be filed in duplicate.

XII.

Notice will be ordered on all petitions for the appointment of an administrator de bonis non or de bonis non with the will annexed, unless the appointment of a person entitled by law to administer the estate is requested, or the petition is assented to, to the satisfaction of the court.

XIII.

Representations of insolvency should be accompanied with a statement, under oath, of the amount so far as can be ascertained, of the debts due from the estate, and of the amount of the appraisal of the real and personal property.

XIV.

The court may appoint a guardian ad litem, or require the appointment of a guardian for minors in cases in which they are interested, before administration is granted, account is settled, allowance made for the widow or license granted to sell real or personal estate, or in any matter pending wherein they may be interested.

XV.

Accounts presented for order of notice must be fully stated before they are presented and notice ordered thereon.

XVI.

Charges and fees of the Register shall be paid in advance. The court may refuse to hear any cause or matter or allow any account until such charges and fees have been paid.

XVII.

When a surety company is offered as surety on probate bonds, a statement of the charge therefor must be filed in court with the bond and with each renewal thereof. And no such bond shall be approved unless the name of the person executing the bond for the surety company has been certified to the Register by the insurance commissioner, or unless and until such surety company shall have filed with the Register a power of attorney or a certified copy thereof, authorizing the execution of such bond. The court may require proof in the form of an affidavit or otherwise, that the person purporting to be an officer of any surety company and executing in behalf of the company any bond, letter or power of attorney, is in fact such an officer.

XVIII.

The signatures of principals and sureties to all probate bonds should be written in full and witnessed.

XIX.

Sureties on the bonds of administrators, executors, guardians, trustees or conservators, will not be appointed appraisers or commissioners on the same estate, nor will any person who is related to the administrator, executor, guardian, trustee, conservator or heirs at law within the sixth degree be appointed to either of said trusts. Christian names and residences of principals and sureties on bonds and of appraisers and commissioners should be fully stated.

XX.

Any petition addressed to the court may be amended in matter of form under the direction of the court, with or without notice, when the rights of parties will not be affected.

XXI.

All petitions for license to sell real estate shall contain an accurate description of the real estate to be sold, and the order of notice thereon shall contain a copy of such description and shall not be printed in the consolidated form.

XXII.

All official communications relating to cases and business in court should be addressed to the Register of Probate to avoid delay.

XXIII.

Parties not familiar with the proceedings in the Probate Court are expected to secure assistance of competent counsellors. Neither the Judge nor Register can advise in matters coming before the court.

XXIV.

No person entitled by law to administer an estate shall be appointed within thirty days after the death of the decedent without consent of all other persons so entitled, other than creditors, who are resident in this State.

XXV.

The Judges of Probate may order notices on all petitions and other matters presented to their several courts.

XXVI.

Letters testamentary or of administration with the will annexed and bonds in cases of nuncupative or lost wills are to follow the general form of letters testamentary and of administrations with the will annexed and bonds prescribed in other cases of testate estates.

XXVII.

All depositions shall be opened and filed by the Register at the term for which they were taken; and if the matters in which they are to be used shall be continued, such depositions shall remain on file and be open to all objections when offered at the trial or hearing as at the return term, and all depositions shall remain on file at least fourteen days; the party producing a deposition may then withdraw it by leave of court, in which case it shall not be used by either party.

XXVIII.

When written evidence is in the hands of an adverse party no evidence of its contents shall be admitted unless previous notice to produce it on trial or hearing shall have been given to such adverse party, or his attorney, and comments by counsel upon a refusal to produce it will not be allowed without first proving such notice.

XXIX.

In cases of contested wills and accounts, on motion of the proponent or accountant, the party objecting may be required to file specifications of the grounds of the objection before the day of hearing, but amendments thereto may be filed by leave of the court, upon such terms as may be deemed reasonable, but not without granting a continuance, if requested by the proponent or accountant, and in such cases the hearing shall be confined to the grounds of objection specified.

XXX.

In cases of license to sell real estate at private sale or to exchange real estate, a certificate under oath of such sale or exchange should be filed in Registry of Probate, within thirty days, showing the amount received or the real estate taken in exchange, and the person to whom sold or with whom exchanged.

XXXI.

No private claim of an administrator, executor, trustee, guardian of an adult or conservator of an estate shall be allowed in his account unless particularly stated in writing, and notice of such claim included in the notice on said account.

XXXII.

Wills must in every case be proved and allowed in open court and in term time, and in case the testimony of the witness or witnesses proving the will is not taken down by the court stenographer and certified, the testimony shall be preserved by an affidavit taken before the Judge or Register, and filed with the other papers in the case.

XXXIII.

All personal surety bonds, when presented for approval, should bear on the back thereof a certificate of a justice of the peace or notary public of the following tenor:

> I hereby certify that I have made due inquiry into the financial standing of the sureties on the within bond, and find them to be jointly worth, above their liabilities, the sum of $ I therefore recommend the acceptance and approval of the within bond.
>
> .....
>
> *Justice of the Peace.*
> *Notary Public.*

XXXIV.

When letters testamentary or of administration are granted without bond, the Judge may direct that letters shall not issue from the

probate office, and in such cases no certificate of appointment shall issue, until twenty days shall have elapsed after date of the decree.

XXXV.

When claims are filed in the probate office verified as required by law, the Register shall forthwith give notice of such filing by mail to the administrator or executor of the estate.

XXXVI.

Petitions for administration filed for notice and petitions for probate of wills shall contain the addresses of the widow or widower, and of the heirs at law and next of kin of deceased so far as known to the petitioner, and the Register shall give notice, by mail, of the filing of said petition to all persons whose addresses are so given, at least seven days before the return day.

XXXVII.

Letters of administration and letters testamentary shall be accompanied with a warrant to appraisers and shall not issue until appraisers are appointed. The warrant need not be recorded until returned, but the fact of issue shall be entered on the docket.

XXXVIII.

All petitions by foreign administrators, executors, guardians, conservators or trustees for license to collect or receive personal property, and all petitions by foreign administrators, executors, guardians or conservators to sell real estate shall be filed in the Registry of Probate, in duplicate, and the Register shall forward to the attorney general one copy by mail seven days at least before the return day.

XXXIX.

The petition for the reduction of the penal sum of any bond signed by a surety company as surety will not be granted until the principal on such bond has filed and settled his account in court.

XL.

Service of all petitions filed in the Probate Court by a husband or wife for desertion under the provisions of Chap. 328 of the Public Laws of 1915, shall be by copy of the petition and order of court thereon, fourteen days at least before the same is returnable. If the residence of the party is known or can be ascertained, actual notice shall be obtained; otherwise notice shall be given in such manner and by such means as the court may order.

XLI.

Rule days in equity proceedings in the Probate Courts shall be the first day of each term of the Probate Court as held in the different counties in the State.

XLII.

The equity rules of the Supreme Judicial Court of the State shall be the rules for equity proceedings in the Probate Courts, so far as the same are applicable thereto.

XLIII.

Causes in equity shall be begun by bill or petition filed in the Register's office upon which subpoena shall issue as a matter of course, returnable on a rule day of the Probate Court of the county in which the bill or petition is filed, held within sixty days after the filing of such bill or petition. In all cases service shall be made by a copy of subpoena and bill or petition attested by the Register. The court may order such further or other notice as the Judge considers necessary.

STATE OF MAINE.

SUPREME JUDICIAL COURT.

The foregoing Rules of Practice and Procedure in the courts of probate and insolvency having been presented to the Justices of this court for approval, by a commission duly appointed under the

provisions of R. S., 1903, chap. 65, § 43, and said rules having been examined.

It is hereby ORDERED that the same be approved and take effect and be in force in all the courts of the probate and insolvency in this State.

Portland, June 17, A. D., 1916.

ALBERT R. SAVAGE,
LESLIE C. CORNISH,
ARNO W. KING,
GEO. E. BIRD,
GEORGE F. HALEY,
GEO. M. HANSON,
WARREN C. PHILBROOK,
JOHN B. MADIGAN.

INDEX

APPEAL.

See EQUITY.

An appeal from a judgment rendered upon a petition brought under R. S., ch. 6, sects. 70-74, to determine whether the petitioner, at the State election held September 14, 1914, was duly elected county commissioner of the County of Kennebec for the term beginning January 1, 1915, or whether the respondent was so elected. *Crosby* v. *Libby,* 35.

ARREST.

Threats of unlawful arrest do not constitute duress, unless there is reasonable ground for apprehension of immediate or impending danger of arrest. *Knowlton* v. *Ross,* 18.

So far as the boys are concerned, if they or their parents solicited their release, and it was done with their full knowledge and consent, then the officers can justify. *Therriault* v. *Breton,* 137.

Unless the officers either take the boys into court to be discharged there, if necessary, or have let the boys go at their own request or the request of their parents, with their knowledge and consent, they cannot justify, but are liable in such case for the original arrest. *Theriault* v. *Breton,* 137.

If the officers had arrested the plaintiffs for a misdemeanor, then it would have been their duty to have procured a warrant within a reasonable time for the alleged offense and take them before the court and place them on trial, and for neglect to do so would have been liable in damages, unless the plaintiffs released them from that obligation or they waived their rights to be taken before the court. *Therriault* v. *Breton,* 137.

The law is well settled that an officer may arrest upon reasonable grounds of suspicion that a felony has been committed and that the person arrested was guilty of a felony, and hold the party arrested for a reasonable time until he can procure a warrant to investigate the case, and if within a reasonable time his investigation shows that there is not reasonable grounds to believe that the party arrested has committed a felony, then he may discharge him without taking him before the court and not be liable. *Therriault* v. *Breton,* 137.

That the officer, acting in a reasonable manner and having reasonable grounds for suspecting the plaintiff to be the person wanted, and having used all necessary and reasonable means to obtain the identification of the plaintiff within a reasonable time, was not liabile for his detention and arrest. *Kittredge* v. *Frothingham,* 538.

ASSESSORS AND OVERSEERS.

See MUNICIPAL CORPORATIONS.

ASSIGNMENT.

In the present case, the assignment or transfer of the bank book does not purport to show payment of any consideration. The burden, therefore, rests upon the assignee to prove the consideration actually paid.
Manson, Ex. v. *Perkins,* 115.

It is well established under our decisions, under circumstances like those in the present case, than an assignee of the whole amount of the deposit or other property may prove the actual amount due him and become, upon such proof, entitled to such amount. *Manson* v. *Perkins,* 115.

But if the consideration he has paid is inadequate and he still claims the whole, his whole claim will then be denied as a fraud upon other creditors who are entitled to the balance of the fund for the payment of their debts.
Manson v. *Perkins,* 115.

ASSUMPTION OF RISK.

See FELLOW SERVANT RULE. NEGLIGENCE.

A servant of mature years and common intelligence, when he engages to serve an employer, is conclusively held to assume the risks of danger which are known to him, as well as those which are incident to his work and which are obvious and apparent to one of his intelligence.
Gallant v. *G. N. P. Co.,* 208.

A servant who is injured by the negligence or misconduct of his fellow-servant cannot maintain an action against his employer for such injuries, unless the employer was negligent in the selection of that fellow-servant. The risk of injury by a fellow-servant is a risk the employee assumes.
Gallant v. *G. N. P. Co.,* 208.

In going with the others in the boat containing the exposed dynamite ready for use in breaking the jam, a fact which he knew, the plaintiff must be held to have assumed the risks of danger to himself incident thereto, including the negligence of his fellow-servants in the boat.
Gallant v. *G. N. P. Co.,* 208.

ATTACHMENT.

ATTESTATION.

ATTRACTIVE APPLIANCE DOCTRINE.

BALLOT.

BANKS AND BANKING.

See CHECKS.

When the charter of a national banking association has expired by limitation, it may be extended by vote of the shareholders, with the approval of the comptroller of the currency. *Smith* v. *Phillips Nat. Bank*, 297.

When the charter of a national banking association is extended by vote of the shareholders, a non-assenting shareholder may, within 30 days, withdraw, and have his shares appraised and paid for by the bank.
Smith v. *Phillips Nat. Bank*, 297.

The notice of withdrawal given by the shareholder in a national banking association, within 30 days after the extension of its charter, is effective as of the date of the expiration of the original charter.
Smith v. *Phillips Nat. Bank*, 297.

If after the extension of the charter of a national banking association a dividend is declared a shareholder who demands and receives the dividend waives the right to withdraw. *Smith* v. *Phillips Nat. Bank*, 297.

While a bank has the privilege of charging overdue notes against the checking account of the maker, it is not required to do so, and its failure to do it does not discharge a surety.
Manufacturers Nat. Bank v. *Chabot & Richard Co.*, 515.

Money deposited in a bank subject to check becomes the absolute property of the bank, and the latter becomes a debtor to the depositor in an equal amount. *Manufacturers Nat. Bank* v. *Chabot & Richards Co.*, 515.

BENEFICIARY.

See INSURANCE. TRUSTS.

BILLS AND NOTES.

In a suit by an indorsee against an indorser who is also the payee, the latter is estopped from denying the genuineness of the maker's signature or the validity of the promise. By indorsing the note and delivering it to the indorsee, the indorser guarantees both its genuineness and validity.
Wamesit Nat. Bank v. *Merriam*, 437

BILL OF LADING.

See CONTRASTS. CARRIERS.

BOND FOR A DEED.

See RESCISSION.

BREACH OF PROMISE.

BRIBERY.

CARRIERS.

not have any actual arrangements with the connecting lines. Its liability therefor depends upon the existence of a contract either express or implied, and the implied contract may be shown by direct or circumstantial evidence. *Ross* v. *M. C. R. R., Co.*, 288.

CERTIORARI.

See MUNICIPAL CORPORATIONS.

A person not a member of the police force of the city of Rockland, who was appointed to the office of deputy marshal under an ardinance requiring the appointment of a police officer, after his removal by the mayor and aldermen and the appointment of his successor de jure, could not have certiorari to quash the removal proceedings, since the appointment of his de jure successor terminated even his de facto character, while only parties having an interest in proceedings other than a public interest are entitled to certiorari.

Barter v. *Mayor and Aldermen of City of Rockland*, 467.

CHECKS AND DRAFTS.

When a check, or bank draft, is signed by a person having authority to do so, addressed to a bank in which the drawer has funds subject to check, with blanks for date, amount and name of payee left unfilled, and, by reason of the negligence of the drawer as to the safe keeping of such check after signature, the same is unlawfully obtained by a stranger, the blanks filled, and thereafter the check comes into the hands of a bona fide holder, for value, without notice, the drawer is liable thereon.

Phillips v. *A. W. Jay Co.*, 403.

COLLECTOR OF TAXES.

See TAX.

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COMPLAINT.

See PLEADING AND PRACTICE.

CONDITIONAL SALE.

See SALE.

CONDITIONS.

See WARRANTY. WILLS.

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See ASSIGNMENT.

CONSTRUCTION.

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CONVERSION.

See TROVER.

CONVEYANCE FOR PIOUS PURPOSES.

See DEEDS.

CORPORATIONS.

See EMINENT DOMAIN.

Where a petition for mandamus brought by a stockholder in a Maine corporation to compel clerk of corporation to allow the petitioner to examine the records and stock book of said corporation and to take copies and minutes therefrom of such parts as concern his interests, *Held:*

The character of this writ and the discretion to be exercised by the court in issuing it seem not to have been taken away nor abridged by the statute herein considered. *Eaton* v. *Manter*, 259.

A state of facts might be presented where the purpose of the petitioner was so obviously vexatious, improper or unlawful, that the court might feel compelled to exercise its discretion in the interests of law and justice and decline to issue the writ. *Eaton* v. *Manter*, 259.

CREDITORS.

See ASSIGNMENT. PREFERENCE.

A voluntary transfer or gift by a husband to a wife is prima facie fraudulent as to existing creditors. *Seavey* v. *Seavey*, 14.

When a transfer or conveyance is made without consideration, it is immaterial whether the grantee or donee is conversant of the fraud as to existine creditors. *Seavey* v. *Seavey*, 14.

When a transfer or conveyance is made for a valuable and adequate consideration, it is valid as against existing creditors, unless there is a fraudulent intention on the part of the transferee. *Seavey* v. *Seavey*, 14.

CREDITORS' BILL.

DAMAGES.

DEBTOR AND CREDITOR.

There was no specific appropriation of this payment to any particular items either by the debtor or creditor and, therefore, the law applied the credit to the extinguishment of the earliest items in the account.
LeHigh Coal & Navigation Co. v. *McLeod*, 427.

It is too late for either party to claim the right to make an appropriation after a controversy has arisen.
LeHigh Coal & Navigation Co. v. *McLeod*, 427.

DECEIT.

Where a plaintiff, in an action of deceit in the sale to him of a farm, bases his ground of action on the claim that a small tract of land of little value, and which was never owned by the grantor, was fraudulently represented to be a part of the property being sold, the oral evidence in support of such claim should be clear, strong and convincing, amounting to something more than a mere preponderance of proof.

And this rule is especially applicable where the only evidence of the alleged fraudulent representation is the testimony of the plaintiff who, previous to the transfer, visited the property and thereafter accepted a deed containing a clear and specific description by metes and bounds of the real estate thereby conveyed. *Barrows* v. *Sanborn*, 71.

DECLARATION.

See PLEADING AND PRACTICE.

DECREE.

See EQUITY.

DEEDS.

See CONDITIONS. MORTGAGES. WARRANTY. WILLS.

Where the language in a deed claimed to have been used to make an exception or reservation is doubtful, it is to be construed most strictly against the grantor and most favorably for the grantee. *Billings* v. *Beggs*, 67.

DELEGATION.

See RETURN. WRIT.

When the signature of a public officer is required, he must make it himself. He cannot delegate the doing of it to another. *Bass* v. *Dumas*, 50.

The actual handling and using of dynamite in log driving operations is not such a duty owing from the master to his servant, as the law forbids the master to delegate to another so as to relieve himself from the consequences of the negligence of those handling and using it.
Gallant v. *G. N. P. Co.*, 208.

DESCENT AND DISTRIBUTION.

See WILLS.

Upon the death of a husband a proportion of his real estate prescribed by statute descends to his widow in fee. *Whiting* v. *Whiting*, 382.

Revised Statutes, chapter 76, section 10, provides that when a relative of the testator, having a devise of real or personal estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased relative if he had survived.
McKellar, Applt., 421.

By force of the statute, the title to the devise or legacy comes to the lineal descendants directly from the testator through the will, and not through the estate of the deceased devisee or legatee. *McKellar, Applt.*, 421.

The wife of such deceased devisee or legatee, either individually or as the representative of his estate, has no interest in such a devise or bequest; and, therefore, had no right of appeal from the allowance of the will or codicil in which such devise or legacy is made. *McKellar, Applt.* 421.

DEVISE.

See WILLS.

DISCLOSURE.

When one summoned as a trustee of another attempts to account for money received from the defendant by saying it was received in payment of indebtedness, he is bound to make a full, direct and explicit disclosure of the character and amount of the claimed indebtedness; otherwise, he should be charged as trustee. Doubtful, indefinite and sweeping statements will not supply the omission of details and particulars.
Seavey v. *Seavey,* 14.

The disclosure in this case does not satisfactorily show that the relation of creditor and debtor existed between her and her husband, the defendant; nor the amount of the valid indebtedness, if any existed
Seavey v. *Seavey,* 14.

DURESS.

See ARREST. FALSE IMPRISONMENT.

Threats of unlawful arrest do not constitute duress, unless there is reasonable ground for apprehension of immediate or impending danger of arrest.
Knowlton v. *Ross,* 18.

An act done, or contract made, under duress is voidable, not void. If a person, who has been constrained by duress to do an act, afterwards voluntarily acts upon it, or in any way affirms its validity, it is a ratification, and he is precluded from avoiding it. *Knowlton* v. *Ross,* 18.

EJECTMENT.

See DEEDS. WILLS.

ELECTION.

See BALLOT.

An appeal from a judgment rendered upon a petition brought under R. S., ch. 6, secs. 70-74, to determine whether the petitioner, at the State election held September 14, 1914, was duly elected county commissioner of the

EMINENT DOMAIN.

EMPLOYERS' LIABILITY ACT.

See CONSTRUCTION.

EQUITY.

Although the sitting Justice before whom the cause was heard filed no findings of facts, the filing of the decree sustaining the bill and appointing a receiver is ipso facto a finding of fact in favor of the plaintiffs upon some, or all, of the allegations in their bill.

Murphy v. *Utah M. M. & T. Co.*, 184.

The decision of a single Justice upon matters of fact in an aquity hearing should not be reversed, unless it clearly appears that such decision is erroneous, and the burden of proving the error rests on the appellant.

Gilman v. *Haviland*, 303.

The findings of the sitting Justice in equity proceedings, upon questions of fact necessarily involved, are not to be reversed upon appeal, unless clearly wrong, and the burden is on the appellant to satisfy the court that such is the fact. *Edgell* v. *Hyde*, et als., 431.

An equity cause in the appellate court is heard anew, hence the admission of evidence below becomes unimportant, except so far as it shall be deemed competent for consideration on appeal.

Edgell v. *Hyde*, et als., 431.

ESTOPPEL.

See DEEDS. MORTGAGE.

The rule invoked by the plaintiff is based upon the doctrine of estoppel; but the rule of estoppel was ingrafted upon the common law to prevent wrongs and not to promote them. *Butterfield* v. *Lane*, 333.

EVICTION.

See DAMAGES.

EVIDENCE.

See DEEDS. MOTION FOR NEW TRIAL. PLEADING AND PRACTICE. RES GESTAE. WITNESS.

EXCEPTIONS.

EXECUTORS AND ADMINISTRATORS.

FALSE IMPRISONMENT.

See ARREST. DURESS. THREATS.

To constitute false imprisonment, there must be actual, physical restraint. Threats to imprison are not imprisonment.

Knowlton v. *Ross,* 18.

FELLOW-SERVANT RULE.

See VICE-PRINCIPAL.

A servant who is injured by the negligence or misconduct of his fellow servant cannot maintain an action against his employer for such injuries, unless the employer was negligent in the selection of that fellow-servant. The risk of injury by a fellow-servant is a risk the employee assumes.

Gallant v. *G. N. P. Co.,* 208.

The fact that the negligent servant is a foreman does not change the rule, unless at the time he was representing the master. The test is the nature of the duty that is being performed by the negligent servant at the time of the injury, and not the comparative grades of the two servants.

Gallant v. *G. N. P. Co.,* 208.

Where plaintiff's fellow servant, who rang the bell to notify the engineer that they desired the elevator to descend, failed to give the proper signal for a loaded cage, and plaintiff was injured by the falling of the cage, there can be no recovery, the negligence being that of a fellow servant.

Wing v. *Bradstreet & Sons Co.,* 481.

FISH AND GAME.

A legislative grant in 1870 of the right to construct and maintain fish weirs in tide waters at a certain place was not abrogated by Chapter 78 of the Laws of 1876 which required persons intending to build a fish weir to apply to the municipal officers for a license, and authorized the municipal officers to grant the same. *McLellan* v. *McFadden,* 242.

One holding a legislative grant of the right to construct and maintain a fish weir at a certain place is not required to obtain municipal license therefor under section 96, Chapter 4 of the Revised Statutes.

McLellan v. *McFadden,* 242.

FORFEITURE.

FRAUD.

FRAUDULENT CONVEYANCE OR TRANSFER.

GIFT.

A voluntary transfer or gift by a husband to a wife is prima facie fraudulent as to existing creditors. *Seavey* v. *Seavey*, 14.

HIGHWAYS.

See RIGHTS ON HIGHWAY.

HIGHWAY COMMISSION.

That this statutory liability on the part of the city was not affected by the fact that on February 5, 1914, the State Highway Commission under sec. 8 of chap. 130 of the Public Laws of 1913, designated Washington avenue as a State highway, nor by the fact that the State made a contract with the City under date of July 2, 1914. That contract did not affect the prior contract between the city and the Hassam Company, nor did it change the relations between the city and the complainant.
Turner v. *City of Portland*, 454.

That under section 14 of the Act of 1913, the State, through its Highway Commission, has power to change the grade of any street and on proper proceedings damages may be assessed therefor; but this power was not exercised here. The city's liability remained unchanged.
Turner v. *City of Portland*, 454.

HUSBAND AND WIFE.

See ATTESTATION. DESCENT. MORTGAGE. PRINCIPAL AND AGENCY. WILLS. WITNESS.

It is uniformly held that no fraud will avoid a marriage which does not go to the very essence of the contract, and which is not in its nature, such a thing as either would prevent the party entering the marriage relation, or, having entered into it, would preclude performance of the duties which the law and custom impose upon husband or wife as a party to the contract. *Trask* v. *Trask*, 60.

INCUMBRANCE.

See CONDITIONS. DEEDS.

INDICTMENT.

See PLEADING AND PRACTICE.

INHERITANCE TAX.

See TAX. VESTED INTEREST.

INSOLVENCY.

INSTRUCTIONS OF COURT.

court," it was not error for him to add, "that due consideration means that you are to consider it as far as it has any bearing as proving the issue in this case, and not as proving anything else."

Poland v. *McDowell*, 511.

INSURANCE.

(Accident Insurance.)

If an accident causes blood poisoning, and the blood poisoning causes death, the death is the direct result of the accident, and liability is established under an accident insurance policy which limits liability to death in consequence of the policy "independently and exclusively of all other causes."

Thompson v. *Columbian Nat. Life Ins. Co.*, 1.

(Fire Insurance.)

Chapter 49, Section 93, R. S., providing for service of notice or process upon an agent of such company, provides further that such agents and the agents of all domestic companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them.

Maxwell v. *York Mutual Fire Ins. Co.*, 170.

The company is bound by their knowledge of the risk and of all matters connected therewith. *Maxwell* v. *York Mutual Fire Ins. Co.*, 170.

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.

Maxwell v. *York Mutual Fire Ins. Co.*, 170.

To avoid liability on a fire insurance policy on the ground of untrue statements in the proof of loss, it must be shown that the statements were knowingly and intentionally untrue, and the burden of showing it is on the company. *Maxwell* v. *York Mutual Fire Ins. Co.*, 170.

The question whether or not there was a custom to thresh grain by the use of a gasoline engine for motive power, and its relation to the case if there was such custom, with all other issues of fact, were for the jury.

Bouchard v. *Dirigo Mutual Fire Ins. Co.*, 361.

As mortgagor and mortgagee have several distinct interests in the mortgaged property, insurable by either for his own benefit, the mortgagee may

(MARINE INSURANCE.)

INTOXICATING LIQUORS.

INVITEES.

JURY AND JURORS.

JURISDICTION.

JUSTIFICATION.

LANDLORD AND TENANT.

See LEASE.

"LAST CLEAR CHANCE."

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILL.

LIEN.

See ATTACHMENT. MORTGAGES.

That the letting of the horses go out of the defendant's custody into that of the mortgagor against the plaintiff's right as owner, under a recorded mortgage, was such a relinquishment of possession as extinguished and discharged the defendant's lien up to the time the plaintiff had notice that they were being kept by the defendant.

Drummond v. *Griffin*, 120.

That the defendant could not be held for the sum demanded for keeping the horses prior to the date of his knowledge of their being kept by the defendant. *Drummond* v. *Griffin*, 120.

That by demanding the whole and refusing to take a less sum, the plaintiff was excused from making a tender of the amount which might have been due subsequent to the date of his knowledge of the keeping.

Drummond v. *Griffin*, 120.

That the plaintiff, having title in the horses, had a right to their custody without further ceremony. *Drummond* v. *Griffin*, 120.

One who takes charge of an animal for sale on commission has such a special property therein that he may sue a railroad for the killing of the animal, where, before suit, he has paid the owner its value.

Smith v. *M. C. R. R. Co.*, 474.

LOGS AND LOGGING.

See RIPARIAN RIGHTS.

MANDAMUS.

See CORPORATIONS.

MARRIAGE.

See AGENCY. BREACH OF PROMISE. HUSBAND AND WIFE.

MISCONDUCT OF COUNSEL.

MISNOMER.

See PLEADING AND PRACTICE.

MORTGAGE.

See INSURANCE. LIEN.

MOTION FOR NEW TRIAL.

MOTION FOR NONSUIT.

MUNICIPAL CORPORATIONS.

NEGLIGENCE.

See ASSUMPTION OF RISK. FELLOW-SERVANT RULE.

When one negligently runs upon or injures another who has negligently put himself into a dangerous situation, he is liable for his subsequent and independent negligence. But this rule does not apply when the injured party's negligence is progressive and actively continues up to the point of collision. *Moran* v. *Smith,* 55.

Where no request has ever been made of a railroad corporation under Revised Statutes, Chapter 51, Section 71, to maintain a flagman, or gates or automotic signals at a railroad crossing, the railroad company is not to be held negligent, as a matter of law, in not maintaining such.
Conant v. *G. T. Ry. Co.,* 92.

Whether this crossing is "near the compact part of a town" within the meaning of Revised Statutes, Chapter 52, Section 86, may not be free from doubt. But if it be assumed that the statute applies in this case, and, therefore, that the speed of the train exceeded the rate specified in the statute, that fact does not conclusively show that the defendant was negligent in so running its train under the circumstances.
Conant v. *G. T. Ry. Co.,* 92.

The defendant hired its train and crew to Hines & Son to do certain work for them. The crew were to control the mechanical operations of the train; Hines & Son were to direct its movements; *Held,* that defendant's crew had a right to assume, and to act upon the assumption, that the person whose duty it was to give the orders to move the train had exercised due care in preparation for its execution and that it was not negligence to obey, unless by the exercise of due care, the orders were, or ought to have been, discovered to be improper or dangerous to perform.
Powers v *M. C. R. R. Co.,* 198.

The defendant cannot be held negligent because of the fact that it furnished dynamite for the use of its servants in the log driving operations, for dynamite is customarily furnished by the proprietors of such operations to be used by their servants in prosecuting the work of driving logs.
Gallant v. *G. N. P. Co.,* 208.

The case shows that the plaintiff's intestate, an electrician, knew that the wires he was handling were charged with a current of 2300 volts, and that he handled them without using any protective or safeguards. It is held that he assumed the risk, and that he was unquestionably guilty of contributory negligence. *Royal* v. *B. H. & U. R. P. Co.,* 220.

OFFER AND ACCEPTANCE.

OFFICER AND POLICE.

See ARREST. CERTIORARI. MUNICIPAL CORPORATIONS. PRINCIPAL AND AGENT. WRIT.

That the sheriff and his deputies, so far as the performing of lawful acts are concerned, are considered one and the same and the sheriff is liable for the misconduct and wrongful acts of his deputy, while the deputy is performing his official duties, but they are not agents of each other, only so far as they are authorized and required by law to aid and assist each other in the performance of their official duties.

Kittredge v. *Frothingham*, 538.

PARENT.

See ARREST.

The parent is the legal custodian of the minor children and is entitled to their custody. *Therriault v. Breton*, 137.

PERFORMANCE.

See CONTRACT.

PLEADING AND PRACTICE.

See EVIDENCE. TRESPASS. TROVER.

If the name of the defendant, by which he was christened or generally called or known, be other than that by which he is designated in the complaint or indictment, it is a case of misnomer and should be pleaded in abatement. *State* v. *Wasilenskis*, 91.

That plaintiff must rely on the strength of his own title.

Tobey v. *Dinsmore*, 126.

The defendant, not proving any title in himself, possession of the locus by plaintiff at time of trespass will sustain an action against a mere trespasser.

Tobey v. *Dinsmore*, 126.

POWER OF APPOINTMENT.

See WILLS.

PREFERENCE.

PREMIUM.

See INSURANCE.

PRESUMPTION.

See TENANTS. WILLS.

PRINCIPAL AND AGENT.

See INSURANCE. NEGLIGENCE. OFFICER AND POLICE.. SALE.

Under Revised Statutes, chapter 49, section 93, which provides that "the agents of insurance companies shall be regarded as in the place of the company in all respects regarding any insurance effected by them," an agent has power to waive the requirement in the policy for a written report of loss or injury; and directions given to the insured by an agent as to procedure touching the subject matter of the insurance, are binding upon the company, whether given before or after liability has been incurred. The agent stands in the place of the company in all respects.

LeBlanc v. *Standard Ins. Co.*, 7.

The fact of agency can be established by proof of any facts or circumstances from which agency can reasonably and logically be inferred. The marriage relation of the parties, however, is not alone enough to establish the fact that the one is the agent of the other. But where the question is whether a husband was the agent of his wife in transactions for the repair and improvement of her property, the marriage relation, and the wife's situation and the condition of her health at the time, are of significance, in connection with the nature of the work contracted for. So, too, is the fact that the husband had transacted similar business with her approval and for which she recognized her responsibility. *Lunge* v. *Abbott*, 177.

A principal is liable for such acts of his agent as were done within the scope of his authority as agent, which included representations made by the agent to plaintiff as to condition and kind of goods for which negotiations of sale were in progress. *Harlow* v. *Perry*, 460.

The declaration of an agent, to be binding upon his principal, must be made by the agent when he himself is engaged in transacting the business of his principal and is acting within the scope of his authority.

Kittredge v. *Frothingham*, 538.

PROBATE AND PROBATE PRACTICE.

See WILLS.

R. S., Ch. 89, Sect. 14, merely requires the claimant to present in writing, or file his "claim." It does not require him to state the particulars of the claim, further than he would in a declaration in a writ. He need not state the consideration. *Fessenden* v. *Coolidge*, 147.

Where A departed from his established residence, and was not heard of nor from by his friends, heirs at law, or next of kin from September, 1902,

PROOF.

See EVIDENCE.

PUBLIC UTILITIES COMMISSION.

See EXCEPTIONS. JURISDICTION.

RATIFICATION.

See CONTRACT.

An act done, or contract made, under duress is voidable, not void. If a person, who has been constrained by duress to do an act, afterwards voluntarily acts upon it, or in any way affirms its validity, it is a ratification, and he is precluded from avoiding it. *Knowlton* v. *Ross,* 18.

Ratification as used in the law of principal and agent is the adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another, who at the time assumed to act as his agent in doing the act or making the contract without authority to do so. A knowledge of all material facts is indispensable.
Gould v. *Maine Farmers Mut. Fire Ins. Co.,* 416.

RECEIVERSHIP.

See EQUITY.

REDEMPTION.

See MORTGAGE.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

See LIEN.

Where tender of amount legally due is made and refused and large amount claimed, further tender is excused and replevin lies at once.
Drummond v. *Griffin,* 120.

RESCISSION.

RES GESTAE.

See EVIDENCE.

A declaration of the agent at the time of sale, in reference to the condition of the goods which he was selling for his principal was admissible as part of the res gastae accompanying the act of the sale.

Harlow v. *Perry*, 460.

RESIGNATION.

See OFFER AND ACCEPTANCE. VACANCY.

The petitioner had the right to withdraw his resignation at any time before its acceptance by the mayor and aldermen.

Dostie v. *Mayor and Aldermen of City of Lewiston*, 62.

In the absence of a statute provision in cases of this kind, a resignation is not complete until it is accepted by competent authority, which is the appointing power.

Dostie v. *Mayor and Aldermen of City of Lewiston*, 62.

As neither the petitioner nor the defendant, on their own motion, can create a vacancy, it follows that the term of service of petitioner was not legally terminated, either by the alleged resignation or by the subsequent attempt to remove him.

Dostie v. *Mayor and Aldermen of City of Lewiston*, 62.

RETURN.

See ATTACHMENT. WRIT.

A return not signed by an officer himself is not a return, although it may have been signed by some one else in his name by his direction.

Bass v. *Dumas*, 50.

The copy of an officer's return of an attachment filed in the town clerk's office must be attested by the officer himself, or the attachment is not preserved.

Bass v. *Dumas*, 50.

RIGHTS ON HIGHWAY.

RIPARIAN RIGHTS.

SALES.

See DECEIT.

The unborn progeny of domestic animals follows the title to the dam in case of sale or mortgage. *Dunton* v. *Kimball Bros. Co.*, 270.

Public policy requires that the judgments and orders of courts and the sales of property thereunder should not be lightly vacated and set aside upon a claim that the parties thereto were of unsound mind at the time they were rendered, especially after the lapse of more than a score of years, during which time other parties have acquired rights in the property involved. Such a claim must be established by proof that is clear and convincing. *Gilman* v. *Haviland*, 303.

By written contract the defendant hired and received of the plaintiff a piano, and expressly agreed to pay the agreed value of the piano in instalments. The title was to be retained by the plaintiff until all instalments were paid, when the title was to pass to the defendant. In a suit to recover an instalment of the price, it is held, that the written contract was a conditional sale. *Guth Piano Co.* v. *Adams* 390.

That when the vendee in a conditional sale agrees expressly to pay the price, the vendor may maintain an action against him on his promise and may also enforce his security. *Guth Piano Co.* v. *Adams*, 390.

That, when such a contract contains the vendee's agreement that the vendor is not to be holden for any agreements made with his salesman other than those specified in the lease, evidence of a warranty of quality made by a salesman, not specified in the contract, is inadmissible against the vendor. *Guth Piano Co.* v. *Adams*, 390.

SALES ON EXECUTION.

See SALES.

SHERIFF'S SALE.

See SALES.

SHAREHOLDER.

See BANKS AND BANKING.

STATUTES.

See CONSTRUCTION.

The provision in the charter of the Bangor Municipal Court that writs may be made returnable "at one of the five terms next begun and held after the commencemnnt of the action" was impliedly repealed by the later statute, Public Laws of 1911, chapter 75, which provides that "writs in civil actions before any municipal or police court may be made returnable at any term thereof to be held not less than seven and not more than sixty-five days from their date." The latter statute controls.

Tibbetts v. *Coombs*, 441.

STATUTE OF LIMITATIONS.

It is not a fraud at common law for an insolvent debtor to pay one creditor for the purpose of giving him a preference over others; nor to pay a debt barred by the statute of limitations. *Seavey* v. *Seavey*, 14.

An action of assumpsit upon a Holmes note. The defense is the Statute of Limitations and the note is within the statutes, unless saved by the attestation. It was attested by one of the payees. *Shepherd* v. *Davis*, 58.

SURETYSHIP AND GUARANTY.

See BILLS AND NOTES.

While a bank has the privilege of charging overdue notes against the checking account of the maker, it is not required to do so, and its failure to do it does not discharge a surety.

Manufacturers Nat. Bank v. *Chabot & Richard Co.*, 515.

TAX.

An inheritance tax being a tax on the privilege or right of inheriting could not be levied or collected as against the appellant until such right existed in fact, a condition only to be made certain in this case by the death of the widow. *Luques, Applt.*, 235.

TELEGRAPH.

THREATS.

TITLE.

TRAVELERS.

TRESPASS.

TRESPASSER.

See ATTRACTIVE APPLIANCE DOCTRINE.

TROVER.

See PLEADING AND PRACTICE.

TRUSTS.

See WILLS.

TRUSTEE.

VACANCY.

VERDICT.

VESTED INTERESTS.

VICE PRINCIPAL.

VOTING.

See BALLOT.

WAGES.

See CONSTRUCTION.

WARRANTY.

See DEEDS. INSURANCE.

WAIVER.

See INSURANCE.

WILLS.

See CONDITIONS. CONSTRUCTION. DEVISE. EXECUTOR AND ADMINISTRATORS. LEGACY. POWER OF APPOINTMENT. TAX. TRUSTS. VESTED INTERESTS.

WITNESS.

WORDS AND PHRASES.

WRIT.

See ATTACHMENT. EXECUTOR. REPLEVIN.

A return not signed by an officer himself is not a return, although it may have been signed by some one else in his name by his direction.
Bass v. *Dumas*, 50.

When the signature of a public officer is required, he must make it himself. He cannot delegate the doing of it to another. *Bass* v. *Dumas*, 50.

When an officer has several writs to serve against the same defendant, attaches the same property on all, and in one case makes a good return, and files an attested copy of it in the town clerk's office, but fails to make a good return or to file a sufficiently attested copy in any of the others, the preservation of the attachment in the one case does not continue the officer's right to possession in the other cases, in which the attachment was dissolved by failure to comply with the statute. *Bass* v. *Dumas*, 50.

When an officer making an attachment fails to preserve it, in the case of bulky property, either by retaining possession or by filing in the town clerk's office a copy attested by himself of his return signed by himself, the attachment is not revived by the officer's amendment of his return by signing it afterwards, by leave of court. *Bass* v. *Dumas*, 50.

The duty of the officer is defined in the writ or precept; that he should follow the commands of the writ in detail and in the order of their recital does not admit of question, for his safety, and the rights of litigants require on his part certainty and precision, as well as good faith. *Erskine* v. *Vannah*, 225.

The provision in the charter of the Bangor municipal court that writs may be made returnable "at one of the five terms next begun and held after the commencement of the action" was impliedly repealed by the later statute, Public Laws of 1911, chapter 75, which provides that "writs in civil actions before any municipal or police court may be made returnable at any term thereof to be held not less than seven and not more than sixty-five days from their date." The latter statute controls.
Tibbetts v. *Coombs*, 441.

A writ made returnable to the Bangor municipal court at a term to be held more than sixty-five days from its date was properly dismissed for that reason. *Tibbetts* v. *Coombs*, 441.

APPENDIX

STATUTES AND CONSTITUTIONS CITED, EXPOUNDED, ETC.

CONSTITUTION OF MAINE.

STATUTES OF UNITED STATES.

SPECIAL LAWS OF MAINE.

STATUTES OF MAINE.

REVISED STATUTES OF MAINE.

ERRATA.

Plummer *v.* Insurance Co. of North America, page 131, line 3 from bottom of page, strike out "to" following "followed."

Frye Pulpwood Co. *v.* Ray, page 275, line 6 from top of page, strike out "to" following "prior" and substitute therefor "in."

Varney *v.* Cole, page 330, line 9 from top of page, strike out "he" and substitute therefor "in."